

W.P. M. Kennedy

Complete Collection

STATE PAPERS

PROCEEDINGS

UPON

WILLIAM H. TAYLOR

AND OTHERS

CHIEF AND MEMBERS

OF THE

OF THE

OF THE

OF THE

OF THE

OF THE

A
Complete Collection
O F
STATE-TRIALS,
A N D
PROCEEDINGS
U P O N
HIGH-TREASON,
A N D O T H E R
CRIMES and MISDEMEANOURS;
F R O M
The Reign of King *RICHARD II.*
T O
The End of the Reign of King *GEORGE I.*

The FIFTH VOLUME.

*Being a SUPPLEMENT to the Four Volumes of
the First Edition.*

L O N D O N:

Printed in the Year M.DCC.XXX.

A
Complete Collection

OF

The Trial and Execution

AND

PROCEEDINGS

UPON

ALICE-TREASON

AND OTHER

CRIMES AND MISDEMEANOURS;

FROM

The Reign of King RICHARD II.

TO

The End of the Reign of King GEORGE I.

The First Volume

Being a Supplement to the First Volume of
the First Edition.

LONDON

Printed in the Year MDCCLXXII.



THE PREFACE.



THE favourable Reception which the First Impression of this WORK has met with from the Public, is a sufficient Recommendation of it in general ; but perhaps it may not be unacceptable to the Reader to point out some of the particular Uses and Advantages of it.

COLLECTIONS are chiefly intended for the Preservation of separate Pieces, which by being scatter'd up and down, are often in length of Time either quite lost, or hard to be

*The Usefulness
of the Work to
the Study of
the Law.*

come at : this indeed is a Care not worth bestowing on those which are of little or no Use ; but the Pieces here preserv'd are evidently such, as a Collection of them must appear at first sight necessary to all studious Inquirers into the Laws of this Nation, especially into that principal Branch of them, which concerns the Life and Liberty of the Subject : for since the Laws of *England* are in a great measure grounded upon immemorial Customs and Usages, the Precedents and Examples of former Times must be singularly useful, if not absolutely necessary to a right understanding of them. And tho Criminal Cases do very much depend upon *Statute Law*, either the Crimes themselves, or the Punishments of them, being for the most part declar'd by Act of Parliament ; yet the Method of Practice in the Trials of those Crimes is in the main govern'd by *Common Law* Rules, and consequently not to be known, but by the Usage in former Cases : and even in those Instances, which fall under the Direction of the Statute Law, the best Expositor of those Statutes is the constant received Practice, ever since they were made, *optimus legum interpret consuetudo* ^a.

THE Professors and Students of the Law will not be the only Persons, who may receive Benefit from this WORK : here will be Matter also of Instruction and Entertainment to all, who are delighted with History, or inquisitive after the Transactions of the former or present Times ; many Parts of History will here be illustrated and set in a true Light ; the Reader may here see, as it were, with his own Eyes, not needing to trust to the Representations of others, which are often full of Partiality or Prejudice, according to the Party and Disposition of the Historians. But the Nature of this Work admits not of such Turns and Disguises, as other general Accounts are but too justly chargeable with ; the following TRIALS being plain Narrations of Sayings and Facts, for the most part published by Authority of the respective Courts, or by indifferent Hands ; where it happens to be otherwise, the Reader is inform'd of it in the Title at the Head of the Trial.

History

^a 4 Co. Instit. 75.

And Elo-
quence.

SUCH as are taken with fluency of Style, or luxuriancy of Fancy, may here be entertain'd with a variety of eloquent Speeches and learned Arguments on many very important Subjects; tho' it must be own'd, intermixed with some others, which do not altogether deserve that Character.

AND since *Scotland* is now become a Part of this Kingdom, it has been thought proper to insert some of the Proceedings in that Country, in which (to do that Nation Right) are discover'd great Learning and Eloquence: and it must be admitted, that very considerable Advantages are there allowed to the Prisoner, which we in *England* do not enjoy; he has what Counsel he thinks fit, and a Copy of the Charge in his own Language; his Counsel are permitted to inspect the Depositions against him before he is brought to his Trial; and they are so little in haste to dispatch a State Prisoner, that the Trial often lasts some Months.

To form a
right Charac-
ter of the
Judges.

ANOTHER Use of this WORK, will be the doing Justice to those JUDGES and COUNSEL, who respectively presid'd or practis'd at these Trials: the Names of such as behav'd impartially on the Bench, without prejudicing the rightful Prerogatives of the Crown on the one hand, or betraying the legal Privileges of the Subject on the other; without bearing hard upon the Innocent, or shewing any unallowable Favour to the Guilty, will by this means be remember'd with Honour, and left upon Record to their lasting Praise and Commendation.

BUT it has not always been the good Fortune of *England* to have the Bench adorn'd with such excellent Persons; the Reader will in the Course of these TRIALS light upon certain Periods, wherein the Judges, who ought by the Duty of their Place to be the great Barrier^b, and to act impartially between Prince and People, have notwithstanding given Opinions in direct contradiction to the known fundamental Laws of the Nation, and as far as in them lay, sacrific'd the Constitution and Liberties of the Kingdom to the Pride and Ambition of an arbitrary Monarch. This generally ended in the Downfall of such Judges, and the Ministers, whose Tools they were; the Politics of those Times not being arriv'd at that Height, to know how to influence the representative Body of the Nation: for what need could Ministers have to corrupt the *Interpreters* of the Law, if the *Makers* of it were intirely at their Devotion?

OTHERS there have been, (as the Reader will have too frequent occasion to remark) who, regardless of Right and Wrong, and all the solemn Oaths they had sworn, have under colour of Law, but yet in open defiance of natural Justice, made no scruple to murder the Innocent, and by foul unwarrantable Practices to acquit the Guilty, just as they receiv'd their Directions from, or thought it would be best pleasing to those above them: to such a monstrous Pitch of bare-fac'd Iniquity were they arriv'd, that they stuck not to determine the same Point different ways at different times, making the Law a mere Nose of Wax, but always turning it to the Destruction of the Person tried before them^c. These Volumes will impartially transmit their Memory to Posterity, with that Reproach and Infamy, so deservedly attendant upon TRAITORS and MURDERERS; and this not by general Characters, which are scarce to be rely'd on, being oft according to the Inclinations of the Writer, but by real Facts; their Behaviour will here appear just as it was, in its own true Colours: by which the Reader, without the help of Names, will easily distinguish the calm and sedate Judge, willing to hear and receive right Information, and desirous to determine according to Truth and Justice, from the hectoring Bully, who, without any regard to the decency of his Character, uses his Authority to no other End, than to silence Reason and Truth, and by Blustering and Clamour to worry the innocent to death.

And Counsel.

THE like Distinction will readily occur with respect to those, whose Office was at the Bar.

SOME he will find, pressing nothing illegal against the Prisoner, nothing hard and unreasonable (however in strictness legal) using no Artifices to deprive him of his just Defence, treating his Witnesses with Decency and Candour; being not so intent upon convicting the Prisoner, as upon discovering Truth, and bringing real Offenders to Justice; looking upon themselves, according to that famous Saying of Queen *Elizabeth*, not so much retained *pro Domina Regina*, as *pro Domina Veritate*.

^b See Sir Francis Winnington's Speech, *Trials*, Vol. III. p. 222.

^c Sir John Hawles's Remarks. See *Trials*, Vol. IV. p. 206.

THESE will appear in a different Light from those, who with rude and boisterous Language abuse and revile the unfortunate Prisoner, who stick not to take all Advantages of him, however hard and unjust, which either his Ignorance, or the strict Rigour of Law may give them; who by Force or Stratagem endeavour to disable him from making his Defense; who browbeat his Witnesses as soon as they appear, tho ever so willing to declare the whole Truth; and do all they can to put them out of countenance, and confound them in delivering their Evidence: as if it were the Duty of their Place to convict all who are brought to Trial, right or wrong, guilty or not guilty; and as if they, above all others, had a peculiar Dispensation from the Obligations of Truth and Justice. Such Methods as these should be below Men of Honour, not to say Men of Conscience: yet in the Perusal of this Work, such Persons will too often arise to view; and I could wish for the Credit of the Law, that that great Oracle of it, the Lord Chief Justice *Coke*^d, had given less reason to be number'd among this sort.

THE Gentlemen of that Profession, whether imploy'd in criminal Prosecutions or civil Actions, are not to blame for doing their best in sifting out the Truth, and making all just Observations in favour of their Clients; yet if after having done so, they should at last find the Merits of the Cause to lie on the other side, I am sure it would be no Disparagement to them to desist from attempting any thing to the prejudice of Truth and Justice: for how just and reasonable soever it may be to undertake the Defense of a Cause, while nothing appears but that it may be right, yet when in the Course of the Evidence it proves manifestly otherwise, it is then high time to desert it; for they must needs think, that no Fees or Retainers will be a just Excuse, either in this World or another, for being wilfully instrumental in promoting Injustice and Wrong: and tho it be no part of their Province to determine either the Law or the Fact, the former of which belongs to the Court, and the latter generally to the Jury; yet if either the one or the other be misled by the artful Turns and Insinuations of the Pleader, or any material Truth suppress'd or misunderstood by his baffling of the Witnesses, the Guilt will, and ought to lie at his door.

A FURTHER Advantage of this Collection is, that it will afford frequent Opportunities to the careful Reader of observing the Excellency of our Laws, and the Advantage an *Englishman* thereby enjoys above his Neighbours. When I meet with an Author extolling our Laws above those of other Countries, and representing us upon that, as well as other accounts, as the Envy of all around us, I presume it is meant chiefly with regard to criminal Procedures: for as to CIVIL SUITS, when I consider the Tedioufness and Delays of such Suits, necessarily arising from our Methods and Forms of Law; the various Offices, and sometimes Courts they must pass thro', before they are finally decided; the exorbitant Fees to Counsel, whereto the Costs recovered bear no proportion; the Duties arising to the Crown from many Incidents in every Cause; and above all, the Nicety of special Pleadings, whereby the justest Cause in the World, after having with great Trouble and Expence been conducted almost to a Period, may thro' the mistake of a Letter (often occasion'd by an Attorney's Clerk) be irretrievably lost, or at least turn'd round to begin again, and that not without payment of Costs to him, who has all the while been the unjust Invader and Detainer of another's Property: when these things, I say, are consider'd, it is hard to imagine, that any one can in good earnest believe, we have in this respect any great matter to boast of.

NOR can I suppose they are our ECCLESIASTICAL COURTS, which make us the Envy of our Neighbours: the petty but chargeable Suits, which are there often instituted to the no small Damage of both sides, only to indulge the private Passions of those who institute them; the constant Practice of denouncing Excommunication for the minutest Contempts, (a Punishment originally design'd only for such flagrant Vices, as render'd a Man unfit for Christian Communion, which formerly was greatly dreaded, but is now by these means brought into Contempt;) and the pecuniary Commutations avowedly permitted for Penances, are things, which will not allow me to make any such Supposal.

THE Excellency therefore of our Laws above others, I take chiefly to consist in that part of them, which regards CRIMINAL PROSECUTIONS: here indeed it may with great Truth and Justice be said, That we have by far the better of our Neighbours, and are deservedly their Admiration and Envy.

^d See the Trial of Sir Walter Raleigh, N^o 18, Vol. I. p. 205.

THIS might be made to appear in many Particulars. In *other Countries* the Courts of Justice are held *in secret*; *with us publicly*^a and in open view: *there* the Witnesses are examin'd in private, and in the Prisoner's *Absence*; *with us* they are produc'd face to face, and deliver their Evidence in open Court, the Prisoner himself being *present*, and at liberty to cross-examine them: *there* the Judges determine both Law and Fact; *with us*, if the Fact be denied by the Prisoner, it must be tried by twelve Men of his own Rank and Condition, ^c who are *sworn* to go according to Truth and Evidence, and are therefore call'd a *Jury*; to any of these the Prisoner may except for just Cause, and in capital Cases to a large number without Cause; and unless this Jury declare him guilty of the Charge, the Judges can proceed no further against him. If the Prisoner be a Peer of the Land, his Trial on all Indictments for Treason, Felony, or Misprision of either, must be by other Peers not fewer than twelve. In *other Countries*, *Racks and Instruments of Torture*^f are applied to force from the Prisoner a Confession, sometimes of more than is true; but this is a Practice which *Englishmen* are happily unacquainted with, enjoying the benefit of that just and reasonable Maxim, *Nemo tenetur accusare seipsum*: in *other Countries* the Criminals are sometimes executed *in private*; *with us* always openly and *in public*, it being necessary to answer the end of Justice, that a public Example be made of Offenders in order to deter others from the like Crimes; but where the Trial and Execution are in private, it not only defeats the end of Justice, but affords an Opportunity of secretly destroying innocent Men, which must needs expose the Subject to a variety of Fears and Dangers inconsistent with the Liberties of a free People.

THESE are great and noble Privileges, which we may justly value ourselves upon, and should be very unworthy of, if we did not highly prize them.

Provisions in
case of Treason.

IN Cases of TREASON the *English* Subject has peculiar Advantages: Treason is a Charge of a general nature, and therefore more difficult to make a Defense to; it subjects the Offender to a severer Punishment, than other Crimes; the Crown is more nearly concerned, by reason whereof the Prisoner has a more powerful Interest to contend with: this is the fatal Engine so often imploy'd by corrupt and wicked Ministers against the noblest and bravest Patriots, whose laudable Opposition to their pernicious Schemes those Ministers are very ready to construe into Treason and Rebellion against the Prince; thereby confounding their own and the Prince's Interest together, as if the one could not be oppos'd without the other. Our Ancestors therefore thought this a Case, wherein the Subject needed more than ordinary Assistance; lest therefore too great a Latitude should be left to the arbitrary Determinations of a Judge, who is the Creature of the Crown, they took care to particularize the several Species of Treasons by an express Law^g: and to guard against all forc'd Constructions and Innuendos, it was by the same Law farther provided, that all Treason should be prov'd by some manifest plain Act or Deed; and that no innocent Person might be in danger of suffering thro' the Perjury of a single Witness, it was afterwards provided^h, that none should be convicted without two positive Witnesses.

NOR does our Law excel others only in defending the *Life* of the Subject against any injurious Attacks, but also in its care and concern for the *Liberty* and Freedom of his Person.

For the Liberty of the Subject.

HOW absolute soever the Sovereigns of other Nations may be, the King of *England* cannot take up or detain the meanest Subject at his mere will and pleasureⁱ: it is one of the Privileges confirm'd by *Magna Charta*^k, that no Man shall be restrain'd of his Liberty, but by the Law of the Land; that is, says Lord Coke^l, by Indictment or Presentment of good and lawful Men, or by the King's Writs out of

^a 2 Co. Instit. 103.

^c Fortescue de Laud. Leg. Angl. cap. 27 & 28.

^f Ibid. cap. 22. *This was the Practice of the antient Civil Law.* See the Fragments of Julius Paulus, lib. 5. Sentent. recept. Tit. 14. de quæstionibus habendis: Si suspicione aliqua reus urgeatur, adhibitis tormentis de sociis & sceleribus suis confiteri compellitur: — Reus evidentioribus argumentis oppressus repeti in quæstionem potest, maximè, si in tormenta animum corpusque duraverit.

See also a whole Title in the Digest de quæstionibus, Lib. 49. tit. 18. See Instances of those who endured these Tortures in Valer. Max. lib. 3. cap. 3. & lib. 8. cap. 4. But so absurd and unreasonable a Practice was this, that even the Antients, among whom it was in use, had no good Opinion of it, as appears from l. 1. § 23. of the said Title de quæstionibus: Res est fragilis, & periculosa, & quæ veritatem fallit; nam plerique patientiâ, siue duritiâ tormen-

torum ita tormentum contemnunt, ut exprimi eis veritas nullo modo possit; alii tantâ sunt impatientiâ, ut in quovis mentiri, quam pati tormenta, velint; ita fit, ut etiam vario modo fateantur, ut non tantum se, verum etiam alios comminentur.

Quintilian. declam. 18. Omnium quidem incertorum suspiciones pessimè semper a corporibus incipiunt; nec benè de cujusquam moribus illam partem corporis interroges, quæ non animo, sed dolore respondet.

See more to this purpose in Montagne's Essays, Book 2. cap. 5. and Grotius's Letters, Let. 693. wherein he approves the Omission of this Practice in England.

^g 25 Edw. 3. Stat. 5. cap. 2.

^h 5 & 6 Edw. 6. cap. 11. Deut. cap. 19. ver. 15.

ⁱ 2 Co. Instit. 186.

^k Cap. 29.

^l 3 Instit. 46. §0.

his ordinary Courts of Justice^m, or by lawful Warrant. Now every lawful Warrantⁿ must be grounded upon Oath, must plainly and specially express the cause of Commitment^o; must be under the Hand and Seal of one, who is authorized to do it, expressing his Office, Place and Authority^p, whereby he committeth, and must conclude, *until he be deliver'd by due course of Law*, and not *until further Order*, or with such like Conclusions. Nor has the Law only prescribed what shall be necessary to a legal Commitment, but it has also provided divers Remedies^q in case any one should be illegally committed, or detained; the Party injured may have an Action or Indictment founded on *Magna Charta*, an Action of false Imprisonment, a Writ *de homine replegiando*, and a Writ *de odio & atia*^r.

BUT so precious is the Liberty of a Man's Person in the eye of the Law, that none of these Remedies was thought sufficient, not giving so speedy a Relief as the urgency of the Case requires; another Remedy is therefore provided, *viz.* the Writ of *Habeas Corpus*^t, which is called *festinum remedium*^u. By this Writ the Gaoler is obliged immediately to bring the Body of his Prisoner before the Lord Chancellor, or one of the twelve Judges, and to certify by whom and for what Cause he stands committed; whereupon the Lord Chancellor or Judge is requir'd (unless he be legally committed for an Offense not bailable by Law) to discharge or bail him, except in Case of Treason or Felony plainly and specially expressed in the Warrant^v; and even in those Cases, that the Innocent may not be worn and wasted with long Imprisonment^w, the Prisoner must be brought to his Trial within a reasonable time; for if he be not indicted the next Term or Sessions after his Commitment, having duly enter'd his Prayer, he shall on the last Day of the Term or Sessions be admitted to Bail, unless it appear to the Court upon Oath, that the Witnesses for the King could not then be produced: and then if he be not indicted and tried the second Term or Sessions after his Commitment, he shall be quite discharged^x.

BUT because all these Precautions in favour of Liberty may be render'd useless by sending the Subject to remote or private Prisons^y, whereby he may lose the Benefit of the King's Commission of Gaol Delivery^z, and the King's Writs be render'd ineffectual for want of knowing whom to direct them to^{aa}; to prevent this Inconvenience, the Law has further provided, that no Subject of *England* shall be sent Prisoner into any Part beyond the Seas, either within or without the King's Dominions^{ab}; nor shall any be compell'd against his Will to serve the King out of the Realm, lest under pretense of Service, as Ambassador or the like, he should be sent into real Banishment^{ac}: nor can any be regularly imprison'd within the Realm in any other Place than the common County Gaol or other public accustomed Gaol^{ad}; for which reason a Gaoler cannot be authorized by any Warrant to deliver his Prisoner into the Custody of an unknown Person^{ae}. Nor can any new Gaol, according to the Opinion of Lord Coke^{af}, be erected, but by Act of Parliament; one Statute^{ag} ordains that none shall be imprison'd by Justices of the Peace (some say this extends to all other Judges and Justices^{ah}) but in the common [County^{ai}] Gaol, saving to Lords and others, who have Gaols, their Franchises.

SOME will be ready to object, If these Laws were in force, that a Subject shall not be compell'd to serve the King out of the Realm, how comes it to pass that divers Subjects [not only Mariners, but others] have been taken up by virtue of Press-Warrants, and by Force put aboard a Ship and carry'd beyond Sea? If it be not lawful to commit to any but antient accustomed Gaols, how comes it about that so many Persons have been taken up by Messengers^{aj}, who have imprison'd them in their own Houses, detaining them there not for two or three days only, (the Time allowed by Law to take their Examinations^{ak}) but for Weeks and Months; thereby making Gaols of their Houses, tho they have neither the Grant of such a Franchise, nor any Act of Parliament to make them so? These are Questions I will not presume to give a satisfactory Answer to; but shall leave that to others, who are more

^m 2 Co. Instit. 187.

ⁿ 2 Co. Instit. 52.

^o 3 Car. 1. cap. 1. § 5. 2 Co. Instit. 616.

^p 2 Co. Instit. 591.

^q 2 Co. Instit. 55.

^r This Writ is now quite disused; what the nature of it was, see 2 Co. Instit. 42.

^t 2 Co. Instit. 55.

^u See Trials, Vol. 4. p. 862.

^v 31 Car. 2. cap. 2. § 2 & 3.

^w 2 Co. Instit. 315.

^x 21 Car. 2. cap. 2. § 7.

^y This was complained of by the Judges in the 34 of Eliz. 1 Ander. Rep. 297.

^z 2 Co. Instit. 43. 315. Cro. Eliz. 830.

^{aa} 2 Co. Instit. 53.

^{ab} 31 Car. 2. cap. 2. § 12.

^{ac} 2 Co. Instit. 47.

^{ad} 9 Co. Rep. 119.

^{ae} 2 Co. Instit. 53. How a Prisoner may lawfully be removed, see 31 Car. 2. cap. 2. § 9.

^{af} 2 Instit. 705.

^{ag} 5 Hen. 4. cap. 10.

^{ah} 2 Co. Instit. 43.

^{ai} See Trials, Vol. 4. p. 862.

^{aj} See Trials, Vol. 4. p. 854. 5 Mod. Rep. 79.

^{ak} Cro. Eliz. 830.

nearly concern'd and better able to do it : I can only say, that whatever may in fact have been done, I do not know that such Practices have ever had the Sanction of one judicial Determination.

IT must be owned that the Guards and Fences of the Law have not always proved an effectual Security for the Subject ; the Reader will in the Course of these TRIALS find many Instances, wherein they, who held the Sword of Justice, did not employ it, as they ought, to the Punishment of Evil-doers, but to the Oppression and Destruction of Men more righteous than themselves. Indeed it is scarce possible to frame a Body of Laws, which a tyrannical Prince, influenced by wicked Counsellors and corrupt Judges may not be able to break thro' ; they may sometimes check, but will never be able to stop the Career of violent and furious Men. The Law itself is a dead Letter, Judges are the Interpreters of it, and if they prove Men of no Conscience nor Integrity, will give what Sense they will to it, however different from the true one ; and when they are supported by superior Authority, will for a while prevail, till by repeated Iniquities they grow intolerable, and throw the State into those Convulsions, which may at last end in their own Ruin. This shews how valuable a Blessing an upright and learned Judge is, and of what great Concern it is to the Public, that none be prefer'd to that Office, but such whose Ability and Integrity may be safely depended on : *Ignorantia judicis est calamitas innocentis* ¹.

Further Provisions in cases of Treason.

HOWEVER, amidst all the Mischiefs caused by the arbitrary Proceedings of these wicked and unjust Judges, there is one good Effect has follow'd from them ; it is to them we owe those additional Provisions, which have been since made for the Security of the Subject : *Ex malis moribus bonæ oriuntur leges* ^m ; *Leges egregiæ apud bonos ex delictis aliorum gignuntur* ⁿ. In all Cases of Treason, wherein the Crown is more immediately interested, the Party accused may now demand a Copy of the whole Indictment ^o, five days at least, and of the Names of the Jurors ^p two days at least before his Trial ; he has a right to the assistance of Counsel ^q, not only in matters of Law, but in matters of Fact ; he may now have the benefit of the usual Process ^r to compel the Appearance of his Witnesses ; who, when produced, are to be examined on Oath ^s, as well as those on the part of the Crown ; (this last Privilege has been since ^t extended to all Treasons and Felonies) each Species of Treason must be prov'd by some Overt-act ^t, and there must be at least two Witnesses to each Species ^u. If the Accused be a Peer, not only *some* pick'd out of the whole Body, but *all* the Peers must be summon'd to the Trial at least twenty days before ^v.

THERE are other Alterations ^x made in favour of the Subject, which the Legislature has not thought fit should take place during the Life of the present Pretender.

AFTER his Decease no Attainder for Treason will work a Disinheritance of the Heir, or affect any other Right, than only that of the Offender during his Life : the Prisoner will then be entitled to have a List, not only of the Jury, but of the Witnesses to be produced against him at the Trial, with the addition of their respective Professions and Places of Abode, deliver'd to him along with the Copy of the Indictment, in the Presence of two Witnesses, ten days before his Trial.

THE first of these Alterations being to mitigate the Punishment of those, who shall by the Law be adjudged guilty, might be thought an unreasonable Relaxation, while there should be any Apprehensions of immediate Danger : But why the others should be defer'd so long, which are intended only as the proper guards of Innocence against violent Prosecutions, I will not pretend to guess ; for the heinousness or mischief of the Crime charged is so far from being a Reason, why the Prisoner should want Assurances, that it is a very strong Reason to the contrary ; it being as easy a matter to impose a false Charge of a great, as of a small Crime.

THESE are some of the Privileges of a *British* Subject, which no other Subject in the World can boast of. But after all, it must not be said, that our Laws will admit of no Alterations for the better.

Observations upon Juries.

1. EVEN in that darling and deservedly esteem'd Privilege of being tried by JURIES, some Change might, I was going to say ought to be made : The Law requires, that the twelve Men, of which a Jury consists, shall all agree before they give in a Ver-

¹ 2 Co. Instit. 30.

^m 2 Co. Instit. 161.

ⁿ Tacit. Annal. Lib. 15. § 20. Some Instances of this kind are there mentioned.

^o 7 Gul. 3. cap. 3. § 1.

^p Ibid. § 7.

^q Ibid. § 1.

^r Ibid. § 7.

^s Ibid. § 1.

^t 1 Ann. cap. 9. § 3.

^u 7 Gul. 3. cap. 3. § 2.

^v Ibid. § 4.

^w Ibid. § 11.

^x 7 Ann. cap. 21.

dict; if they don't, they must undergo a greater Punishment than the Criminal himself; they are to be confin'd in one Room without Meat, Drink, Fire or Candle, till they are starv'd. It would be pretty hard to assign any tolerable Reason for this Usage: If it has seldom or never happen'd, I'm afraid it has sometimes been prevented only by the unjust Compliance of some of the Jurors against their own Consciences. For however plain some Cases may be, others there are, wherein they cannot avoid differing in their Judgments: nor do they deserve any Censure for so doing; many Men, many Minds; all can't see Things in the same Light. To what end therefore are they to be restrained in this manner? It may indeed force them to an outward seeming Agreement against the Dictates of their Consciences; but can never be a Means of informing their Judgment, or convincing their Understanding. I have known, when a Juror being afterwards asked, how he could join in such an unjust Verdict, could give no better Reason for it, than that the others were of that Opinion; which, I fear, is the best Reason a great many are able to give.

IF it be said, that otherwise one stubborn Fellow may stand it out against all the rest, even contrary to the Convictions of his own Mind, it is very true he may do so; and if his Body be as stubborn as his Mind, starve them out too. But why then is his Voice regarded? Why can't the others give a sufficient Verdict without him? Or, if a Man must not be convicted without the Agreement of all, why then is not the Prisoner acquitted, when they can't agree? But why must the Jurors be compell'd to an Agreement one way or other? After all, a forc'd Agreement (as all Agreements procur'd by Restraint are) is no better than none. If the Consent of him, who stands it out against the rest, be of any regard, it ought to be free; if of none, then why can't a Verdict be given without it? If twelve must agree, the better way would be to have twenty three on a Jury, and the Verdict be given by the Majority; for sure 'tis an odd way of deciding a Cause, that it should be left to the Determination of him, who can fast the longest. But suppose it should be thought requisite, that two-thirds should be of a mind, and if so many could agree to find the Prisoner guilty, he should be convicted; and if they did not, he should be acquitted; Would not this be a sufficient Security for Innocence? Sure it would be much better to make a Provision in case of Non-Agreement, than by forcible Methods to extort the Appearance of one; for it is all one to the Prisoner, whether he be convicted without the Concurrence of all, or by a Concurrence which is not sincere, but forced.

2. ANOTHER thing not to be counted among the Excellencies of our Law is, the Indictments and other Proceedings being in the Latin Tongue. Every body knows, that not one Prisoner in a great many understands that Language: and tho the Indictment is generally explained to him in the vulgar Tongue, yet it is to the Original he must take his Exceptions, and upon that the Arguments must be founded. It is a Maxim in Law, *Ignorantia juris non excusat*¹, Ignorance of the Law is no good Plea, if it be not, it must be very unreasonable to use any Methods, which tend to conceal that Law, and keep People in ignorance of it: *Misera servitus est, ubi jus est vagum aut incognitum*².

The Proceedings being in Latin.

THE same might be said, with respect to the writing it in a peculiar Hand not generally understood. In the days of *Oliver Cromwell* all Proceedings were in the vulgar Tongue; and tho it has not been thought proper to continue a Practice introduced by an Usurper, yet if the thing be really fit and right, it matters not, who introduced it: *fas est & ab hoste doceri*.

3. HERE it may not be amiss to take notice of one thing relating to the Form of our Indictments. It is very common to insert Words, which are never intended to be proved: as for instance, the Words *vi & armis* in Indictments for writing or publishing Libels, and in many other Cases, where there is no pretense or colour of Truth in them: e.g. *Juratores presentant, quod J. S. VI ET ARMIS falso & malitiose scripsit quendam libellum*³; which not only is an Absurdity in the nature of the thing, but tends to ensnare the Consciences of Jurymen; who in giving a general Verdict against the Defendant, do not always consider whether that part of the Indictment be prov'd. When a Jurymen gives a general Verdict against the Defendant, he does in effect declare upon Oath, that he believes the entire Charge, as laid in the Indictment, to be true; how therefore can he find a Man guilty generally, when there is one part of the Charge, which he either believes to be false, or at least has no reason to believe to be true? It is said that these are words of course: if they be, yet still they have a natural and proper meaning (else why are they inserted?) and if they are not true, I don't see how any one can upon Oath honestly declare they are, unless it can be thought an Excuse for giving a rash (not to say a false) Verdict, that it is a

The Form of Indictments.

¹ Digest. Lib. 22. tit. 6. De juris & facti ignorantia, §. 9. Plowd. Com. 343.

² 4 Co. Inst. 246. 332.

³ See the Indictments of Francis Smith, and of Laurence Braddon, in the Appendix.

thing of course. The Words of course are generally the most material Words in an Indictment; *proditorie* is a word of course in an Indictment for Treason, *burglariter* in Burglary, and *felonice* in Felony; but if any of those words be omitted in their respective Cases, the Indictment will be naught.

In blasphemous

IT is greatly to be feared, that Jurymen do sometimes over-look the most essential Words of an Indictment, under the notion of their being words of course. Thus in the Case of a *blasphemous Libel*, it is customary to insert the Words *falso & malitiose scripsit*, &c. and indeed they are the very *Gift* of the Indictment, and absolutely necessary to constitute the Offense: for as no words can be *Blasphemy* (i. e. a reproachful Reflexion upon God or Religion) which are true, for Truth can be no Reflexion on the God of Truth; so no Opinions, however erroneous, can merit that Denomination, unless utter'd with a wicked malicious design of reviling God or Religion^a. And yet how often have Persons been found guilty upon these Indictments, without any Proof either of the Falseness of the Positions, or of the Malice of him who wrote them? nay sometimes, when there is a great deal of reason to think they were published from no other Principle, but a sincere love and regard for Truth? These are things not always sufficiently attended to by Juries; it often satisfies them, if the Defendant be prov'd to have done the Fact (i. e. wrote the Book) whether with the Circumstances *falso & malitiose*, as charged in the Indictment, or not: and yet when the Defendant comes to move in Arrest of Judgment, that what he has done cannot amount to *Blasphemy*, because it was not done with an evil Intent; he is then told, that that is found by the Verdict, and must be taken to be true; and so indeed it must: but then this should be a Caution to Juries, how they find a Man guilty of an Indictment generally without due Proof of every part of it; since every thing, which was proper for their Consideration, will after Verdict be suppos'd to have been consider'd by them, whether in reality it was so or not.

And defamatory Libels.

THUS in the Case of *defamatory Libels*, or of *scandalum magnatum*, when the word *falso* is inserted, the Defendant ought not to be found guilty, if the Assertion be true. I would not be understood to mean, that in those Cases it is necessary the Words should be false in order to maintain an Indictment; but only that, where the Indictment charges a Man with *falsely* writing a Libel, he cannot justly be found guilty of that Indictment so laid, if the Words be *true*.

Trials for Felony.

4. HITHERTO the Law allows not a Copy of the Indictment, nor of the Names of the Jurors, nor the Assistance of Counsel as to matter of Fact on any Indictments for FELONY, yet it is the Opinion of many it would be never the worse if it did; for it seems very strange to allow a Man these Assistances in defense of his Property, and deny them to him, when his Life lies at stake. Perhaps it will be said, that the Prisoner would by these means be enabled to make captious Exceptions to the Proceedings, whereby public Justice might be either protracted or evaded; but this Objection would be remov'd, if the Law did not allow of such Exceptions: either they relate to the Merits of the Cause, or they do not; if they do, they are not captious, but he ought to have the Benefit of them; if they do not, there will be no Wrong done in disallowing them.

Le Peine fort et dure.

5. THERE is one thing in our Laws which is very singular, and comes the nearest of any thing to the Tortures used in other Countries, *viz.* LE PEINE FORT ET DURE, or pressing to death: 'Tis true, this is not used to force the Prisoner to confess, but only to plead one way or other; but yet even this seems a needless piece of Severity. In Treason, if the Party refuse to plead, the Charge is taken *pro confesso*; nor would it be any Inconvenience if it were so in other Cases, or rather if it amounted to a Plea of *not guilty*, and the Court thereupon proceeded to hear the Proofs of the Fact; for it is as unreasonable to press a Man to death without a Trial, as it would be to hang him without one: Nor can a Plea extorted by such Methods give any Credit to the Proceedings of the Court more than if they had proceeded without any, which yet would be no Injustice to the Prisoner, who will not plead, when he may: Nor, on the other hand, is it reasonable, that the hardness of a Criminal, if he should be able to endure such a lingering Death, should exempt him from the Forfeitures the Law has thought his Crime to deserve: If this Advantage were taken away, the only Temptation of standing mute would be taken away too.

IT has been esteemed an Advantage of our Law, that it does not inflict various and cruel Deaths, (that which is inflicted for Treason is the only one, which has any appearance of Severity; and even there in the Execution it is generally the same with other capital Cases :) but yet it must be also observ'd, that our Laws are very liberal of the Lives of Offenders, making no distinction between the most atrocious and

^a See Reformat. leg. Ecclesiast. de Blasphemia, cap. 1. | iracundia. Whitlock's Speech in behalf of James Nayler, Blasphemia contemptu contumelias in deum projicit, & | Vol. II. p. 275. Blasphemy is crimen malitie.

heinous Felonies, and those of a less degree. If a Man commit a single Robbery, Hanging is the Punishment inflicted by Law; if he commit Robbery and Murder with ever so many cruel Circumstances, the Punishment is still the same, and no more: So little regard is had in proportioning the Punishment to the Offense, that the Letter of the Law makes no difference between picking a Man's Pocket ^b and cutting his Throat; between stealing his Horse ^c, and firing his House about his ^{Theft.}

HOW far this is either just or prudent, is left to every one's own Reason to determine; it is certainly a strong Temptation to an Highway-man to add Murder to Robbery, when by that means he runs less danger of a Discovery, and no danger of a severer Punishment.

THE Law of God to the *Israelites* required, that a Person convicted of Theft should restore two-fold ^d, and in some Cases four or five-fold ^e; (thus it was also by the Civil Law ^f) and in Cases where personal Violence was offer'd, the Punishment was Retaliation, *Eye for Eye, Tooth for Tooth, Hand for Hand, Foot for Foot, Burning for Burning, Wound for Wound, and Stripe for Stripe* ^g: and the perhaps this Law may not in strictness be binding on other Nations, yet undoubtedly where the Reason holds the same, it is the best Pattern for our Imitation ^h.

MURDER is indeed a Crime, which even by the Law of Retaliation calls for a capital Punishment; it is so peremptorily enjoined by the Law given to Noah, (and therefore binding on all his Posterity) *Whoever sheds Man's Blood, by Man shall his Blood be shed* ⁱ, that some have questioned ^k, whether any Prince or Power on Earth can lawfully dispense with it in any Case of a plain notorious Murder: most certainly they ought not, without some very important and peculiar Reasons, and not merely for Favour or Interest. The Law of God forbids, *that any Satisfaction shall be taken for the Life of a Murderer, but he shall surely be put to death* ^l.

AS to other less Offenders, it would be a more equitable and effectual Punishment to confine them to hard ^m Labour at home; or, if they deserve it, to sell them to the *Moors* or *Spaniards* abroad: it is Idleness which is the Source of their Guilt, and generally draws them into the commission of their Crimes, and therefore nothing more proper to reclaim and deter them, than hard Work and Labour: however, they have by their Guilt incur'd a Forfeiture of their natural Liberty, so that no Wrong will be done them in disposing of them in that manner. I am sure it is a much more lawful Method of making Slaves than the practice of kidnapping and stealing innocent Men from off the *African* Shore, and forcibly carrying them away from all their Friends and Relations into a miserable Slavery in *America*, without any better Title, than what arises from the difference of Complexions.

THIS Severity of our Law in inflicting capital Punishments upon the lighter Crimes of Pilfering and Thieving seems the more extraordinary, when one considers the great Indulgence shewn to one of the first Magnitude, and which is productive of much more mischievous Consequences, I mean ADULTERY, which it is holden ⁿ, ^{And Adultery.} does not by our Law admit of any Prosecution in a criminal way; yet whether we consider the Guilt of the Offender, or the Mischief done to the injured Party, there is no Comparison between the one and the other: what proportion is there between a private Theft, perhaps of some Trifle, which may soon be repaired, and the Invasion of our Neighbour's Bed, ^o irreparably robbing him of all the Satisfaction and Comfort of his Family, confounding Relations, and imposing upon him the charge of maintaining a spurious Issue as his own? the one is often done only to allay the Vio-

^b 8 Eliz. cap. 4. § 2.

^c 1 Edw. 6. cap. 12. § 10. 2 & 3 Edw. 6. cap. 33.

^d Exod. cap. 22. ver. 4. & 7.

^e Ibid. cap. 22. ver. 1.

^f Instit. lib. 4. tit. 1. de obligation. quæ ex delicto, &c. § 5.

^g Exod. cap. 21. ver. 24, 25. Levit. cap. 24. ver. 19,

^h Deut. cap. 19. ver. 21.

ⁱ Grot. de jur. bel. lib. 2. cap. 20. § 32.

^j Gen. cap. 9. ver. 6. Grot. de jur. bel. Lib. 1. cap. 2.

^k See this Question discuss'd in Bishop Barlow's Cases of

Conscience.

^l Numb. cap. 35. ver. 31.

^m Puf. Law of Nat. lib. 8. cap. 3. § 26. Mori Utopia,

lib. 1.

ⁿ 2 Co. Instit. 488. 2 Salk. Rep. 552. Galizard & Rigault: This is the general Opinion, tho I must confess, I see not, but that Adultery is indictable by our Law. It is allowed on all hands that an Indictment lies for seducing a Servant away from his Master's Service; and that the same reason extends to the seducing a Wife away from her Husband: of this

there is a Precedent in Tremain's Entries, p. 209. The King against Mountague, 1 Jac. II. and another in Offic. Cler. Pac. p. 311. Tho these were Cases where the Wife went away with the Adulterer, yet the reason holds proportionably, where she is seduc'd to a breach of her Fidelity and Trust, tho it be without going away. If a Man debauch his Wife's Sister, this has been held a Misdemeanour punishable by Indictment or Infamation; this was the Case of Ford Lord Grey, for debauching the Earl of Berkley's Daughter; see Trials, Vol. III. p. 515. N^o. 112. and of the King against Heathcote, for debauching Mr. Holworthy's Daughter, Trin. 7 Geo. I. (1720.) B.R. Rot. 46. Sure it is not less injurious to debauch another Man's Wife; but still it is punishable only as a Misdemeanour, and not with that Severity as the Guilt of the Offense requires, and the Laws of other Nations have thought it to deserve: so that the injured Party is in a manner oblig'd to betake himself to a civil Action for Damages; tho, as Mr. Wollaston says in the place cited below, the Offense is of such a nature that no Satisfaction can be made for it, if the injured Man thinks so, as he generally does.

^o See Wollaston's Religion of Nature, § 6. par. 19.

lence of a pressing Hunger, but the other always to gratify an irregular and ungo-vern'd Lust. Nor can it with reason be pretended, that the one is a Crime of a *public*, the other of a *private* nature: if the Public be concern'd in the Preservation of the Property of Goods, it cannot be less so in the Preservation of the more valuable Rights, which affect the Peace and Quiet of Families. Is private stealing an Of-fense against the Community? The other is much more so, having a greater ten-dency to promote Frays and Quarrels, public Disturbances and Breaches of the Peace, from whence Bloodshed and Murders often ensue.

WHAT may be the reason why our Laws make so light of this enormous Crime, whether it be the Countenance it receives from great Examples and the Commonness of the Fault, or some other reason, I will not take upon me to say; but most certain it is, that the Laws of other Nations had a different Sense of it, and treated it in a severer manner: By the *Mosaic Law* it was always punish'd with Death^a; and long before that Law it was esteem'd an *Iniquity to be punish'd by the Judges*^b.

BY an old Law of *Romulus*^c the Adulteress was to be put to death; *Adulterii con-victam vir & cognati, uti volent, necant*: and tho afterwards the Civil Law (*Lex Julia de adulteriis*) punish'd it only (*per relegationem*^d) with Banishment, or (*per deportationem*^e) with Transportation into some remote island; yet the Father of the Adulteress was permitted to kill both his Daughter and the Adulterer^f, and in some Instances the Husband had the same Power^g; and if he chanced to use that Power in a Case not allow'd, even then he was not to be punish'd with Severity, but only to undergo a milder sort of Punishment^h: But at length when the Empire became Christian, under the Reign of *Constantine*, Adultery was made capital, *Sacrilegos nuptiarum gladio puniri oportet*ⁱ, and so it continued to *Justinian's*^k Time and long after. Some are of opinion that it was so even while the Empire was Hea-then, under the Reign of *Diocletian* and *Maximian*, it being enumerated in one of their Laws^l among the capital Crimes.

Of smaller
Crimes and
Misdemean-
ours.

AS to smaller Crimes and Misdemeanours, they are differenc'd with such a variety of extenuating or aggravating Circumstances, that the Law has not, nor indeed could affix to each a certain and determinate Penalty; this is left to the Discretion and Prudence of the Judge, who may punish it either with Fine or Imprisonment^m, Pil-lory or Whipping, as he shall think the nature of the Crime deserves: but tho he be intrusted with so great Power, yet he is not at liberty to do as he lists, and inflict what arbitrary Punishments he pleases; due regard is to be had to the Quality and Degree, to the Estate and Circumstances of the Offender, and to the greatness or smallness of the Offense; that Fine, which would be a mere Trifle to one Man, may be the utter Ruin and Undoing of another; and those Marks of Ignominy and Disgrace which would be shocking and grievous to a Person of a liberal Education, would be slighted and despised by one of the vulgar sort.ⁿ A Judge therefore who uses this dis-cretionary Power to gratify a private Revenge, or the Rage of a Party, by inflicting indefinite and perpetual Imprisonment, excessive and exorbitant Fines, unusual and cruel Punishments, is equally guilty of perverting Justice and acting against Law, as he, who in a Case where the Law has ascertained the Penalty, wilfully and know-ingly varies from it. If no Measures were to be observed in these discretionary Pu-nishments, a Man who is guilty of a Misdemeanor might be in a worse Condition than if he had committed a capital Crime; he might be expos'd to an indefinite^o and perpetual Imprisonment, a Punishment not at all favour'd by Law, as being worse than Death it self^p: nor does an extravagant Fine, which is beyond the Power of the Of-fender ever to pay or raise, differ much from it; for if his Imprisonment depend upon a Condition, which will never be in his power to perform, it is the same as if it were ab-solute and unconditional; if the Offender be not able to pay such a Fine as his Offense deserves, he must then submit to a corporal Punishment in lieu of it, according to the old Rule, *Qui non habet in crumena, luat in cute*^q. It is true, that a Clause of *Magna Charta*^r, which requires the saving every Man's Contenment, (*viz.* his means of Live-lihood) extends only to Amerciaments, which are ascertained by a Jury, and not to

^a Levit. cap. 20. ver. 10. Deuter. cap. 22. ver. 22. Ezek. cap. 18. ver. 11. Susanna ver. 41. John cap. 8. ver. 5.

^b Job cap. 31. ver. 11.

^c See Bodinus in methodo historica, cap. 4.

^d Digest. de divortiis & repudiis, lib. 24. tit. 2. l. 8.

^e Digest. de quaestionibus, lib. 48. tit. 18. l. 5.

^f Digest. ad leg. Jul. de adulter. lib. 48. tit. 5. l. 20.

^g Ibid. l. 24.

^h Digest. ad leg. Cornel. de sicariis, lib. 48. tit. 8. l. 1.

ⁱ Digest. ad leg. Jul. de adulter. l. 38. § 8.

^j Cod. ad leg. Jul. de adulter. lib. 9. tit. 9. l. 30. § 1.

^k Institut. de publicis judiciis, Lib. 4. tit. 18. § 4.

^l Cod. de transact. lib. 2. tit. 6. l. 18.

^m 8 Co. Rep. fo. 59. b.

ⁿ Wollast. Relig. of Nat. § 2. Obs. 5. Puf. Law of Nat. B. 8. cap. 3. § 25.

^o Trials, Vol. II. p. 617.

^p Vita pejor morte, Trials, Vol. II. p. 742.

^q 2 Co. Instit. 173.

^r Cap. 14.

Fines, which are imposed by the Court; but nevertheless those Fines ought to be moderate and within Bounds; where a Court has a Power of setting Fines, that must be understood of setting *reasonable* Fines: *an excessive Fine*, says Lord Coke¹, is *against Law*², and so it is declared to be by the *Act*³ for declaring the Rights and Liberties of the Subject, &c. The same Statute declares the Illegality of unusual and cruel Punishments.

IT is no easy matter to settle the precise Limits, how far a Court of Justice may go in these Cases; every Case must depend upon its own particular Circumstances. But some Fines and some Punishments are so monstrously extravagant, that no body can doubt their being so; such were the Fines of Sir Samuel Barnardiston⁴ and Mr. Hampden⁵, such were the repeated Pilloryings and barbarous Whippings of Oates⁶, Dangerfield⁷, and Johnson⁸.

THESE Punishments may no doubt be properly inflicted, where they are in a moderate degree and proportion'd to the Offense; only it were to be wish'd, that some better care were taken in the Execution of them. How unreasonable is it that a Criminal sentenc'd to be *Whipt* should lie at the Mercy of a vile Executioner, and that it should be left in the Power of a common Hangman to make that Whipping as severe or as favourable as he pleases? In this respect it must be owned we are excell'd by foreign Countries, where the Magistrate, who is the best Judge of the Offender's Guilt, is present at the Execution of the Sentence, and gives the proper Directions about it.

AS to the *Pillory*, that is intended only to expose the Offender to Shame and Infamy, and to mark him out to the Public, as a Person not fit to be trusted, but to be shunn'd and avoided by all creditable and honest Men: never did the Law design that he should be expos'd to the Peltings of a Mob, or the Assaults and Injuries of a furious Rabble, whereby the Prisoner is so disguised as to defeat one main design of setting him there, which was, that he might be publicly known and observ'd.

IT is indeed a surprizing Neglect, that no effectual Care has hitherto been taken to suppress these Practices, especially considering the fatal Consequences which have sometimes ensued from them, even to the loss of the poor Man's Life. It is not sufficient that whoever injures him in this manner may be punish'd for so doing; for how is it possible that a Man in his Condition should observe who it is that does him the Injury, or secure him if he did? he is at that time in the hands of Justice, and Justice ought to protect him: when a Man is at liberty, he is in many Cases able to defend himself; but when he is in the Custody of the Law, and is thereby disabled from being his own Defender, the Law ought to be his Security and Defense against any injurious Treatment.

IT cannot be pretended that this is altogether impracticable; Experience shows us, how effectually it may be done, when the Officers find an Advantage by it; nor would there be any harm in it, if the Officers were obliged by proper Penalties to take the same care without Money, which they are so well able to do with it.

7. ANOTHER thing in which our Law seems defective is the want of some further guard against the Packing of JURIES, and the Oppressions and Extortions of GAOLERS; but these are now under the Consideration of the Legislature, who it is hop'd, will apply proper Remedies to these growing Evils. As to the latter of these, I fear no Remedy will be effectual while they are suffer'd to buy and sell their Places; for while that is permitted, they will be under stronger Temptations than Men of their Character and Function usually resist, to exact more than is their due; the thing it self has an appearance of Hardship, to force a Man into Gaol against his Will, and yet oblige him to pay for his Admission into it: if he be guilty, the Punishment of the Law should be deem'd sufficient, but if innocent, the Hardship is still the greater, especially where it falls upon the Indigent and Neccessitous. It is chiefly owing to this that our Gaols swarm with Multitudes of miserable Objects, who lie there year after year without any hope of Redemption; so that when they have suffer'd the Penalty of the Law, they have a severer Punishment still to undergo for the Non-payment of Fees, a Debt which is forc'd upon them against their Consent, and is often out of their Power ever to discharge, whereby the poor Wretches are in effect condemned to perpetual Imprisonment; a thing very odious in the eye of the Law, even for great and heinous Crimes.

¹ 8 Co. Rep. fo. 38. b.

² 11 Rep. 4. 44. a.

³ See Sir John Hawles's Remarks, Trials, Vol. IV. p. 165.

⁴ 1 Gul. & Mar. Sess. 2. cap. 2. § 1.

⁵ Trials, Vol. III. p. 854.

⁶ Trials, Vol. III. p. 771.

⁷ 1685. Trials, Vol. IV. p. 104.

⁸ 1685. Burnet's Hist. own Times, p. 637.

⁹ 1686. See Memoirs of his Life, prefixed to his Works.

HOW much better would it be for the Public to allow the Gaoler a reasonable Salary, instead of these Perquisites, which arise from the Miseries of the Unfortunate, who are thereby often necessitated to take dishonest and unlawful Methods to enable themselves to pay them?

The true Design of Gaol-deliveries.

WHILE Prisoners are thus long detained, the true design of *Gaol-Deliveries* can never be answer'd: This is a Commission, says Lord Coke^m, instituted by the Law of the Land, *ne homines diu detineantur in prisona*, but that they might receive *plenam & celerem justitiam*: he adds, that Gaols ought to be deliver'd thrice a Year, or oftner, if need be. Of so much Consequence does the Law esteem it to be, that the Abbot of *St. Albans*ⁿ, who had a Grant of a Gaol and Gaol-delivery, was adjudged to have forfeited his Franchise for an unreasonable Delay in making Delivery of his Gaol.

BUT what are the Prisoners benefited by Gaol-deliveries, if after the Law has done with them, they may still be detained for Fees, which they will never be able to pay?

ANOTHER Design of Gaol-deliveries was by clearing the Prisons to make room for new Comers; but the Discharge of the old Prisoners being by these means prevented, the continual addition of new ones renders the Crowd so great, that the Place becomes too strait for its Inhabitants: This, together with the Filth and Nastiness occasion'd by their miserable Poverty and want of Conveniencies, is the cause of those contagious Distempers which are wont so violently to rage in many of our Prisons, not confining themselves within the Prison-Walls, but sometimes spreading their Infection in the very Court where the Prisoners are brought to Trial, to the no small hazard of Judges, Juries, Counsel, and all who attend there. A dreadful Instance of this is recorded in History^o to have happen'd in the twentieth Year of Queen *Elizabeth* at *Oxford* Assizes, when the Prisoners brought such a Stench with them into Court, that the Lord Chief Baron *Bell*, the Sheriff, several Counsel, almost all the Jurors, and near three hundred others, died within the space of forty Hours after it. I could wish our own Times had not furnish'd us with a fresher Instance of this kind.

The ill Consequences of the common Management of Gaols.

A FURTHER Mischief arising from this long Detention of Prisoners is, that that it defeats the principal End of all Law and Justice. All Punishments below Capital are intended to reform the Criminal, and deter him from offending again: but as our Gaols are commonly managed, it is to be fear'd, they breed up and harden more Rogues, than the Law either reclaims or removes. The Prisoners are indulged so great a Liberty in Rioting and Debauchery, which the Keepers, who have the Advantage arising from the Sale of the Liquors, find their account in promoting; the young Novices are permitted to contract so intimate an Acquaintance and Familiarity with the old Offenders, that our Gaols are rather the Schools and Nurseries of all manner of Roguery and Wickedness, than proper places for Correction and Amendment. It is generally observed, that they who enter in raw and unexperient'd Offenders, with some sense of Shame and Modesty, soon grow to be impudent and harden'd Villains, entering themselves Members of a Gang, wherein they are not only instructed in the Theory, but experient'd in the Practice of their wicked Arts. This may seem strange to some, who think they are restrained, at least while they are Prisoners, from doing Mischief without doors; yet it is not without reason apprehended by others, that they sometimes find means to make Excursions, which is hard to be accounted for without the Connivance or Permission of their Keepers, who no doubt take care to be no Losers by it: and tho this may be a Favour not usually shown to any but inferior Rogues, who are detained for smaller Crimes; yet I could mention an Instance (attested by a Person of undoubted Credit) of one who was committed to *Newgate* for breaking open an House in the Night time, and while he was in [suppos'd] Custody for that Offense, was apprehended committing a Fact of the like kind in a remote part of the Town.

The Use of Chains and Fetters in Gaols.

ANOTHER matter of Complaint is, that intolerable and inhuman Practice of many Gaolers, who to extort from their unhappy Guests such Sums as they shall think fit to exact, thrust them, as soon as they arrive within their Dominions, into stinking Dungeons, loading them with Fetters and Irons till they can bring them to a Compliance with their unjust Demands: the Pretense indeed is, that they are answerable for their Prisoners, and therefore ought to be allowed the use of proper means to secure them. That this is nothing but Pretense is sufficiently plain, Money being generally able to procure a Release from these Shackles, which do then become no longer necessary for the Safeguard of the Prisoner, having already answer'd their real Design.

^m 4 Instit. p. 168.

ⁿ 2 Co. Instit. 43.

^o See *Baker's Chronicle*, p. 353.

THO Gaolers are indeed answerable for their Prisoners, yet neither the Law of *England* nor common Humanity esteems such Means as proper in ordinary Cases; *Severos quidem facit justitia, inhumanos non facit*^p: they may make their Prisons as strong as they can, may set what Guards and Keepers they will to watch them, but must use no Force or Violence to their Persons, no Tortures or Pains, while the Prisoners quietly submit themselves to the Process of the Law; *Carcer ad continendos homines, non ad puniendos haberi debet*^q. Prisons are designed only for the Custody of the Prisoners, not for their Punishment, unless when it becomes part of the Sentence; and even then it is no otherwise intended as a Punishment, than by way of Confinement to the Prison, not as a Justification of any ill Usage in it.

IF a Prisoner is boisterous and unruly, or makes any Attempt to escape, or perhaps if he only threatens to do so; in such case it may be allowable to use a stricter Discipline.

Lord Chief Justice Coke says^r, *That Shackles about the Feet ought not to be, but for fear of Escape*. If these words have any meaning, they must import, that unless a Prisoner has given just Cause to apprehend an Escape, he ought not to be fetter'd: otherwise it may be pretended of all Prisoners, let them behave never so peaceably and civilly, who will by these means lie at the Mercy of Gaolers, whose very Mercies often are Cruelties.

THE same Author says in another place^t, *Where the Law requireth, that the Prisoner should be kept in salva & arcta custodia, yet that must be without Pain or Torment to the Prisoner*, which Chains and Fetters undoubtedly are.

AND again in his Comment^s on the Statute of *Westm.* 2. cap. 11. by which Statute the Gaoler is permitted in a particular Case there mentioned to lay his Prisoner in Irons, he makes this Observation, *That by the common Law it might not be done*.

THERE is one great Absurdity in this Practice, that by these means the Prisoner often suffers more before he is tried, than the Law inflicts on him when he is found guilty; but yet I know not how it comes to pass, it is too generally and too notoriously practis'd to be either conceal'd or deny'd.

THIS Method of Proceeding is resembled by Lord Coke^t to that of *Rhadamanthus* the Judge of Hell, who first punisheth and then heareth; like as the chief Captain did by *St. Paul*^u, first ordering him to be bound with Chains, and then demanding of him who he was, and what he had done:

8. THERE is one thing more which ought not to be wholly pass'd over, and that is the *Multiplicity and Voluminousness* of our Laws: If what lies scatter'd in so many various (some obsolete) Acts, were (so much of them as should be judged fit to be continued) collected under their several Heads into so many distinct Acts, the Law would be much more plain and easy; whereas now, considering the variety of Subjects which are often thrown together into one Act, and the various Acts relating to one and the same Subject, it is no easy matter to find out the whole relating to one particular Head; and when it is found, many Difficulties arise from the Clashings and Inconsistencies of the several Acts, the old ones not being always sufficiently consulted when the new ones are made; so that it is to be wished we may never feel the Inconvenience which *Tacitus*^w complains of, *Antehac flagitiis laborabatur, nunc legibus*.

The Voluminousness of the Laws.

I THOUGHT these short Observations upon the Laws of *England*, so far as they relate to public Crimes and the Incidents thereto, would not be altogether unsuitable to a Work consisting entirely of the Histories of criminal Prosecutions.

THE Conclusion naturally resulting from the whole is, That as our Laws have many Excellencies and Advantages which we have just reason to value them for, so they have also their Defects and Blemishes: such a blind Veneration for them as will not allow this, does not only suppose a Perfection which all human Contrivances are incapable of, but is the greatest Obstruction to all Attempts for an Amendment: That some Things need to be mended, no experienc'd Lawyer can deny; and that they should be so, every honest one will heartily desire.

WHETHER the Particulars here mentioned be of that number, is submitted to the Judgment of all true Lovers of their Country, who it is hop'd will be so far from being offended hereat, that they will use their utmost Endeavours to promote the

^p 2 Co. Instit. 315.

^q Digest. lib. 48. tit. 19. de pœnis, l. 8. § 9. *Eract.* l. 3. fol. 154. b. 2 Co. Instit. 43.

^r 3 Instit. p. 34. in the Margin.

^t Ibid. 35.

^s 2 Instit. p. 381.

^t 2 Instit. 55.

^u Acts cap. 21. ver. 33.

^w Annal. lib. 3. § 25.

Amendment of whatever shall appear to need it. I pretend not to have taken notice of every Particular in our Crown Law which may deserve it; my Design was only to give a few Hints, wherein I might evince the necessity of a Reformation; and if I can be any way instrumental in bringing it about by stirring up others of more Capacity and Influence to undertake the Task, I shall answer my End.

THE Reader will by this time expect some Account of the Improvements and Alterations of this Edition.

*An Account
of this Edition.*

WHEN the first Edition was preparing for the Press, the Undertakers were at great Pains and Expense, and offer'd large Encouragements to procure whatever was proper and suitable to their Design; but as they were sensible there must needs be many Defects and Omissions in the first Attempt of a Work of this nature, so they have continued their Pains to supply those Defects, and have offer'd the same Encouragements to any who should furnish them with such material Trials as were then omitted.

HOW they have succeeded in their Endeavours may be seen from the large number of *Additional Trials*: These, together with the Additions interspersed thro' the other Trials, have swell'd the Work to five Volumes; to which there is added a Sixth, containing the most remarkable Trials from the Reign of Queen Anne, where the first Edition ended, to the end of the Reign of King George I.

THE larger Trial of the Earl of *Strafford* is here purposely omitted, as being an entire Volume in *Rushworth's Collections*, which is to be had by itself.

TO make this Collection more generally acceptable, the Reader is informed at the end of each Trial, where the Prisoner was convicted of a capital Crime, whether he was executed or not; and (where it could be had) an Account also is added of his Behaviour and Speech at the Place of Execution.

AND whereas in the former Edition some Trials were inserted out of the Order of time, and Parts of others transpos'd, they are here reduced to their proper Places; the Names of the Judges, Attorney-General, &c. are here generally, if not always inserted; several Notes are added to explain and illustrate the Text, and divers References made to the Books of Reports and Historians of the Times: and for the Ease and Conveniency of referring, each Trial is distinctly number'd; the several Titles are render'd uniform, containing the Date when, the Crime for which, and the Court before whom the Prisoner was try'd; all which are continued where there was room for them thro'out the Running Title; the Omission whereof in some Places 'tis hop'd the candid Reader will excuse, since in a Work of this nature, where such a variety of Printers are employ'd, it can scarce be expected that all Parts of it should be perform'd with equal Care and Exactness.

TO render this Work the more useful, especially to the Gentlemen of the Law, there is subjoin'd by way of *Appendix* a Collection of Records relating to the said Trials. The Undertakers wish they could say they had had the same Success in this part of the Work as in the other; but hope the Fault will not be imputed to them, who have inserted all they could procure, and done their Endeavours to procure the rest.

THAT the whole might be the better fitted for Use, there are added two *Alphabetical Tables*; the one containing the Names of the Persons tried or proceeded against, together with the Times and Places of their Trial, and also their Crimes and Punishments; the other of the several Matters contained in all the Six Volumes.

March 27.

1730.

M. N.

Abbreviations us'd in the Table, and the Running Titles.

H. L. ———	House of Lords.
B. R. ———	The King's Bench.
Scacc. ———	Exchequer.
C. S. ———	The Star Chamber.
G. H. ———	Guild-Hall.
O. B. ———	The Old Baily.
H. C. J. ———	High Court of Justice.
Mich. ———	Michaelmas Term.
Hil. ———	Hilary Term.
Pasch. ———	Easter Term.
Trin. ———	Trinity Term.

A N

Alphabetical T A B L E

O F T H E

NAMES of the Persons tried or proceeded against, the *Crimes* for which they were tried, the *Places* where, and the *Punishments* of such as were convicted.

Year.	Month.	Names.	Crimes.	Where try'd.	Punishments.	N ^o .	Trials.
A.							
1586	Sept. 15	Abington	High-Treason	Westm.	Hang'd, &c.	11	VOL. I. 126
1679	Jan. 17	Anderfon	A Romish Priest	O. B.	Repriev'd	89	II. 289
1668	April 4	Appletree	High-Treason	O. B.	Pardon'd	67	II. 581
1661	Jan. 23	Argyle (Marquiss)	High-Treason	Scotl.	Beheaded	57	II. 413
1681	Nov.	Argyle (Earl)	High-Treason	Scotl.	Beheaded	109	III. 437
1684	June 14	Armstrong (Sir Tho.)	High-Treason	B. R.	Hang'd, &c.	126	III. 895
1589	April 18	Arundel (Earl)	High-Treason	H. L.	Died in Prison	13	I. 156
1690	Jan. 17	Ashton	High-Treason	O. B.	Hang'd	146	IV. 451
1678	Feb. 11	Atkins (Samuel)	Murder of Sir E. B. G.	B. R.	Acquitted	79	II. 788
1679	Aug. 13	Atkins (William)	Romish Priest	Affiz.	Guilty	87	II. 964
1723	May	Atterbury (Bishop)	A Treasonable Conspiracy	Parl.	Banish'd	191	VI. 333
1631	April 25	Audley (Lord)	A Rape and Sodomy	H. L.	Beheaded	31	I. 366
1660	Oct. 15	Axtel	A Regicide	O. B.	Hang'd, &c.	56	II. 365
B.							
1586	Sept. 14	Babington	High-Treason	Westm.	Hang'd, &c.	10	I. 121
1620	Mar. 19	Bacon (Lord)	Bribery and Corruption	H. L.	Fin'd and imprison'd	30	I. 353
1684	Dec. 3	Baillie	High-Treason	Scotl.	Hang'd, &c.	121	III. 1011
1586	Sept. 14	Ballard	High-Treason	Westm.	Hang'd, &c.	10	I. 121
1634	Dec. 3	Balmerino (Lord)	A Treasonable Libel	Scotl.	Pardon'd	35	I. 407
1683	Feb. 14	Barnardiston (Sir Sam.)	A Misdemeanour	G. H.	Fin'd	123	III. 845
1586	Sept. 14	Barnewell	High-Treason	Westm.	Hang'd, &c.	10	I. 121
1637	June 14	Bastwick	A Libel	C. S.	Pillory'd, Ears cut off, and imprison'd	36	I. 459
1685	Dec. 9	Bateman	High-Treason	O. B.	Hang'd, &c.	135	IV. 162
1605	Jan. 27	Bates	Gunpowder Plot	Westm.	Hang'd, &c.	19	I. 224
1701	Feb. 19	Bayard (Col.)	High-Treason	N. York	Repriev'd	169	V. 419
1702	Nov. 25	Baynton	A forcible Marriage	B. R.	Repriev'd	173	V. 469
1668	April 4	Beadle	High-Treason	O. B.	Acquitted	67	II. 581
1668	April 4	Beasley	High-Treason	O. B.	Hang'd, &c.	67	II. 581
1586	Sept. 15	Bellamy	High-Treason	Westm.	Hang'd, &c.	11	I. 126
1678	Feb. 10	Berry	Murder of Sir E. B. G.	B. R.	Hang'd	78	II. 756
1681	Octob. 5	Bethel	Affault and Battery	Southw.	Fin'd	107	III. 409
1688	June 29	Bishops (seven)	A Libel	B. R.	Acquitted	142	IV. 300
1683	July 13	Blague	High-Treason	O. B.	Acquitted	119	III. 654
1600	Mar. 5	Blunt (Sir Christopher)	High-Treason		Beheaded	17	I. 202
1662	June 25	Bolton	Refusing to take the Oaths	O. B.	Imprison'd	59	II. 459
1718	Oct. 13	Bonnet (Maj.) and others	Piracy	Carolina	Hang'd	186	VI. 156
1681	Feb. 28	Borosky	Murder of Mr. Thynn	O. B.	Hang'd	110	III. 462
1567	April 12	Bothwell (Earl)	Murder of King of Scots	Scotl.	Acquitted	6	I. 78
1703	Feb. 28	Bouchier	High-Treason	B. R.	Repriev'd	175	V. 510
1683	Feb. 7	Braddon	A Misdemeanour	B. R.	Fin'd	122	III. 771
1388	Feb. 3	Brambre (May. of Lon.)	High-Treason	H. L.	Hang'd, &c.	1	I. 1
1663	Feb. 22	Brewster	A Libel	O. B.	Pillory'd, fin'd, and imprison'd	64	II. 534
1679	Aug. 13	Brommich	A Romish Priest	Affize	Guilty	86	II. 961
1663	Feb. 22	Brooks	A Libel	O. B.	Pillory'd, fin'd, and imprison'd	64	II. 543

TABLE of the Persons tried, their Crimes, &c.

Year.	Month.	Names.	Crimes.	Where try'd.	Punishments.	N ^o .	Trials.
1631	June 27	Brodway	<i>A Rape and Sodomy</i>	B. R.	Hang'd	32	Vol. I. 374
1633	Feb. 7	Buckner	<i>A Libel</i>	C. S.	Censur'd	34	I. 396
1637	June 14	Burton	<i>A Libel</i>	C. S.	Pillory'd, Ears cut off, and imprison'd	36	I. 459
1681	July 25	Busby	<i>A Romish Priest</i>	Affiz.	Repriev'd	105	III. 329
1699	Oct. 12	Butler	<i>Forgery</i>	O. B.	Fin'd	164	V. 232
C.							
1687	April	Cambridge (University)	<i>A Contempt</i>		Vice Chancel. depriv'd	139	IV. 250
1680	July 2	Carr	<i>A Libel</i>	G. H.	Guilty	97	III. 57
1660	Oct. 12	Carew	<i>A Regicide</i>	O. B.	Hang'd, &c.	56	II. 326
1715	Feb. 9	Carnwath (Earl)	<i>High-Treason</i>	H. L.	Pardon'd	182	VI. 1
1688	Mar. 7	Cavenagh and others	<i>Cow-stealing</i>	Ireland	Hang'd	145	IV. 404
1680	June 11	Cellier	<i>High-Treason</i>	B. R.	Acquitted	95	III. 32
1680	Septemb.	The same	<i>A Libel</i>	O. B.	Pillory'd and fin'd	100	III. 89
1648	Jan. 20	Charles (King)	<i>High-Treason</i>	H. C. J.	Beheaded	43	I. 940
1695	Mar. 11	Charnock (Robert)	<i>High-Treason</i>	O. B.	Hang'd, &c.	150	IV. 550
1586	Sept. 15	Charnock (John)	<i>High-Treason</i>	Westm.	Hang'd, &c.	11	I. 126
1663	& 1667	Clarendon (Earl)	<i>H. Treason and H. Crimes</i>	Parl.	Banish'd	66	II. 550
1660	Oct. 12	Clement	<i>A Regicide</i>	O. B.	Hang'd, &c.	56	II. 334
1721	Mar. 13	Coke (Arundel)	<i>Slitting Mr. Crispe's Nose</i>	Affiz.	Hang'd	189	VI. 212
1692	Sept. 2	Cole	<i>Murder of Dr. Clench</i>	O. B.	Acquitted	147	IV. 502
1678	Nov. 27	Coleman	<i>High-Treason</i>	B. R.	Hang'd, &c.	74	II. 656
1681	Aug. 17	Colledge	<i>High-Treason</i>	Oxon	Hang'd, &c.	106	III. 341
1660	Oct. 13	Cook (John)	<i>A Regicide</i>	O. B.	Hang'd, &c.	56	II. 337
1696	May 9	Cook (Peter)	<i>High-Treason</i>	O. B.	Pardon'd	156	IV. 726
1681	Feb. 28	Conningmark (Count)	<i>Murder of Mr. Thynn</i>	O. B.	Acquitted	110	III. 462
1679	July 18	Corker	<i>High-Treason</i>	O. B.	Acquitted	84	II. 913
1679	Jan. 17	The same	<i>A Romish Priest</i>	O. B.	Repriev'd	89	II. 989
1678		Cornwallis (Lord)	<i>Murder of Clerk</i>	H. L.	Acquitted	76	II. 721
1683	May 8	Cornish and others	<i>A Riot</i>	G. H.	Fin'd	113	III. 541
1685	Oct. 19	The same	<i>High-Treason</i>	O. B.	Hang'd, &c.	134	IV. 130
1668	April 4	Cotton	<i>High-Treason</i>	O. B.	Hang'd, &c.	67	II. 581
1699	July 16	Cowper and others	<i>Murder of S. Stout</i>	Affiz.	Acquitted	163	V. 194
1696	Apr. 21	Cranburne	<i>High-Treason</i>	Westm.	Hang'd, &c.	154	IV. 686
1662	June 25	Croke	<i>Refusing to take the Oaths</i>	O. B.	Imprison'd	59	II. 459
1600	Mar. 5	Cuffe	<i>High-Treason</i>		Hang'd, &c.	17	I. 202
1679		Curtis	<i>A Libel</i>	G. H.	Guilty	93	II. 1038
D.							
1678	Decemb.	Danby (Earl)	<i>High-Treason</i>	Parl.	Pardon'd	77	II. 727
1600	Mar. 5	Davers (Sir Charles)	<i>High-Treason</i>		Beheaded	17	I. 202
1600	Mar. 5	Davis	<i>High-Treason</i>		Hang'd, &c.	17	I. 202
1696	Oct. 19	Dawson and others	<i>Piracy</i>	O. B.	Hang'd	158	V. 1
1685	Jan. 14	Delamere (Earl)	<i>High-Treason</i>	H. L.	Acquitted	137	IV. 210
1715	Feb. 9	Derwentwater (Earl)	<i>High-Treason</i>	H. L.	Beheaded	182	VI. 1
1605	Jan. 27	Digby (Sir Everard)	<i>Gunpowder Plot</i>	Westm.	Hang'd, &c.	19	I. 224
1586	Sept. 14	Donn	<i>High-Treason</i>	Westm.	Hang'd, &c.	10	I. 121
1663	Feb. 22	Dover	<i>A Libel</i>	O. B.	Pillory'd, fin'd, and imprison'd	64	II. 541
1660	Oct. 16	Downes	<i>A Regicide</i>	O. B.	Repriev'd	56	II. 392
E.							
1668	April 4	Earles	<i>High-Treason</i>	O. B.	Acquitted	67	II. 581
1690	Jan. 17	Elliot	<i>High-Treason</i>	O. B.	Not tried	146	IV. 406
1615	Nov. 16	Elvis (Sir Jervis)	<i>Murder of Sir T. Overb.</i>	G. H.	Hang'd	25	I. 324
1600	Feb. 19	Elsex (Earl)	<i>High-Treason</i>	H. L.	Beheaded	16	I. 190
1613		Elsex (E. and Countess)		Delegates	Divorc'd	22	I. 307
F.							
1668	April 4	Farrel	<i>High-Treason</i>	O. B.	Acquitted	67	II. 581
1631	June 20	Farewell	<i>Libels</i>	G. H.	Pillory'd and fin'd	111	III. 501
1605	Jan. 27	Fawkes	<i>Gunpowder Plot</i>	Westm.	Hang'd, &c.	19	I. 224
1679	June 13	Fenwick	<i>High-Treason</i>	O. B.	Hang'd, &c.	82	II. 825
1696	Novem.	Fenwick (Sr John)	<i>High-Treason</i>	Parl.	Beheaded	160	V. 40
1685	Oct. 19	Fernley	<i>High-Treason</i>	O. B.	Repriev'd	134	IV. 130
1706	Dec. 4	Fielding	<i>Bigamy</i>	O. B.	Pardon'd	179	V. 614
1707	June 25	The same	<i>Marriage with the Duchess of Cleveland annul'd</i>				V. 632
1643	Dec. 14	Fiennes (Col.)	<i>Cowardice</i>	C. of War	Pardon'd	40	I. 75
1681	Mar. 25	Fitz-Harris	<i>High-Treason</i>	B. R.	Hang'd, &c.	102	III. 224
1631	June 27	Fitz-Patrick	<i>A Rape and Sodomy</i>	B. R.	Hang'd	32	I. 374

T A B L E of the Persons tried, their Crimes, &c.

Year.	Month.	Names.	Crimes.	Where try'd.	Punishments.	N ^o .	Trials.
1660	Oct. 10	Fleetwood	<i>A Regicide</i>	O. B.	<i>Repriev'd</i>	56	II. 307
1668	April 4	Ford	<i>High-Treason</i>	O. B.	<i>Acquitted</i>	67	II. 581
1654	June 30	Fox	<i>High-Treason</i>	H. C. J.	<i>Pardon'd</i>	49	II. 212
1716	Jan. 22	Francia	<i>High-Treason</i>	O. B.	<i>Acquitted</i>	184	VI. 58
1615	Nov. 27	Franklin	<i>Murder of Sir T. Overb.</i>	B. R.	<i>Hang'd</i>	26	I. 329
1695	Mar. 23	Friend (Sir John)	<i>High-Treason</i>	O. B.	<i>Hang'd, &c.</i>	151	IV. 587
1702	May 20	Fuller	<i>An Impostor</i>	G. H.	<i>Pillory'd, &c.</i>	170	V. 445
G.							
1586	Sept. 15	Gage	<i>High-Treason</i>	Westm.	<i>Hang'd, &c.</i>	11	I. 126
1660	Oct. 16	Garland	<i>A Regicide</i>	O. B.	<i>Repriev'd</i>	56	II. 394
1606	Mar. 28	Garner	<i>Gunpowder Plot</i>	G. H.	<i>Hang'd, &c.</i>	0	I. 240
1679	Feb. 11	Gascoigne (Sir Tho.)	<i>High-Treason</i>	B. R.	<i>Acquitted</i>	94	III. 1
1679	June 13	Gavan	<i>High-Treason</i>	O. B.	<i>Hang'd, &c.</i>	82	II. 825
1685	Oct. 19	Gaunt	<i>High-Treason</i>	O. B.	<i>Burnt</i>	134	IV. 130
1654	June 30	Gerhard	<i>High-Treason</i>	H. C. J.	<i>Beheaded</i>	49	II. 212
1662	Dec. 11	Gibbs	<i>High-Treason</i>	O. B.	<i>Hang'd, &c.</i>	61	II. 474
1651	July 18	Gibbons	<i>High-Treason</i>	H. C. J.	<i>Beheaded</i>	47	II. 183
1719	July 28	Gilbert (C. Baron) &c.	<i>A Contempt</i>	Ireland	<i>Imprison'd</i>	187	VI. 188
1680	July 14	Giles	<i>Attempt to murder Mr. } Arnold</i>	O. B.	<i>Pillory'd and fin'd</i>	98	III. 65
1605	Jan. 27	Grant	<i>Gunpowder Plot</i>	Westm.	<i>Hang'd, &c.</i>	19	I. 224
1704	Mar. 14	Green (Capt.) and his } Crew	<i>Piracy</i>	Scotl.	<i>Hang'd</i>	178	V. 576
1678	Feb. 10	Green (Robert)	<i>Murder of Sir E. B. G.</i>	B. R.	<i>Hang'd</i>	78	II. 756
1668	April 4	Green (William)	<i>High-Treason</i>	O. B.	<i>Acquitted</i>	67	II. 581
1662	June 25	Grey	<i>Refusing to take the Oaths</i>	O. B.	<i>Imprison'd</i>	59	II. 459
1678	Dec. 17	Grove	<i>High-Treason</i>	O. B.	<i>Hang'd, &c.</i>	75	II. 692
1682	Nov. 23	Grey (Lord) and others	<i>A Misdemeanour</i>	B. R.	<i>No Judgment</i>	112	III. 515
H.							
1701		Halifax (Lord)	<i>High Misdemeanours</i>	H. L.	<i>Acquitted</i>	167	V. 339
1660	Oct. 15	Hacker	<i>A Regicide</i>	O. B.	<i>Hang'd, &c.</i>	56	II. 378
1637		Hampden (John)	<i>Ship-Money</i>	Scac'	<i>Judgment against him</i>	37	I. 483
1685	Feb. 6	Hampden (John)	<i>High Misdemeanours</i>	B. R.	<i>Fin'd</i>	121	III. 740
1685	Dec. 30	The same	<i>High-Treason</i>	O. B.	<i>Pardon'd</i>	136	IV. 207
1648	Feb. 9	Hamilton (Duke)	<i>High-Treason</i>	H. C. J.	<i>Beheaded</i>	44	II. 1
1679	Feb. 5	Harris	<i>A Libel</i>	G. H.	<i>Pillory'd, fin'd and } imprison'd</i>	91	II. 1033
1638	Trin. T.	Harrison (Tho.)	<i>Misdemeanour</i>	B. R.	<i>Fin'd and imprison'd</i>	38	I. 699
1660	Oct. 11	Harrison (Tho.)	<i>A Regicide</i>	O. B.	<i>Hang'd, &c.</i>	56	II. 309
1692	April 6	Harrison (Henry)	<i>Murder of Dr. Clench</i>	O. B.	<i>Hang'd</i>	147	IV. 484
1679	June 13	Harcourt	<i>High-Treason</i>	O. B.	<i>Hang'd, &c.</i>	8	II. 825
1702	Nov. 25	Hartwell	<i>A forcible Marriage</i>	B. R.	<i>Acquitted</i>	173	V. 469
1660	Oct. 16	Harvey	<i>A Regicide</i>	O. B.	<i>Repriev'd</i>	56	II. 386
1702	Mar. 24	Hathaway	<i>An Impostor</i>	Affize	<i>Pillory'd, &c.</i>	174	V. 486
1701		Haversham (Earl)		H. L.	<i>Acquitted</i>	167	V. 339
1668	Mar. 11	Hawkins	<i>Felony</i>	Affize	<i>Acquitted</i>	68	II. 591
1684	Nov. 21	Hayes	<i>High-Treason</i>	B. R.	<i>Acquitted</i>	129	III. 983
1660	Oct. 16	Heveningham	<i>A Regicide</i>	O. B.	<i>Repriev'd</i>	56	II. 396
1658	June 1	Hewet (Dr.)	<i>High-Treason</i>	H. C. J.	<i>Beheaded</i>	54	II. 277
1571	Feb. 9	Hickford	<i>High-Treason</i>	B. R.		8	I. 117
1678	Feb. 10	Hill	<i>Murder of Sir E. B. G.</i>	B. R.	<i>Hang'd</i>	78	II. 756
1662	Dec. 11	Hind	<i>High-Treason</i>	O. B.	<i>Repriev'd</i>	61	II. 474
1615	Nov. 10	Hollis (Sir John)	<i>Misdemeanour</i>	C. S.	<i>Fin'd</i>		I. * 322
1684	Apr. 21	Holloway	<i>High-Treason</i>	B. R.	<i>Hang'd, &c.</i>	124	III. 855
1683	July 12	Hone	<i>High-Treason</i>	O. B.	<i>Hang'd, &c.</i>	116	III. 618
1660	Oct. 15	Hulet	<i>A Regicide</i>	O. B.	<i>Repriev'd</i>	56	II. 381
1701	May 31	Hurly	<i>Perjury</i>	Ireland.	<i>Fin'd</i>	168	V. 384
I.							
1562	Nov. 14	James	<i>High-Treason</i>	B. R.	<i>Hang'd, &c.</i>	60	II. 466
1586	Sept. 15	Jones (Edward)	<i>High-Treason</i>	Westm.	<i>Hang'd, &c.</i>	11	I. 126
1660	Oct. 12	Jones (John)	<i>A Regicide</i>	O. B.	<i>Hang'd, &c.</i>	56	II. 334
1388	Feb. 3	Ireland (Duke)	<i>High-Treason</i>	H. L.	<i>Escap'd</i>	1	I. 1
1678	Dec. 17	Ireland	<i>High-Treason</i>	O. B.	<i>Hang'd, &c.</i>	75	II. 692
K.							
1664	Oct. 8	Keach	<i>A Libel</i>	Affize	<i>Pillory'd, fin'd, and } imprison'd</i>	65	II. 546
1723	May	Kelly	<i>A Treasonable Conspiracy</i>	Parl.	<i>Imprison'd</i>	191	VI. 333
1695	Oct. 31	Kendal and Roe	<i>Habeas Corpus</i>	B. R.	<i>Bail'd</i>		IV. 854

T A B L E of the Persons tried, their Crimes, &c.

Year.	Month.	Names.	Crimes.	Where try'd.	Punishments.	N ^o .	Trials.
1715	Feb. 9	Kenmure (<i>Vifcount</i>)	<i>High-Treason</i>	H. L.	<i>Beheaded</i>	182	Vol. VI. 1
1679	Jan. 17	Kemith	<i>A Romish Priest</i>	O. B.	<i>Arraign'd only</i>	89	II. 989
1679	Aug. 4	Kerne	<i>High-Treason</i>	Affize	<i>Acquitted</i>	85	II. 957
1605	Jan. 27	Keys (Robert)	<i>Gunpowder Plot</i>	Westm.	<i>Hang'd, &c.</i>	19	I. 224
1695	Mar. 11	Keys (Thomas)	<i>High-Treason</i>	O. B.	<i>Hang'd, &c.</i>	150	IV. 550
1701	May 8	Kidd (<i>Capt.</i>) and others	<i>Murder and Piracy</i>	O. B.	<i>Hang'd</i>	166	V. 287
1695	Mar. 11	King	<i>High-Treason</i>	O. B.	<i>Hang'd, &c.</i>	150	IV. 550
1702	Oct. 8	Kirkby and others	<i>Desertion</i>		<i>Shot to death</i>	171	V. 449
1696	May 20	Knightley	<i>High-Treason</i>	B. R.	<i>Pardon'd</i>	157	IV. 765
1679	Nov. 25	Knox	<i>A Misdemeanour</i>	B. R.	<i>Fin'd and imprison'd</i>	88	II. 966
L.							
1679	Nov. 25	Lane	<i>A Misdemeanour</i>	B. R.	<i>Pillory'd, fin'd, and imprison'd</i>	88	II. 966
1679	June 14	Langhorne	<i>High-Treason</i>	O. B.	<i>Hang'd, &c.</i>	83	II. 874
1668	April 4	Latimer	<i>High-Treason</i>	O. B.	<i>Pardon'd</i>	67	II. 581
1643	Mar. 12	Laud (<i>Archbishop</i>)	<i>High-Treason</i>	H. L.	<i>Beheaded</i>	41	I. 803
1722	Nov. 21	Layer	<i>High-Treason</i>	B. R.	<i>Hang'd, &c.</i>	190	VI. 229
1679	Mar. 28	Lewis	<i>High-Treason</i>	Affize	<i>Hang'd, &c.</i>	80	II. 797
1649	Oct. 24	Lilburne (<i>Col.</i>)	<i>High-Treason</i>	G. H.	<i>Acquitted</i>	45	II. 19
1653	Aug. 20	His Jury					II. 81
1660	Oct. 16	Lilburne (Robert)	<i>A Regicide</i>	O. B.	<i>Repriev'd</i>	56	II. 390
1668	April 4	Limerick	<i>High-Treason</i>	O. B.	<i>Hang'd, &c.</i>	67	II. 581
1704	Apr. 19	Lindsay	<i>High-Treason</i>		<i>Repriev'd</i>	176	V. 512
1685	Aug. 27	Lisle (<i>Lady</i>)	<i>High-Treason</i>	Winton.	<i>Beheaded</i>	133	IV. 105
1686	August	London (<i>Bishop</i>)	<i>A Contempt</i>		<i>Suspended</i>	138	IV. 243
1683	Hil. T.	London (<i>City</i>)	<i>Quo Warranto</i>	B. R.	<i>Charter forfeited</i>		IV. 769
1651	June 20	Love	<i>High-Treason</i>	H. C. J.	<i>Beheaded</i>	46	II. 83
1696	April 22	Lowick	<i>High-Treason</i>	Westm.	<i>Hang'd, &c.</i>	155	IV. 706
1615	Nov. 10	Lumsden	<i>Misdemeanour</i>	C. S.	<i>Fin'd</i>		I. * 322
1679	Jan. 17	Lumsden	<i>A Romish Priest</i>	O. B.	<i>Repriev'd</i>	89	II. 989
M.							
1644	Feb. 10	Macguire (<i>Lord</i>)	<i>High-Treason</i>	B. R.	<i>Hang'd, &c.</i>	42	I. 928
1725	May 6	Macclesfield (<i>Earl</i>)	<i>High Misdemeanours</i>	H. L.	<i>Fin'd</i>	192	VI. ad fin.
1687	June	Magdalen College	<i>A Contempt</i>		<i>Fellows expell'd</i>	140	IV. 258
1679	July 18	Marshal (William)	<i>High-Treason</i>	O. B.	<i>Acquitted</i>	84	II. 913
1679	Jan. 17	The same	<i>A Romish Priest</i>	O. B.	<i>Repriev'd</i>	89	II. 989
1660	Oct. 16	Marten (Harry)	<i>A Regicide</i>	O. B.	<i>Repriev'd</i>	56	II. 388
1670	Sept. 1	Mead (Will.)	<i>A Tumult</i>	O. B.	<i>Acquitted</i>	69	II. 606
1600	Mar. 5	Merrick (<i>Sir Gilly</i>)	<i>High-Treason</i>		<i>Hang'd, &c.</i>	17	I. 202
1668	April 4	Messenger	<i>High-Treason</i>	O. B.	<i>Hang'd, &c.</i>	67	II. 581
1660	Oct. 16	Meyne	<i>A Regicide</i>	O. B.	<i>Repriev'd</i>	56	II. 395
1660	Oct. 16	Millington	<i>A Regicide</i>	O. B.	<i>Repriev'd</i>	56	II. 389
1677	Jan. 7	Mitchel	<i>Attempt to murder the ABp of St. Andrews</i>	Scotl.	<i>Hang'd</i>	71	II. 619
1663	June 3	Moders (<i>Germ. Princess</i>)	<i>Bigamy</i>	O. B.	<i>Acquitted</i>	62	II. 494
1692	Jan. 31	Mohun (<i>Lord</i>)	<i>Murder of Mountford</i>	H. L.	<i>Acquitted</i>	149	IV. 506
1699	Mar. 29	The same	<i>Murder of Coote</i>	H. L.	<i>Acquitted</i>	162	V. 180
1615	Dec. 4	Monson (<i>Sir Tho.</i>)	<i>Murder of Sir T. Overb.</i>	G. H.	<i>Not tried</i>	27	I. 330
1658	June 1	Mordaunt	<i>High-Treason</i>	H. C. J.	<i>Acquitted</i>	55	II. 288
1535	May 7	More (<i>Lord Chancellor</i>)	<i>High-Treason</i>		<i>Beheaded</i>	4	I. 59
N.							
1715	Feb. 9	Nairn (<i>Lord</i>)	<i>High-Treason</i>	H. L.	<i>Pardon'd</i>	182	VI. 1
1656	Decemb.	Naylor	<i>Blasphemy</i>	H. Com.	<i>Whipt, Pillory'd, & Branded, &c.</i>	52	II. 265
1388	Feb. 3	Nevil (<i>ABp of York</i>)	<i>High-Treason</i>	H. L.	<i>Escap'd</i>	1	I. 8
1715	Feb. 9	Nithisdale (<i>Earl</i>)	<i>High-Treason</i>	H. L.	<i>Escap'd</i>	182	VI. 1
1571	Jan. 16	Norfolk (<i>Duke</i>)	<i>High-Treason</i>	H. L.	<i>Beheaded</i>	7	I. 82
1699	Febr.	Norfolk (<i>D. and Duch.</i>)	<i>Adultery</i>	Parl.	<i>Divorc'd</i>	165	V. 239
O.							
1413	Sept. 23	Oldcastle (<i>Ld Cobham</i>)	<i>Herefy</i>	ABp.	<i>Hang'd and burnt</i>	3	I. 37
1684	June 18	Oates	<i>Scand' Magn'</i>	B. R.	<i>Damages 100000 l.</i>	127	III. 899
1685	May 8	The same	<i>Perjury</i>	B. R.	<i>Pillory'd, whipt, & fin'd, &c.</i>	132	IV. 1
1685	May 9	The same	<i>Perjury</i>	B. R.	<i>Pillory'd, whipt, & fin'd, &c.</i>		IV. 66
1701		Orford (<i>Earl</i>)	<i>High Misdemeanours</i>	H. L.	<i>Acquitted</i>	167	V. 339
1717	June 24	Oxford (<i>Earl</i>)	<i>High-Treason, &c.</i>	H. L.	<i>Acquitted</i>	185	VI. 102

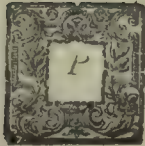
TABLE of the Persons tried, their Crimes, &c.

Year.	Month.	Names.	Crimes.	Where try'd.	Punishments.	N ^o .	Trials.
P.							
1680	June 23	Palmer (<i>Earl Castle- maine</i>)	<i>High-Treason</i>	B. R.	<i>Acquitted</i>	96	III. 36
1689	Oct. 26	<i>The same</i>	<i>High-Treason</i>	H. Com.	<i>Bail'd</i>	143	IV. 393
1682	June 20	Pain	<i>Libels</i>	G. H.	<i>Fin'd</i>	111	III. 501
1584	Feb. 25	Parry	<i>High-Treason</i>		<i>Hang'd, &c.</i>	9	I. [121]
1679	Jan. 17	Parris	<i>A Romish Priest</i>	O. B.	<i>Repriev'd</i>	89	II. 989
1678	April 4	Pembroke (<i>Earl</i>)	<i>Murder of Cony</i>	H. L.	<i>Manſlaughter</i>	72	II. 637
1670	Sept. 1	Penn (<i>William</i>)	<i>A Tumult</i>	O. B.	<i>Acquitted</i>	69	II. 606
1660	Oct. 16	Pennington	<i>A Regicide</i>	O. B.	<i>Repriev'd</i>	56	II. 387
1655	Apr. 19	Penruddock (<i>Col.</i>)	<i>High-Treason</i>		<i>Beheaded</i>	51	II. 259
1695	Mar. 24	Perkins (<i>Sir William</i>)	<i>High-Treason</i>	O. B.	<i>Hang'd, &c.</i>	152	IV. 615
1592	Apr. 27	Perrot (<i>Sir John</i>)	<i>High-Treason</i>	Westm.	<i>Died in Priſon</i>	15	I. 181
1660	Oct. 13	Peters (<i>Hugh</i>)	<i>A Regicide</i>	O. B.	<i>Hang'd, &c.</i>	56	II. 353
1678	Dec. 17	Pickering	<i>High-Treason</i>	O. B.	<i>Hang'd, &c.</i>	75	II. 692
1683	May 8	Pilkington and others	<i>A Riot</i>	G. H.	<i>Fin'd</i>	113	III. 541
1662	Dec. 11	Phillips	<i>High-Treason</i>	O. B.	<i>Hang'd, &c.</i>	61	II. 474
1681	June 8	Plunket	<i>High-Treason</i>	B. R.	<i>Hang'd, &c.</i>	103	III. 291
1723	May	Plunket (<i>John</i>)	<i>A Treasonable Conſpiracy</i>	Parl.	<i>Imprison'd</i>	191	VI. 333
1654	Sept. 18	Pordage (<i>Dr.</i>)	<i>Insufficiency</i>		<i>Ejected</i>	50	II. 217
1701		Portland (<i>Earl</i>)	<i>H. Miſdemeanours</i>	H. L.	<i>Acquitted</i>	167	V. 339
1660	Oct. 16	Potter	<i>A Regicide</i>	O. B.	<i>Repriev'd</i>	56	II. 394
1680	July 24	Preſticks	<i>High-Treason</i>	Aſſize	<i>Acquitted</i>	99	III. 79
1690	Jan. 17	Preſton (<i>Lord</i>)	<i>High-Treason</i>	O. B.	<i>Pardon'd</i>	146	IV. 406
1688	Mar. 6	Price (<i>John</i>) and others	<i>High-Treason</i>	Irel.	<i>Not try'd</i>	144	IV. 397
1679	Feb. 3	Price (<i>Anne</i>)	<i>Subornation of Perjury</i>	B. R.	<i>Fin'd</i>	90	II. 1013
1684	Nov. 6	Pritchard and Papillon	<i>A falſe Arreſt</i>	G. H.	<i>Guilty</i>	130	III. 988
1633	Feb. 7	Prynn	<i>A Libel</i>	C. S.	<i>Fin'd, Mutilated, &c.</i>	34	I. 396
1637	June 14	<i>The ſame</i>	<i>A Libel</i>	C. S.	<i>Pillory'd, Ears cut off, and imprison'd</i>	36	I. 459
R.							
1603	Nov. 17	Raleigh (<i>Sir Walter</i>)	<i>High-Treason</i>	Winton	<i>Beheaded</i>	18	I. 205
1679	Apr. 24	Reading	<i>A Miſdemeanour</i>		<i>Pillory'd, fin'd, and imprison'd</i>	81	II. 802
1721	Feb. 3	Reaſon	<i>Murder of Capt. Lutterel</i>	B. R.	<i>Manſlaughter</i>	188	VI. 195
1668	April 4	Richardſon	<i>High-Treason</i>	O. B.	<i>Acquitted</i>	67	II. 581
1685	Oct. 19	Ring	<i>High-Treason</i>	O. B.	<i>Repriev'd</i>	134	IV. 130
1660	Oct. 16	Roe (<i>Owen</i>)	<i>A Regicide</i>	O. B.	<i>Repriev'd</i>	56	II. 390
1605	Jan. 27	Rookwood (<i>Ambroſe</i>)	<i>Gunpowder Plot</i>	Westm.	<i>Hang'd, &c.</i>	19	I. 224
1696	April 2	Rookwood (<i>Ambroſe</i>)	<i>High-Treason</i>	Westm.	<i>Hang'd, &c.</i>	153	IV. 649
1684	Nov. 18	Rofewell	<i>High-Treason</i>	B. R.	<i>Pardon'd</i>	128	III. 909
1683	July 12	Rouſe	<i>High-Treason</i>	O. B.	<i>Hang'd, &c.</i>	117	III. 621
1679	July 18	Rumley	<i>High-Treason</i>	O. B.	<i>Acquitted</i>	84	II. 913
1679	Jan. 17	Ruffel	<i>A Romiſh Priest</i>	O. B.	<i>Repriev'd</i>	89	II. 989
1683	July 13	Ruffel (<i>Lord</i>)	<i>High-Treason</i>	O. B.	<i>Beheaded</i>	118	III. 629
S.							
1684	May 2	Sacheverell (<i>Wil.</i>) &c.	<i>A Riot</i>	B. R.	<i>Fin'd</i>	125	III. 861
1709	Feb. 27	Sacheverell (<i>Dr.</i>)	<i>H. Miſdemeanour</i>	H. L.	<i>Silenc'd for 3 years</i>	181	V. 645
1586	Sept. 14	Salisbury	<i>High-Treason</i>	Westm.	<i>Hang'd, &c.</i>	10	I. 121
	Sept. 13	Savage	<i>High-Treason</i>	Westm.	<i>Hang'd, &c.</i>	10	I. 121
	Oct. 12	Scots (<i>Queen</i>)	<i>A Conſpiracy ag'. Q. Eliz.</i>		<i>Beheaded</i>	12	I. 135
1660	Oct. 12	Scot	<i>A Regicide</i>	O. B.	<i>Hang'd, &c.</i>	56	II. 330
1660	Oct. 12	Scroop	<i>A Regicide</i>	O. B.	<i>Hang'd, &c.</i>	56	II. 320
1677	June 29	Shaftesbury (<i>Earl</i>)	<i>Habeas Corpus</i>	B. R.		70	II. 612
1681	Nov. 24	<i>The ſame</i>	<i>High-Treason</i>	O. B.	<i>Ignoramus</i>	108	III. 414
1662	Dec. 11	Sellers	<i>High-Treason</i>	O. B.	<i>Repriev'd</i>	61	II. 474
1632	Feb. 6	Sherfield	<i>A Miſdemeanour</i>	C. S.	<i>Fin'd</i>	33	I. 377
1683	May 6	Shute, and others	<i>A Riot</i>	G. H.	<i>Fin'd</i>	113	III. 541
1683	Nov. 21	Sidney (<i>Col.</i>)	<i>High-Treason</i>	B. R.	<i>Beheaded</i>	120	III. 710
1658	May 25	Slingsby (<i>Sir Henry</i>)	<i>High-Treason</i>	H. C. J.	<i>Beheaded</i>	53	II. 273
1660	Oct. 16	Smith (<i>Henry</i>)	<i>A Regicide</i>	O. B.	<i>Repriev'd</i>	56	II. 391
1679	Feb. 7	Smith (<i>Francis</i>)	<i>A Libel</i>	G. H.	<i>Fin'd</i>	92	II. 1036
1701		Somers (<i>Lord</i>)	<i>H. Miſdemeanours</i>	H. L.	<i>Acquitted</i>	167	V. 339
1616	May 25	Somerſet (<i>Earl</i>)	<i>Murder of Sir T. Overb.</i>	H. L.	<i>Pardon'd</i>	29	I. 334
1616	May 24	Somerſet (<i>Counteſs</i>)	<i>Murder of Sir T. Overb.</i>	H. L.	<i>Pardon'd</i>	28	I. 331
1600	Feb. 19	Southampton (<i>Earl</i>)	<i>High-Treason</i>	H. L.	<i>Repriev'd</i>	16	I. 119
1633	Feb. 7	Sparkes	<i>A Libel</i>	C. S.	<i>Cenſur'd</i>	34	I. 396
1683	Feb. 7	Speke	<i>A Miſdemeanour</i>	B. R.	<i>Fin'd</i>	122	III. 771
							1608

TABLE of the Persons tried, their Crimes, &c.

Year.	Month.	Names.	Crimes.	Where try'd.	Punishments.	N ^o	Trials.
1608	Aug. 12	Sprot	High-Treason	Scotl.	Hang'd	21	I. 302
1707	Nov. 25	Spurr	A forcible Marriage	B. R.	Acquitted	173	V. 469
1687	Feb. 6	Standfield	Parricide	Scotl.	Hang'd, &c.	141	IV. 279
1681	June 18	Stapleton (Sir Miles)	High-Treason	Affize	Acquitted	104	III. 317
1679	Jan. 17	Starkey	A Romish Priest	O. B.	Repriev'd	89	II. 989
1680	Nov. 30	Stafford (Earl)	High-Treason	H. L.	Beheaded	101	III. 101
1678	Nov. 21	Stayley	High-Treason	B. R.	Hang'd, &c.	73	II. 652
1681	Feb. 28	Sterne	Murder of Mr. Thynn	O. B.	Hang'd	110	III. 462
1708	Nov. 15	Stirling, and others	High-Treason	Scotl.	Acquitted	180	V. 634
1640	Mar. 22	Strafford (Earl)	High-Treason	H. L.	Beheaded	39	I. 702
1653	Novem.	Streater (Capt.)	Habeas Corpus	Up. B.	Discharg'd	48	II. 195
1662	Dec. 11	Stubbs	High-Treason	O. B.	Hang'd, &c.	61	II. 474
1388	Feb. 3	Suffolk (Earl)	H. Treason and H. Misdemeanours	H. L.	Escap'd	1	I. 1
1702	Nov. 25	Swendsen	A forcible Marriage	B. R.	Hang'd	172	V. 453
T.							
1679	Feb. 3	Tasborough	Subornation of Perjury	B. R.	Fin'd	90	II. 1013
1660	Oct. 16	Temple (James)	A Regicide	O. B.	Repriev'd	56	II. 395
1660	Oct. 16	Temple (Peter)	A Regicide	O. B.	Repriev'd	56	II. 395
1682	June 20	Thompson	Libels	G. H.	Pillory'd and fin'd	111	III. 501
1407	July 3	Thorpe	Heresy	ABp.	Imprison'd	2	I. 16
1554	Apr. 17	Throckmorton	High-Treason	G. H.	Acquitted	5	I. 63
	Nov. 10	His Jury		C. S.	Fin'd		I. 78
1680	July 24	Thwing	High-Treason	Affize	Hang'd, &c.	99	III. 79
1586	Sep. 15	Tilney	High-Treason	Westm.	Hang'd, &c.	11	I. 126
1586	Sep. 14	Titchburne	High-Treason	Westm.	Hang'd, &c.	10	I. 121
1660	Oct. 16	Titchburne (Robt.)	A Regicide	O. B.	Repriev'd	56	II. 390
1662	Dec. 11	Tonge	High-Treason	O. B.	Hang'd, &c.	61	II. 474
1721	Feb. 3	Tranter	Murder of Capt. Lutterel	B. R.	Man slaughter	188	VI. 195
1586	Sep. 15	Travers	High-Treason	Westm.	Hang'd, &c.	11	I. 126
1388	Feb. 3	Trefilian (L. C. J.)	High-Treason	H. L.	Hang'd, &c.	1	I. 1
1615	Nov. 7	Turner (Anne)	Murder of Sir T. Overb.	B. R.	Hang'd	24	I. 322
1663	Jan. 15	Turner (Col.) and others	Burglary	O. B.	Hang'd	63	II. 498
1679	June 13	Turner (Anthony)	High-Treason	O. B.	Hang'd, &c.	82	II. 825
1704	Nov. 4	Tutchin	A Libel	G. H.	No Judgment	177	V. 532
1663	Feb. 20	Twyn	High-Treason	O. B.	Hang'd, &c.	64	II. 524
V.							
1662	June 2	Vane (Sir Henry)	High-Treason	B. R.	Beheaded	58	II. 431
1696	Nov. 6	Vaughan (Capt.)	High-Treason	O. B.	Hang'd, &c.	159	V. 17
1590	July 24	Udal	Felony	Affize	Pardon'd	14	I. 161
1654	June 30	Vowel	High-Treason	H. C. J.	Hang'd, &c.	49	II. 212
1681	Feb. 28	Vratz	Murder of Mr. Thynn	O. B.	Hang'd	110	III. 462
W.							
1660	Oct. 16	Waite	A Regicide	O. B.	Repriev'd	56	II. 395
1679	July 18	Wakentian (Sir Geo.)	High-Treason	O. B.	Acquitted	84	II. 913
1683	July 12	Walcot	High-Treason	O. B.	Hang'd, &c.	115	III. 600
1660	Oct. 10	Waller (Sir Hardrefs)	A Regicide	O. B.	Repriev'd	56	II. 304
1683	May 19	Ward (Sir Patience)	Perjury	B. R.	Fled	114	III. 577
1699	Mar. 28	Warwick (Earl)	Murder of Coote	H. L.	Man slaughter	161	V. 137
1615	Nov. 10	Wentworth (Sir John)	Misdemeanour	C. S.	Fin'd		I. 322
1615	Oct. 19	Weston	Murder of Sir T. Overb.	G. H.	Hang'd	23	I. 313
1679	June 13	Whitebread	High-Treason	O. B.	Hang'd, &c.	82	II. 825
1715	Feb. 9	Widdrington (Lord)	High-Treason	H. L.	Pardon'd	182	VI. 1
1668	April 4	Wilks	High-Treason	O. B.	Acquitted	67	II. 581
1605	Jan. 27	Winter (Robert)	Gunpowder Plot	Westm.	Hang'd, &c.	19	I. 224
	Jan. 27	Winter (Thomas)	Gunpowder Plot	Westm.	Hang'd, &c.	19	I. 224
1715	Mar. 15	Wintoun (Earl)	High-Treason	H. L.	Escap'd	183	VI. 17
1721	Mar. 13	Woodburn	Shitting Mr. Crispe's Nose	Affize	Hang'd	189	VI. 212
1668	April 4	Woodward	High-Treason	O. B.	Acquitted	67	II. 581

The several TRIALS, &c. contained in the Fifth [Supplemental] Volume.

1388.  *Proceedings in Parliament against Alexander Nevil Archbishop of York, Robert Vere Duke of Ireland, Michael de la Poole Earl of Suffolk, Robert Tresilian Lord Chief Justice of England, and Nicholas Brambre sometime Mayor of London, and others, for High-Treason.* Page 1
1592. *The Trial of Sir John Perrot Lord Deputy of Ireland, for High-Treason; now first publish'd from the Manuscript.* 16
1660. *The Trial of Sir Christopher Blunt, Sir Charles Davers, Sir John Davis, Sir Gilly Merrick, and Henry Cusse for High-Treason.* 25
1608. *The Trial of George Sprot in Scotland, for High-Treason, in conspiring with John Earl of Gowry to murder King James I.* 28
1620. *Proceedings in Parliament against Francis Bacon, Viscount St. Albans, Lord Chancellor of England, upon an Impeachment for Bribery and Corruption in the Execution of his Office.* 33
1632. *Proceedings in the Star-Chamber against Henry Sherfield Esq; Recorder of Salisbury, for breaking a painted Glass-Window in the Church of St. Edmonds in the said City.* 46
1637. *Proceedings in the Star-Chamber against Dr. John Bastwick, Mr. Henry Burton, and William Prynne Esq; for several Libels.* 66
- Proceedings in the Case of Ship-Money between the King and John Hampden Esq;* 91
1638. *The Trial of Thomas Harrison Clerk, for a Misdemeanour.* 306
1643. *The Trial of Col. Nathanael Fiennes, before a Council of War, for cowardly surrendering the City and Castle of Bristol. With some Cases and Records relating thereunto.* 309
1654. *The Trial of John Gerhard, Peter Vowell, and Somerset Fox, before the High Court of Justice, for High-Treason, in conspiring to Murder the Lord Protector.* 367
1661. *Proceedings against Archibald Marquis of Argyle, for High-Treason.* 372
1662. *The Trial of John Crook, Isaac Grey and John Bolton, Quakers, at the Old Baily, for refusing to take the Oaths of Allegiance and Supremacy.* 390
- 167 $\frac{1}{2}$. *The Trial of Mr. Samuel Atkins, at the King's Bench, for being accessory to the Murder of Sir Edmundbury Godfrey.* 397
1681. *The Trial of Slingsby Bethel Esq; at the Bridge-House in Southwark, for an Assault and Battery on Robert Mason, at the Election of Members of Parliament for the Borough of Southwark.* 406
1683. *The Trial of Sir Patience Ward Kt. at the King's Bench for Perjury at the Trial between the Duke of York Plaintiff, and Thomas Pilkington Esq; Defendant, on an Action upon the Statute de Scandalis Magnatum.* 412
- Proceedings between the King and the City of London, on an Information in nature of a Quo Warranto.* 435
1684. *The Trial of William Sacheverell and others for a Riot committed at Nottingham.* 520

A Catalogue of the TRIALS.

1684. <i>The Trial of Joseph Hayes for High-Treason.</i>	Page 553	<i>Duke of Norfolk and the Lady Mary Mordant.</i>	558
1695. <i>Proceedings between the King and Thomas Kendall and Richard Roe, on an Habeas Corpus, on a Commitment for High-Treason.</i>	605	1701. <i>The Trial of Patrick Hurley in Ireland for Perjury, and for conspiring with others to cheat the Popish Inhabitants of the County of Clare.</i>	613
1699. <i>The Proceedings upon the Bill of Divorce between his Grace the</i>			

Estimate of the two Supplemental Volumes.

Vol. V, Contains	_____	Sheets.
VI.	_____	162½
	_____	180½
		343

Which at Three Half-pence *per* Sheet, according to the printed Proposals, } 2 l. 2 s. 10½.

The Large Paper, at 2 d. ½ *per* Sheet, comes to 3 l. 11 s. 5½.

ERRATA in Vol. V.

IN Page 520. at the end of the Proceedings on the *Quo Warranto*, dele the whole three Lines with the N. B.



A Complete

COLLECTION

OF

TRIALS, &c.

Proceedings in PARLIAMENT against *Alexander Nevil* Archbishop of *York*, *Robert Vere* Duke of *Ireland*, *Michael de la Pole* Earl of *Suffolk*, *Robert Tresilian* Lord Chief Justice of *England*, and *Nicholas Brambre* sometime Mayor of *London*, and others, for High-Treason, *Feb. 3. 1388.*
11th of *Rich. II.*



THESE Men being raised from mean Estates by the favour of the King, and advanced to the degree of Privy-Counsellors, were the Men who had the only Rule of the Common-wealth, which under the King they govern'd for some small space

with careful Diligence, acquiring thereby deserv'd Commendations: but not long did they thus steer the Ship of the Kingdom, for many of them being of inferior Rank by Birth, not having their Veins dignified with noble Blood, they were the sooner entic'd with the libidinous baits of Voluptuousness, and infected with the insatiable itch of Avarice; insomuch that despising the Authority of the King, and neglecting the Commodity of the Realm, and only desiring to keep up the Revenues of the Kingdom, they so wrought by their Policy, that the King is impoverish'd, and the Treasury exhausted: upon which the Commons murmur at the multiplicity of Tenths, Levies and Subsidies; the Peers repine to see themselves disgrac'd and their Inferiors honour'd; and in a word, the whole Kingdom endures an universal Misery.

The Nobility seeing the miserable estate, wherein the whole Kingdom lay, bleeding as it were to Death, urged the King to summon a Parliament, to the end the Grievances of the Nation might be inquir'd into and redress'd*. Accordingly a Parliament was shortly after held *O. 7ob. 1. 1386.* in which among many other Acts, *John Fortham* Bishop of *Durham* was discharg'd of his Office of Treasurer, and *John Gilbert* Bishop of *Hereford* appointed in his place; and *Michael de la Pole* Earl of *Suffolk*, and Chancellor of *England*, was dismiss'd from his Chancellorship, and immediately after was impeached of high Crimes and Misdemeanors by the Commons, as follows.

1. That the said Earl being Chancellor, and sworn to act for the just Profit of the King, hath purchased of our Lord the King, Lands, Tenements and Rents to a great Value, as appears by the Record in the Rolls of Chancery; and that against his Oath, not regarding the great Necessity of the King and Realm, being Chancellor at the time of such Purchase made, did cause the said Lands and Tenements to be set at a much smaller Value than really they were worth by the Year, in deceit of the King.

*Rot. Par. 10
Rich. 2. N^o
1, &c.*

* *Hol. Chron. Vol. 3. p. 453, &c. Grafton p. 377, &c. Walsingh. p. 334. Tyr. Hist. of Engl. Vol. 3. Part 2. p. 895, &c. Brady's Introduc't. p. 307.*

To this first Article the Earl answered to this Effect. That while he was Chancellor, he neither purchased any Lands of the King, nor did he give any to him, unless when he made him an Earl, he had four hundred Marks *per Ann.* from the King by way of Exchange, for so much as he had by Inheritance out of the Customs of *Kingston upon Hull*, whereof some part was assigned to him by one *Tydeman of Limburgh* and others before he was Chancellor, and some part since that time; which exchange was for the King's annual Advantage: as also because of the Sum of one thousand Marks paid by the Earl upon that Consideration. And he further endeavour'd to prove, that the Oath he had taken, when he was made Chancellor, had another intent than what they (the Commons) would put upon it; and yet notwithstanding that Oath, he might lawfully take, or purchase from the King.

But the Commons not being satisfied with this Answer, reply'd thereto, and shewed the Lords the Copy of his (the Chancellor's) Oath, when he took the Great Seal into his Custody, being in manner following, *viz.*

You shall swear that you will well and truly serve our Lord the King and his People, in the Office of Chancellor, and will do Right to all Persons both Poor and Rich, according to the Laws and Customs of the Realm, and shall faithfully advise the King, and conceal his Counsels; and you shall not know of, nor permit any Damage or Disherison to the King, nor that the Rights of his Crown shall by any ways be destroyed, if you can hinder it; and if you cannot hinder it, you shall then clearly and expressly make it known to the King, together with your faithful Advice and Counsel thereupon: and you shall always act for, and procure the Profit of the King, in all things where you may reasonably do it. So help you God and the Holy Gospels.

Wherefore the Commons prayed, that this being read, and well understood, and the Circumstances of his said Answer consider'd, to wit, that he had not denied to have receiv'd of the Gift of the King, since he was made an Earl, and being then in the Office of Chancellor, divers Lands and Tenements, as is contain'd in the Impeachment; and it is openly known that he had receiv'd from the King other Lands and Tenements, that are certain and sure, to the Value of four hundred Marks *per Annum*, in exchange for four hundred Marks yearly, which he had upon the Customs of *Kingston upon Hull*, that are casual, and not so sure, without informing the King of his Damage in that particular. And whereas he the said Chancellor has alledged, that he received part of the said Lands and Tenements so taken in Exchange before he was Chancellor; the Commons reply, that he was then sworn of the King's Privy Council, and that afterwards at his being made Chancellor, was again obliged by Oath; and that being in the said Office, he had agreed to the Exchanges by him before desired; and had received from the King the Remainder of the said Lands and Tenements in full performance of the said Exchanges; and therefore they demand Judgment of the Parliament upon his aforesaid Answer: which being thought insufficient by the Lords, the following Judgment was given, being to this Effect. That since the said Earl had not alledg'd in his Answer, that he had observ'd his Oath, when he swore

*that he would not know of, or suffer any Damage or Disherison of the King, nor that the Right of his Crown should any ways be destroy'd if he could hinder it, with the rest of the Clause in the said Oath, as is above recited; yet that he being the principal Minister of the King, and knowing his Estate, and the necessity of the Realm, had taken such Lands and Tenements as are laid in the said Impeachment, and are recited in the first Article; and tho he hath alledged in his Answer, that the Gifts so bestowed upon him, were confirm'd in full Parliament; yet since he hath produced no such Record enroll'd in Parliament, therefore it was adjudged, that all Mannors, Lands, Tenements, and their Appurtenances, so received by him from the King, should be seized and taken into his Hands, to have and to hold them to him, and his Heirs, as fully as ever they had been before the Gift so made of them to the said Earl, with the Issues and mesne Profits of the same from the time of the said Grant, and which were to be levied out of the rest of the said Earl's Lands elsewhere; yet that it was not the Intention of the King, nor of the Lords, that this Judgment so given should make him lose the Title of Earl, nor yet the twenty Marks yearly, which he was to receive out of the Issues and Profits of the County of *Suffolk*, by reason of the said Title.*

2. The second Article is, That whereas nine Lords were assign'd by the last Parliament to view and examine the State of the King and Realm, and to deliver their Advice how the same might be improved and amended, and put into better Order and Governance; and thereupon such Examination to be deliver'd to the King, as well by word of Mouth as in Writing; and altho the said late Chancellor did say in full Parliament, that the said Advice and Ordinances should be put in due Execution, yet it was not done, and that by the default of him who was the principal Officer or Minister. The Earl's Answer to this being not very material, is omitted.

3. Item, Whereas a Tax was granted by the Commons in the last Parliament, to be expended according to a certain Form demanded by the said Commons, and assented to by the King and Lords, and not otherwise; yet the Monies thence arising, were expended in another manner, so that the Sea was not guarded as it was order'd to have been; whence many Mischiefs have already happen'd, and more are like to ensue to the Realm, and all this by the default of the said Lord Chancellor. This Article the Earl denied, and it does not appear that it was proved.

4. Item, Whereas one *Tideman of Limburgh* having had granted to him and his Heirs a Gift of fifty Pounds *per Annum* by the King's Grandfather, out of the Customs of *Kingston upon Hull*, which the said *Tideman* had forfeited to the King, so that the Payment of the said fifty Pounds *per Annum* was discontinued for five and thirty Years and upwards; yet the said Chancellor knowing the Premises, purchased to him and his Heirs of the said *Tideman*, the said fifty Pounds *per Annum*, and prevail'd with the King to confirm the said Purchase, whereas the King ought to have had the whole Profit.

For this Purchase the said Earl was adjudged to make Fine and Ransom, and the said fifty Pounds were to go to the King, and his Heirs, with the Mannor of *Floxstete*, and ten Marks of Rent, which were exchanged for the fifty Pounds

per Annum out of the Customs or Profits, with the Issues aforesaid.

5. And whereas the Master of *St. Anthony* is a Schismatick, and for that Cause the King ought to have the Revenues (being to the value of four hundred Marks yearly) which appertain to him in *England*; the said late Chancellor, who ought to advance and procure the Profit of the King, took to Farm the said Profits at twenty Marks *per Annum*, and so got to his own use above three hundred Marks; and afterwards when the true Master nominated by the Pope, ought to have had the Possession and Livery of the said Profits, he could not obtain the same, till he and two Persons with him became bound by Recognizance in Chancery of three thousand Pounds to pay yearly to the said Chancellor, and his Son *John*, one hundred Pounds *per Annum* for the Term of their two Lives.

As to this, it is adjudged, that the King shall have all the Profits belonging to the said Master of *St. Anthony's* at the time of the Purchase; and that for the Recognizance so made, the said Earl shall be awarded to Prison, and fined and ransomed at the Pleasure of the King.

6. *Item*, That in the time of the late Chancellor, there were granted and made divers Charters, and Patents of Pardon for Murders, Treasons, Felonies, &c. against the Laws of the Land; and that before the Commencement of this present Parliament, there was made and sealed a Charter of certain Franchises granted to the Castle of *Dover*, in disinherison of the Crown, and to the subversion of the Pleas and Courts of the King, and of his Laws.

To this the Judgment was, The King awards that those Charters be repealed.

7. *Item*, Whereas by an Ordinance made in the last Parliament, that ten thousand Marks should be raised for the Relief of the City of *Gaunt*, yet by the default of the said late Chancellor, the said City of *Gaunt* was lost, and also a thousand Marks of the said Money*. The Sum of the Earl's Answers to the rest of these Articles, were either by denying some of them, or confessing and excusing others; but for all that he was soon after cast into the Castle of *Windfor*, and all his Lands, which were of no small Revenue, confiscated.

Neither did the Parliament stop here, but to provide further for the whole State, they did by the unanimous Consent of the King, Prelates, Barons, and Commons, constitute and give plenary and absolute Power to certain Commissioners

as well of the Spirituality as of the Temporality for the ordering and disposing of the publick Affairs, according as to them should seem best and most necessary for the desperate estate of the Commonwealth, to depress civil Dissensions, and to pacify and appease the grudgings of the People.

These † Commissioners were 13 in number, and were as follows;

Of the Spirituality.

1. *William* Archbishop of *Canterbury*.
2. *Alexander Nevil* Archbishop of *York*.
3. *Thomas Arundel* Bishop of *Ely*, lately made Chancellor of *England*.
4. *William Wickham* Bishop of *Winchester*.
5. *John Gilbert* Bishop of *Hereford*, Lord Treasurer.
6. *Thomas* Bishop of *Exeter*.
7. *Nicholas* Abbot of *Waltham*, Lord Keeper of the Privy Seal.

Of the Laity.

8. *Edmond Langley* Duke of *York*.
9. *Thomas* of *Woodstock* Duke of *Glocester*.
10. *Richard* Earl of *Arundel*.
11. *John* Lord *Cobham*.
12. *Richard* Lord *Scrope*.
13. *John Devereux*, Knight.

These, as Men eminent in Virtue, were chosen by the general Suffrage, and confirm'd by the King under the Great Seal; and sworn to carry themselves as dutiful and obedient Subjects in all their Actions: And it was farther enacted, "That if any should refuse or disobey the Ordinances so made for the publick good, the Punishment for the first Offence should be the Confiscation of all his Goods, and for the second the Loss of his Life."

Thus all Things being dispos'd for the best, the Parliament was dissolv'd, and every Man return'd to his own Home. 20 Nov. 1386.

Soon after the said *Michael de la Pole*, with others of his Confederates, being moved with implacable Fury against the late Statute, buzz'd into the King's Ears, that the Statutes lately enacted were very prejudicial to the Honour of his Crown, and derogatory to his princely Prerogative; that if they were in force he was no King, but rather resembled the Shadow of one; and earnestly moved the King against the other Lords, and to disannul all that was done in the late Parliament. The King gave credit to these Tales, and therefore had the Lords in great Jealousy; but he released *Michael de la Pole* Earl of *Suffolk* out of the Castle of

* *Walsingham* relates that all these Articles above mention'd were so fully prov'd, that the Earl could not deny them; inasmuch that when he stood upon his Defence, he had nothing to say for himself: Whereupon the King blushing for him, shook his Head and said, Alas, alas *Michael*, see what thou hast done.

† The Commission which is among the Parliament Rolls to *Richard II.* Part 1. M. 7. mentions but eleven Commissioners, omitting the Bishops of *Ely* and *Hereford*, and was in Substance as follows.

That the King of his own Free-will, and at the Request of his Lords and Commons, had chang'd the Great Officers of the Crown abovemention'd, for the good Government of the Kingdom, the good and due Execution of the Laws, and in relief of his own Estate, and ease of his People; and had appointed eleven Commissioners, viz. *William* Archbishop of *Canterbury*, *Alexander* Archbishop of *York*, *Edmond* Duke of *York*, and *Thomas* Duke of *Glocester* (the King's Uncles) *William* Bishop of *Winchester*, *Thomas* Bishop of *Exeter*, *Nicholas* Abbot of *Waltham*, *Richard* Earl of *Arundel*, *John* Lord *Cobham*, *Richard* Le *Scrope* and *John Devereux*, to be his great and continual Council for one Year next coming, after the Date of these Letters Patents; by which he gave them Power to survey and examine all his Officers, Courts, Household, and the Government of the whole Kingdom, to receive all his Revenue, as also all Subsidies, Taxes, and other Payments, to do what they would in the Kingdom, and to amend all things according to their Discretions. And these Powers were given to any six of them, with his three great Officers, willing, that if any Difference in Opinion should happen between his Counsellors and those Officers, that the matter should be determined by the Major part of them; commanding and charging all Prelates, Dukes, Earls, Barons, the Steward, Treasurer, and Comptroller of his Household, the Justices of one Bench or the other, and other his Justices whatsoever, Barons and Chamberlains of the Exchequer, Sheriffs, Escheators, Mayors, Bayliffs, and all other his Officers, Ministers, and Lieges whatsoever, that they should be attending, obedient, counselling and assisting to the said Counsellors and Officers, so often and in what manner they should direct. Dated at *Westminster* the 19th Day of November. Upon this Commission a Statute was made, and the whole recited in it, which may be seen in the Statute Book to *Richard II.* Cap. 1.

Windſor, and ſuffer'd him to go at large : notwithstanding which, the ſaid Earl of *Suffolk*, the Duke of *Ireland*, and *Robert Tresilian* Lord Chief Juſtice, doubtful of their own Safeguards, did what they could to move the King forward to the Deſtruction of the Duke of *Gloceſter*, the Earls of *Arundel*, *Warwick*, *Derby*, and *Nottingham*, with others of that Party ; and accordingly they conſpir'd together with *Alexander* Archbiſhop of *York*, and Sir *Nicholas Brambre*, to deviſe means how they might diſpatch the ſaid Lords ; and for that purpoſe wrote Letters to the King of *France* to aid and aſſiſt them in ſeizing on the ſaid Lords, and further prevail'd with the Judges to declare the ſaid Lords guilty of High-Treaſon for procuring the ſaid late Statutes.

But the ſaid Duke of *Gloceſter*, and the Earls of *Arundel* and *Warwick*, ſeeing the heap of Ills that daily did ariſe by the Practices of thoſe Conſpirators, ſet almoſt in every part of the Kingdom Intelligencers, who ſhould apprehend all Meſſengers, and intercept all Letters, which went under the King's Name, and ſend them to the Commiſſioners. And thus did they come to have Intelligence of the whole Plot of the Conſpirators, all their Letters being indors'd, *Glory be to God on High, on Earth Peace, and Good-will towards Men*: and by coming to the Knowledge of each Circumſtance they found that the Kingdom was at the point of Deſtruction, wherefore they fought for a Remedy, for by the Law of Nature 'tis lawful to repel Violence by Violence ; every Man according to his Ability levied a Power for the preſervation of the King and Kingdom ; part of which Forces being committed to the Earl of *Arundel*, he march'd away by Night, and pitch'd his Tents near *London*: and in the mean time he uſed ſuch Diſcipline in his Camp, that he lacked nothing, but all things were ſold at reaſonable Rates as if it had been a Market.

On the other ſide, the Conſpirators intending to prevent their Purpoſes, cauſed it to be proclaim'd thro'out the City of *London*, " That none ſhould upon pain of the Forfeiture of all their Goods, either ſell, give, or communicate any Neceſſaries to the Army of the Earl of *Arundel*, but ſhould treat them as Rebels to the King and Country." Further, they counſell'd the King to abſent himſelf from the Parliament (which was to begin on *Candlemas* next, according as the King and Commiſſioners had appointed it) unleſs the Duke of *Gloceſter*, the Earls of *Arundel* and *Warwick*, and the reſt of the Commiſſioners would ſwear, " That neither they nor any in their Name ſhould accuſe them, or urge any Accuſation againſt them." In the mean time the three

1388. Noblemen, viz. Duke of *Gloceſter*, and the Earls of *Arundel* and *Warwick*, having muſter'd their Troops on the 14th of *November* in the ſame Year at *Waltham-Croſs* in the County of *Hertford*, ſent for the Commiſſioners that were at *Weſtmiſter* in Parliament, and ſent the Archbiſhop of *Canterbury*, the Lord *John Lovel*, Lord *Cobham*, and Sir *John Devereux*, with an Accuſation in Writing againſt the aforeſaid Conſpirators, viz. the Archbiſhop of *York*, the Duke of *Ireland*, the Earl of *Suffolk*, *Robert Tresilian* and *Nicholas Brambre*, wherein they accus'd them of High-Treaſon ; which their Appellation they did offer to maintain, and that they were willing to proſecute the ſame, and to prove it to be true: they cauſed alſo the reſt of the Commiſſioners to

ſubſcribe as Parties to their Appellation. When theſe things came to the Ears of the King, he ſent unto them requiring to know what their Requeſt was, and what they wiſhed to have done : They return'd answer thus, " That they did deſire, that the Traitors which were always about him filling his Ears with falſe Reports, and daily committed inſufferable Crimes and Injuries, might be rewarded with condign Punishment ; for it were better ſome few ſhould die for the People, than the whole Nation ſhould periſh." The King being adviſed by the Archbiſhop of *Canterbury*, and the Biſhop of *Ely* Lord Chancellor, ſent to them, willing them to come to him to *Weſtmiſter* on the Sunday then next following ; which the Lords would not agree to, till the Lord Chancellor with divers other Noblemen of good Credit had undertaken upon their Oaths on the King's behalf, that no Fraud, Deceit, Peril or evil Pretence ſhould be put in practice againſt them, whereby they might come to loſs of Life, Limbs, Goods, or otherwiſe, thro' the King's means.

When therefore the Lords were ready according to Covenant to come to *Weſtmiſter*, they were ſecretly advertiſ'd that there was an Ambuſh laid in a place call'd the *Mews*, and ſo they ſtaid and came not at the appointed Hour : whereupon when the King demanded how it fortun'd that the Lords kept not Promise ; the Biſhop of *Ely* made answer, *because there is an Ambuſh of a thouſand armed Men or more laid in ſuch a place (and nam'd it) contrary to Covenant, and therefore they neither come, nor hold you for faithful to your word.* The King hearing this was aſtoniſh'd, and ſaid with an Oath, *that he knew of no ſuch thing* ; and withal ſent to the Sheriffs of *London*, commanding them to go to the *Mews*, and if upon ſearch made they found any Force of Men there aſſembled, to take and kill all ſuch as they could lay hands on : but Sir * *Thomas Trivet* and Sir *Nicholas Brambre*, who had indeed aſſembled ſuch a number of Men, when they underſtood what Order the King had given therein, ſent their Men back to *London*.

* He was afterwards kill'd by a fall from his Horſe.

The Lords after this receiving a ſafe Conduct from the King, and perceiving all to be ſafe and clear, came to *Weſtmiſter* with a gallant Troop of Gentlemen ; and entering the Hall, as ſoon as they had ſight of the King (who was ſeated on a Throne apparel'd in his kingly Robes, with his Scepter in his Hand) made to him their humble Obeifance, and went on till they came to the nether Steps going up to the King's Seat of State, where they made their ſecond Obeifance, and then the King gave them Countenance to come nearer to him ; and they ſo did, kneeling down before him : and forthwith he roſe from his place, and lovingly welcoming them, took each of them by the Hand, and then ſat him down again ; when the aforeſaid Lords again appeal'd the Archbiſhop, the Duke of *Ireland*, the Earl of *Suffolk*, *Robert Tresilian* that falſe Juſtice, and *Nicholas Brambre* that diſloyal Knight (for ſo they term'd them) of High-Treaſon, according as they had done before at *Waltham-Croſs* ; and to prove their Accuſations to be true, they threw down their Gloves, proteſting by their Oaths to proſecute it to Battle : Nay, ſaith the King, *Not ſo, but in the next Parliament, which we do appoint beforehand to begin the*

morrow after the Purification of our Lady, both they and you appearing shall receive according to Law all that which Reason doth appoint. And finally, it was concluded they should all meet together at the next Parliament, and each one receive according to Justice; and in the mean time the King commanded them upon their Honours, not any Party to molest the other until the next Parliament*.

In the mean time the Earl of *Suffolk* fled to *Calais*, and the Archbishop of *York* fled along with the Bishop of *Durham*, it was not known whither; and the Duke of *Ireland* going into *Cheshire*, *Lancashire* and *Wales*, rais'd Forces to withstand the Appellants, (to whom were now join'd the Earls of *Derby* and *Nottingham*) with which Forces he march'd towards *London*; but meeting with the Appellants Forces at *Ratcote-bridge* near *Chipping-Norton* in *Oxfordshire*, he was stopt in his march, and his Men revolting from him, was constrain'd to save himself by flight in swimming cross the River *Thames* †.

On the other side, *Nicholas Brambre* in the King's Name caused all the Gates of the City of *London* to be shut against the Appellants, and to be guarded with a sufficient Watch: nevertheless the Lords Appellants marched towards *London* to confer with the King; but when they heard that *Nicholas Brambre* had caused the Gates of the City to be shut against them, they encamp'd themselves on the 27th of *December* in *Clerkenwell*, and sent two Knights and two Esquires to the Mayor and Aldermen of *London* to desire Entrance: then came the Mayor of *London* and certain of the chief Citizens, and brought the Keys of the City with them, and submitted themselves to the Lords, and offer'd them entrance into their City with all their People at their Pleasures.

The next Day there happen'd an Interview between the King and the Appellants so far, that they open'd their Minds one to another: but because the King was loth to speak to them before such a rabble of Men, and on the other side refused to go out of the *Tower* to speak with them, and the Appellants feared some Violence or Wrong to be offer'd them, they would not go into the *Tower* without a strong Guard of valiant Warriors; therefore the most wise of the Appellants after divers Consultations resolv'd to go and confer with the King; but first they sent a strong Troop well arm'd to search all the Corners and Caves of the *Tower*, and relation being made of the Safety of the place, with a selected band of valiant Cavaliers they entred the *Tower*, and seizing the Gates, and placing a Guard, they appear'd before the King, who was set in a Pavilion richly array'd; and after their humble Salutations done, they a third time appeal'd the aforesaid Conspirators in the same Sort and Form as afore: which Appellation being ended, the King swore that he would do Justice so far as the Rule of Law, Reason and Equity did require.

These things being accomplish'd, they departed from the *Tower* to their own Homes; and then it was publish'd in the Presence of the King, and thro'out his Dominions, That on the morrow after *Candlemas-Day*, a † Parliament should be held, and the aforesaid Conspirators should personally appear there to answer the Appellation whereby they were charg'd with so many Treasons.

In the mean while the King, by Consent of the said Commissioners and Appellants, issued out several †† Orders for the apprehending and seizing all suspected Folk, and for keeping them in safe Custody till the Parliament should assemble: accordingly divers Officers of the Household were expell'd their Office, and together with several others apprehended and committed to Prison, viz. Sir *Simon Burleigh*, Sir *William Elman*, Sir *John Beauchamp*, Sir *Thomas Trevel*, Sir *John Salisbury*, and divers others; and there was also taken Sir *Nicholas Brambre*, but he found Surety for his forth-coming; but the Duke of *Ireland*, Archbishop of *York*, Earl of *Suffolk*, and *Robert Tresilian* were no where to be found.

Shortly after, that is to say, the morrow after *Candlemas-Day*, the Parliament began; and the first Day, by the joint Consent of all the Commissioners, were arrested sitting in their places **, all the Justices (except Sir *William Skipworth*, who had been hinder'd by Sickness from being along with the other Judges when the Commissioners were declar'd guilty of High-Treason, and *Tresilian* who was fled) who were all immediately displac'd from their Offices, and sent Prisoners to the *Tower*, and there kept in separate Places.

All the Peers as well of the Spirituality as the Temporality being assembled in the great Hall at *Westminster*, the King soon after came and sat down in his Throne; and after him the five Noblemen Appellants (the same of whose admired Worth echo'd thro' all the Land) entred the House in their costly Robes, leading one another Hand in Hand, with an innumerable Company following them; and beholding where the King sat, they all at once with submissive Gestures revered the King. The Hall was so full of Spectators, that the very Roofs were cover'd with them; but amongst this infinite multitude there could not be found any of the Conspirators; *Brambre*, who had attempted to flee away, had been taken a little before, and was cast into *Glocester Gaol*.

The Clergy then placing themselves on the Right-hand, and the Nobility on the Left-hand of the King, according to the antient Custom of the high Court of Parliament, the Lord Chancellor standing with his Back towards the King, by the King's Command declar'd the Cause of their Summons to Parliament; which was to consider by what means the Distraction of the Realm, thro' evil Management, might for the future be composed, the King better advised, the Nation better

* See a Proclamation by the King to this purpose, *Hollin. Vol. 3. p. 460.*

† He afterwards was translated by Pope Urban V. to the See of St. Andrews in Scotland; but that Kingdom being under Obedience to the Anti-Pope, the Translation was of no Service to him, so that he was constrain'd to be a Parish Priest at *Lovain*, where he continued three Years, till the time of his Death.

‡ He afterwards got into Holland, from whence he went to *Lovain*, where in 1393. he was slain in hunting a wild Boar.

† See the King's Order to the Sheriff of Kent for proclaiming it, and summoning the Conspirators to appear at it, dated 4 Jan. 1388: *Rym. Fœd. Tom. 7. p. 567.* The like Order to all the Sheriffs thro'out England, of the same Date. *Ibid.*

†† See a Warrant directed to the Constable of *Glocester Castle*, for taking into Custody *Robert Tresilian* and *Nicholas Brambre*, dated 4 Jan. 1388. *Rym. Fœd. Tom. 7. p. 566.* See likewise another Warrant of the same Date, directed to the Constable of *Dover Castle*, and the Warden of the Cinque Ports, for keeping in Custody and apart several others accused by the Lords. *Ibid.*

** Sir *Roger Fulthorp*, Sir *Robert Belknap*, Sir *John Carey*, Sir *John Holt*, Sir *William Burleigh*, and *John Lofton*, the King's Serjeants at Law.

govern'd, Misdemeanors more severely punish'd, and good Men more encourag'd, how the Kingdom also might be best defended, the Sea best kept, the Marches of *Scotland* securely guarded, *Guyenne* preserv'd, and lastly how the Charges of these things may most easily be born; and then gave notice that whoever would complain in Parliament of such things as could not well be redress'd by the common Law, might carry their Petitions to the Clerk in Chancery, there named and appointed to receive them. Which being ended, the aforesaid five Appellants arising, declar'd their Appellation by the Mouth of *Robert Pleasington*, their Speaker, who thus spoke:

Behold the Duke of *Glocester* comes to purge himself of Treasons which are laid to his Charge by the Conspirators. To whom the Lord Chancellor by the King's Commandment answer'd: My Lord Duke, the King conceiveth so honourably of you, that he cannot be induced to believe that you who are of Affinity to him in a collateral Line, should attempt any Treason against his Majesty.

The Duke, with his four Companions upon their Knees, humbly gave Thanks to the King for his gracious Opinion of their Fidelity.

The Lords Spiritual and Temporal there present then claimed as their Liberty and Franchise, that all great Matters moved in that Parliament, and to be moved in other Parliaments in time to come, touching the Peers of the Land, should be discuss'd and judged by the Course of Parliament, and not by the Law civil, or by the common Law of the Land used in the inferior Courts of the Kingdom; which Claim, Liberty and Franchise, the King allow'd and granted in full Parliament.

Then after Silence proclaim'd, the Appellants arose, and accus'd the aforesaid Conspirators of high Treason, and deliver'd in certain Articles in writing, wherein were contain'd the Particularities of their Treasons; which were as follow.

1. That as false Traitors and Enemies to the King and Kingdom taking advantage of his tender Age, and the Innocency of his Person, they inform'd and put upon him for Truth divers false things of their own Invention, against all Loyalty and good Faith, and made him intirely their own; so that they had his Love, firm Faith and Credit, while he hated and suspected his loyal Lords and Lieges, by whom he ought to have been govern'd: That these false Traitors had encroach'd to themselves Royal Power, by enslaving the King, blemishing his Sovereignty, and lessening his Prerogative and Royalty; and made him so obedient to their Will, that he was sworn to be govern'd, counsell'd and conducted by them: by virtue of which Oath they kept him in obedience to their false Imaginations and mischievous Deeds contain'd in the following Articles.

2. Also whereas the King is not bound to take any Oath, but on the Day of his Coronation, or for the common Profit of himself and Kingdom, the aforesaid *Alexander*, *Robert* and *Michael*, as false Traitors and Enemies to the King and Realm, made him to swear, and assure them, that he would maintain, support, and live and die with them: and also whereas the King ought to be of more free Condition than any other of his Kingdom, they have put him more in Servitude than any one, against his Honour, Estate and Royalty, against their Ligeance, as Traitors to him.

3. Also the said *Robert*, *Michael* and *Alexander*, by the Assent and Counsel of *Robert Tresilian* that

false Justice, and *Nicholas Brambre* that false Knight of *London*, by their wicked contrivance would not permit the great Men of the Kingdom, nor good Counsellors to come near the King, nor would suffer him to speak to them, unless in their Presence and Hearing, encroaching to themselves Royal Power, Lordship and Sovereignty over the Person of the King, to the great Dishonour and Peril of the King, the Crown and his Realm.

4. Also the aforesaid *Alexander*, *Robert Vere*, *Michael de la Pole*, *Robert Tresilian*, and *Nicholas de Brambre*, by their false Wickedness evilly advis'd the King, so that his personal Presence which he ought to make to the great Lords, and his Liege People, and the Favours and Rights to which they requested his Answer, were not to be obtain'd but at their Pleasure and Allowance, in staying the King from his Duty, and against his Oath, and turning the Hearts of the great Lords from him, with design to estrange his Heart from the Peers of the Land, to have amongst them the sole Government of the Kingdom.

5. Also by the said Encroachment of *Robert de Vere*, Duke of *Ireland*, and *Michael de la Pole*, with the Advice and Counsel of *Alexander* Archbishop of *York*, they caused the King without Assent of the Kingdom, by their Abetments, without any Deserts of the Persons, to give divers Lordships, Castles, Towns and Mannors, as well annexed to his Crown as others, as the whole Realm of *Ireland*, the Town of *Okeham*, and the Forest thereof, and the Lands which were the Lord *Audley's*, and other great Estates, to the said *Robert de Vere*, and others, whereby they were mightily enrich'd, and the King became so poor that he had not wherewith to support and bear the Charges of the Kingdom, unless by Impositions, Taxes, and Tributes put upon his People, in disherison of his Crown, and to the undoing of the Realm.

6. Also by the Encroachment of the said *Alexander*, *Robert* and *Michael*, by the Assent and Advice of the aforesaid *Robert Tresilian* and *Nicholas Brambre*, they caused the King to give divers Lands, Mannors, Tenements, Rents, Offices and Bailiwicks to People of their Kindred, and other Persons of whom they receiv'd great Bribes; and also to make them of their Party, in their false Quarrels and Purposes, as in the Case of *Sir Robert Mansel Clerk*, *John Blake*, *Thomas Uske*, and others, to the Destruction of the King and Kingdom.

7. Also *Robert de Vere*, *Michael de la Pole*, *Alexander* Archbishop of *York*, with the rest of the Persons above-named, by Assent and Counsel of the said *Nicholas Brambre*, &c. encroaching to themselves Royal Power, caused the King to give very great Sums of Gold and Silver, as well of his own Goods and Jewels as the Treasure of the Kingdom, besides Tenths, Fifteenths, and other Taxes granted by divers Parliaments to be expended in defence and safeguard of the Kingdom, and otherwise, which amounted to the Sum of one hundred thousand Marks and more, to the said *Robert*, and others. And further, they caused many good Ordinances and Purposes made and ordained in Parliaments, as well for the Wars as Defence of the Kingdom, to be interrupted, to the great Injury of the King and Kingdom.

8. Also by the said Encroachment and great Bribes taken by the said *Robert*, *Michael*, and *Alexander*, divers not sufficient nor fit had the Guard and Government of divers Lordships, Castles and Countries,

Countries, as in *Guyenne* and elsewhere, as well on this side as beyond the Sea; whereby the People and Countries of those Territories being loyal to the King, for the most part were destroy'd, and great Dominions of late render'd into the Hands and Possession of the Enemy, without assent of the Realm, which were never in the Hands of the Enemy since the Conquest of them; as also in the Marches of *Scotland*, and elsewhere, in disherison of the Crown, and great Injury to the Realm; as in the Case of *Harpeden*, *Craddock*, and others.

9. Also by the Encroachment of the aforesaid *Alexander*, *Robert*, *Michael*, *Robert* and *Nicholas*, divers People have been hinder'd of the Benefit of the common Law of *England*, and put to great Delays, Losses and Costs; while Statutes and Judgments justly made upon necessary Causes in Parliament have been reversed and annulled by the Procurement of the said Misdoers, and Traitors, and this by reason of the large Bribes by them extorted, to the great Prejudice of the Kingdom.

10. Also the five aforesaid encroaching to themselves Royal Power, as false Traitors to the King and Kingdom, caus'd and counsell'd the King to grant Charters of Pardon for horrible Felonies and Treasons, as well against the State of the King, as of the Party, against the Law and Oath of the King.

11. Also, Whereas the great Lordship and Land of *Ireland* hath been beyond Memory parcel of the Crown of *England*, and the People thereof for all that time have been the King's Lieges without any Mesne Lord, to him and his Royal Progenitors, and our Lord and his noble Progenitors Kings of *England*, have in all their Charters, Writs, Letters and Patents, and also under their Seals, in augmentation of their Names and Royalty, styled themselves Lords of *Ireland*; the aforesaid *Robert*, Duke of *Ireland*, *Alexander* and *Michael*, &c. as false Traitors to the King by the said Encroachment, gave Advice that the King, as much as was in him, had granted that *Robert de Vere* should be King of *Ireland*; and to accomplish this wicked Purpose, the aforesaid Traitors counsell'd and excited the King to send Letters to the Pope to ratify and confirm their traitorous Intention, without the Knowledge and Assent of the Kingdom of *England*, or Land of *Ireland*, in parting the King's Ligeance in respect to both Nations, in decrease of the honourable Name of the KING, and in open Dishonour of his Crown of *England*, and full Destruction of his loyal Lieges and the Nation of *Ireland*.

12. Also, Whereas by the great Charter and other good Laws and Usages of the Kingdom, no Man ought to be taken, put in Prison, or to Death without due Process of Law, the aforesaid *Nicholas Brambre*, false Knight of *London*, took by Night certain Persons out of the Prison of *Newgate*, Chaplains, and others, to the Number of twenty two; some Debtors and others accus'd of Felony, and some Approvers in the Case of Felony, and some taken and imprison'd there upon suspicion of Felony; and led them into *Kent* to a Place called the *Foul Oak*, and there encroaching to himself Royal Power, as a Traitor to the King, and without Warrant, or Process of Law, caused all their Heads to be cut off but one, who was appealed of Felony by an Approver, and him he suffer'd to go at large at the same time.

13. Also, The aforesaid *Alexander*, *Robert*, *Michael*, *Nicholas*, &c. Traitors to the King and

Kingdom, took great Bribes in many Cases in the Name of the King for maintenance of Quarrels, or Suits; and once took Bribes of both Sides or Parties.

14. Also, These five caused some Lords and others, loyal Lieges, to be put out of the King's Council; so as they dar'd not to speak in Parliament about the good Government of the King's Person or Kingdom.

15. Also, Whereas in the last Parliament all the Lords, Sages and Commons there assembled, seeing the imminent Ruin of the King and Kingdom by the Perils and Mischiefs aforesaid, and for that the King had forsaken the Council of the Kingdom, and holden himself altogether to the Council of the said five Evil-doers and Traitors; and also for that the King of *France*, with his Royal Power, was then shipp'd ready to have landed in *England*, to have destroy'd the Kingdom and Language thereof, and there was no Ordinance then made, or Care taken for the Safety of the King and Kingdom; they knew no other Remedy than to shew the King fully how he was ill govern'd, led and counsell'd by the Traitors and ill Doers aforesaid; requiring him most humbly, as his loyal Lieges, for the Safety of him and his whole Realm, and for avoiding the Perils aforesaid, to remove from his Presence the said Evil-doers and Traitors, and not to do any thing after their Advice, but according to the Counsel of the loyal and discreet Sages of the Realm: And hereupon the said Traitors and Evil-doers, seeing the good and honourable Opinion of the Parliament; to undo this good Purpose by their false Counsel, caused the King to command the Mayor of *London* to kill and put to death all the said Lords and Commons, except such as were of their Party; to the doing whereof, these great Traitors and Evil-doers should have been Parties, and present, to the undoing of the King and the Kingdom.

16. Also, That those five Traitors above-mention'd, when the Mayor and good People of *London* utterly refus'd in the Presence of the King to murder the Lords and Commons; they by their said traitorous Accroachment falsely counsell'd the King, and prevail'd with him to leave the Parliament for many Days, and caused him to certify that he would not come to the Parliament, nor treat with the Lords and Commons concerning the Business of the Kingdom, for any Peril, Ruin or Mischief whatsoever that might happen any ways to him, or the Realm, if he were not first assur'd by the Lords and Commons, that they would not speak nor do in that Parliament any thing against any of the Misdoers, saving that they might proceed on in the Process, which was then commenced against *Michael de la Pole*, to the great Ruin of the King and Kingdom, and against the ancient Ordinances and Liberties of Parliaments.

17. Also, The said Lords and Commons, after they understood that the King's Mind (thro' the wicked Excitation and Counsel of the said five, &c. above-mention'd) was such, that he would not suffer any thing to be commenced, pursued or done against the said Evil-doers, so that they durst not speak or proceed against the King's Will; upon consideration of the former Counsel and Advice of the Lords and Justices, with other Sages and Commons of Parliament, how the Estate of the King and his Royalty might be best saved against the Perils and Mischiefs aforesaid, knew not how to find out any other Remedy than

to ordain, That * twelve loyal Lords of the Land should be the King's Council for one Year, and that there should be made such a Commission and Statute, by which they should have full and sufficient Power to ordain, &c. according to the Effect of the said Commission and Statute; by both which no Man was to advise the King against them, under Forfeiture, for the first Offence, of his Goods and Chattels; and for the second Offence, of Life and Member: Which Ordinance, Statute, and Commission being made by the Assent of the King, the Lords, Judges, and other Sages and Commons, assembled in the said Parliament to preserve to the King his Royalty and Realm, the said Traitors and Misdoers, by their evil, false and traiterous Informations, insinuated to the King, that the said Ordinance, Statute and Commission were made to defeat his Royalty; and that all those who procur'd and counsell'd the making of them, and those who excited the King to consent to them, were worthy to be put to death as Traitors to the King.

18. Also, after this, the aforesaid five Misdoers and Traitors caused the King to assemble a Council of certain Lords Justices and others, many times without the Assent and Presence of the Lords of the said great Council; and made divers Demands of them very suspicious, concerning divers Matters, by which the King, Lords and common People were in great trouble, with the whole Realm.

19. Also, to accomplish the said High-Treason, the said Misdoers and Traitors, *Alexander, Robert, Michael, &c.* by the Assent and Counsel of *Robert Tresilian* and *Nicholas Bambre*, caused the King to ride thro' the Kingdom with some of them into *Wales*, and caused him to make come before him, the Lords, Knights, and Esquires, and other good People of those Parts, as well of Cities and Burghs, as other Places, and made some to enter into Bond; and obliged others by their Oaths to stand by him, against all People, and to effect his Purpose, which at that time was the Will and Purpose of the said Misdoers and Traitors, by their false Imaginations, Deceits and Accroachments above-said; which Securities and Oaths were against the good Laws and Usages of the Land, and against the Oath of the King, to the great Ruin and Dishonour of the King and Kingdom.

20. Also, by force of such Bonds and Oaths, all the Realm was put into great Trouble by the said Evil-doers and Traitors; and in peril, to have suffer'd many intolerable Mischiefs.

21. Also, to bring about their traiterous Purposes, the said five caused the King to go into several other Parts of the Kingdom for some time; whereby the Lords assigned by the said Ordinances, Statute and Commission, could not advise with him about the Business of the Kingdom; so as the Purport and Effect of the Ordinances, Statute and Commission were defeated, to the great Ruin of the King and Kingdom.

22. Also, the said *Robert de Vere*, Duke of *Ireland*, by the Counsel and Abetment of the other four Traitors, accroaching to himself Royal Power, without the King's Commission, or other suffi-

cient or usual Warrant, made himself Chief Justice of *Chester*, and by himself and Deputies held all manner of Pleas, as well common as of the Crown, and gave Judgments upon them, and made Execution thereof; and also caused many original and judicial Writs to be sealed with the Great Seal used in those Parts; and also by such Accroachment of Royal Power, he caused to rise with him great part of the People of that Country; some by Threats, others by Imprisonments of their Bodies; some by seizing of their Lands, others by many dishonest Ways, by colour of the said Office; and all this to make War upon and destroy the loyal Lords and others the King's Liege Subjects, to the undoing of the King and the whole Realm.

23. Also, the said Traitors, *Robert de Vere, Alexander, Michael, &c.* by the Counsel and Abetment of *Robert Tresilian* and *Nicholas Bambre*, accroaching to themselves Royal Power, caused to be deliver'd *John de Blois*, Heir of *Bretagne*, who was Prisoner, and Security to the King and Kingdom, without assent of Parliament, or the King's Great Council, and without any due Warrant, to the great strengthening the Adversary of *France*, the ruin of the King and Realm, and against the Statutes and Ordinances aforesaid made in the last Parliament.

24. Also, the said five Traitors caused the King to have a great Retinue of late of divers People, to whom he gave Badges, which was not done in antient time by any King his Progenitor, that they might have Power to perform their false Treasons aforesaid.

25. Also, the aforesaid five Misdoers and Traitors, in full Accomplishment of all their Treasons aforesaid, and to make the King give Credit to them and their Counsel, and hold them more loyal and greater Sages than others of the Kingdom; and the more to colour their false Treasons, caused the King to make come before him to the Castle of *Nottingham*, divers Justices and Lawyers, on the Morrow after *St. Bartholomew's-Day* last past, and there † constrained the said Justices to set their Hands to the Answers to certain Questions then propounded and delivered to them, that by means thereof those Persons who were about the King might have colour to put to death the Duke of *Glocester* and other Lords, who in the last Parliament were ordained to have the Governance of the Realm.

Which Questions and Answers were as follow:

(1.) *First*, It was ask'd of them, whether the new Statute, Ordinance and Commission, made in the last Parliament held at *Westminster*, be hurtful to the King's Prerogative?

Whereunto all of one mind answer'd, That they were hurtful, and especially because they be against the King's Will.

(2.) *Item*, It was inquir'd of them how they ought to be punish'd that procur'd the said Statute, Ordinance and Commission to be made?

Whereunto with one Assent they answer'd, That they deserv'd Death, except the King of his Grace would pardon them.

(3.) *Item*,

* There were Thirteen Commissioners, but only Twelve of them were Peers.

† Divers of the Justices refused to subscribe, but yet they were obliged to do as the rest did; among whom was Robert Belknap, who utterly refused, till the Duke of Ireland and the Earl of Suffolk compell'd him thereto; for if he had persisted in his Refusal he had not escaped their Hands: and yet when he had set to his Seal, he burst out into these Words: Now here lacketh nothing but a Rope, that I may receive a Reward worthy my Desert; and I know if I had not done this I should not have escaped your Hands; so that for your Pleasures and the King's I have done it, and thereby deserve Death at the Hands of the Lords. *Holin. Vol. 3. p. 456.*

(3.) *Item*, It was inquir'd how they ought to be punish'd, which mov'd the King to consent to the making of the said Statute, Ordinance and Commission? Whereunto they answer'd, That unless the King would give them his Pardon they ought to lose their Lives.

(4.) *Item*, It was inquir'd of them what Punishment they deserv'd that compell'd the King to the making of that Statute, Ordinance and Commission? Whereunto they gave Answer, That they ought to suffer as Traitors.

(5.) *Item*, It was demanded of them how they ought to be punish'd that interrupted the King, so that he might not exercise those Things that appertain'd to his Regality and Prerogative?

Whereunto Answer was made, that they ought to be punish'd as Traitors.

(6.) *Item*, It was enquir'd of them, whether, that after the Affairs of the Realm, and the Cause of the calling together of the States of the Parliament, were once by the King's Commandment declar'd and open'd, and other Articles on the King's behalf limited, upon which the Lords and Commons of the Realm ought to treat and proceed; if the Lords nevertheless would proceed upon other Articles, and not meddle with those Articles which the King had limited, till the time the King had answer'd the Articles proponed by them, notwithstanding the King injoin'd them to the contrary: Whether in this Case the King might rule the Parliament, and cause them to proceed upon the Articles by him limited before they proceeded any further?

To which Question it was answer'd, That the King should have in this Part the Rule for Order of all such Articles to be prosecuted until the end of the Parliament; and if any presum'd to go contrary to this Rule, he was to be punish'd as a Traitor.

(7.) *Item*, It was ask'd, whether the King, whensoever it pleased him, might not dissolve the Parliament, and command the Lords and Commons to depart from thence, or not?

Whereunto it was answer'd, that he might.

(8.) *Item*, It was inquir'd, that for so much as it was in the King to remove such Justices and Officers as offend, and to punish them for their Offences, whether the Lords and Commons might without the King's Will impeach the same Officers and Justices upon their Offences in Parliament, or not? To this answer was made, That they might not; and he that attempted contrary was to suffer as a Traitor.

(9.) *Item*, It was enquir'd how he is to be punish'd that mov'd in the Parliament, that the Statute wherein *Edward*, the Son of King *Edward*, Great Grandfather to the King that now is, was indicted in Parliament, might be sent for? by Inspection of which Statute, the said new Statute or Ordinance and Commission, were conceived and devised in the Parliament.

To which Question, with one accord, as in all the Residue, they answer'd, that as well he that so summon'd, as the other, which by force of the said Motion brought the said Statute into the Parliament House, be as publick Offenders and Traitors to be punish'd.

(10.) *Item*, It was inquir'd of them, whether the Judgment given in the Parliament against *Michael de la Pole*, Earl of *Suffolk*, were erroneous, and revocable or not?

VOL. V.

To which Question likewise with one Assent they said, That if the same Judgment were now to be given, the Justices and Serjeants aforesaid would not give the same, because it seemeth to them that the said Judgment is erroneous and revocable in every Part. In witness of the Premises, the Justices and Serjeant aforesaid to these Presents have set their Seals; these being Witnesses, *Alexander* Archbishop of *York*, *Robert* Archbishop of *Dublin*, *John* Bishop of *Durham*, *Thomas* Bishop of *Chester*, *John* Bishop of *Bangor*, *Robert* Duke of *Ireland*, *Michael* Earl of *Suffolk*, *John* Rippon Clerk, and *John* Blake.

26. These five Evil-doers and Traitors are also farther accused, that they drew away the Heart and Good-will of the King from the said Lords and others, who had agreed to make the said Commission and Ordinances in the last Parliament, and he thereupon accounted them Enemies and Traitors; and being sure the said Justices favour'd their Designs, contriv'd that those Lords and others should be arrested, indicted, and attainted by false Inquests of Treason, and put to death, and they and their Issue disherited: and these false Arrests, Indictments, and Attainders were to be made in *London* or *Middlesex*; and for that purpose they had procur'd a false and wicked Person called *Thomas Husk*, to be Under-sheriff of *Middlesex*; who by their Assent, Procurement and Command, undertook the said false Indictments and Attainders should be made and accomplish'd: And for the more complete effecting of their Treason, they caused the King to send his Letters of Credence by one *John Rippon*, a false Clerk, and one of their Crew, to the Mayor of *London* to arrest the Duke of *Glocester*, and others therein named; and by force of those Letters one *John Blake* carry'd to the Mayor a Bill of Information against them, by which they were to be Indicted and Attainted. The Effect of which Bill was, "That it seem'd for the better that certain of the Lords, Knights, and Commons of the last Parliament which were notoriously impeachable, should be privately indicted in *London* and *Middlesex* of Conspiracy and Confederacy, for that they at a certain Day mention'd, falsely and traiterously had conspired and confederated between themselves to make in the same Parliament a Statute and Commission against the Royalty of our Lord the King, and in derogation of his Crown, and procur'd the same Statute there afterwards at a certain Day to be passed; and also had procur'd, nay constrain'd our Lord the King to assent against his Will to have it made; and they traiterously against their Allegiance hinder'd the King from using his Royalty, to the great Disherison of him, and Derogation to his Crown, against their Allegiance, swearing to maintain each other in this Matter."

And further, The said Evil-doers and Traitors set a Watch to give notice of the Duke of *Lancaster's* landing in *England*, that he might be arrested upon his Arrival.

27. Also the above-named five Evil-doers and Traitors, after having inform'd the King that he should believe that the said Statute, Ordinance and Commission were made in derogation of his Royalty and Prerogative, they strongly possessed him that all those who made, or caused to be made the said Statute, Ordinance and Commission, had thereby a Purpose to degrade, and finally to oppose him,

him, and that they would not give over that Purpose until they had perfected it; for which Cause the King held them as Enemies and Traitors.

28. Also, after this false and traitorous Information, when the Five aforesaid had procured the King to hold the loyal Lords as Enemies and Traitors; the said Misdoers and Traitors advised him by every way possible, as well by the Power of his own People, as by the Power of his Enemies of *France* and others, to destroy and put to death the said Lords, and all others who assented to the making of the said Statute, Ordinance and Commission; and that it might be done so privately, as none might know of it till it was done.

29. Also, to accomplish the High-Treason aforesaid, *Alexander*, &c. *Robert de Vere*, &c. and *Michael*, &c. by their Advice, caused the King to send his Letters of Credence to his Adversary the King of *France*; some by one *Nicholas Southwell*, a Groom of his Chamber, and others by other Persons of small Account, as well Strangers as *English*, requesting and praying the King of *France* that he would with all his Power and Advice be aiding and assisting him to destroy and put to death the said Lords and other *English* which the King held to be his Enemies and Traitors, as above, to the great Disturbance and Dissatisfaction of the whole Realm.

30. Also the three last named Persons encroaching to themselves Royal Power, caused the King to promise the King of *France*, by his Letters Patents and Messages, that for such his Aid and Power to accomplish the same, he would grant and surrender unto him the Town and Castle of *Calais*, and all other Castles and Fortresses in the Marshes and Confines of *Picardy* and *Artois*, with the Castles and Towns of *Cherburgh* and *Brest*; to the great Dishonour, Trouble, and Ruin of the King and Kingdom.

31. Also, after the last named three were sure of having Aid and Assistance from the King of *France*, by Instigation and Contrivance of the said Traitors, a Conference was to have been in the Marshes of *Calais* about a Truce for five Years between the two Nations; at which Conference both Kings were to be present, as likewise the *English* Lords whom the King then held to be his Traitors; and there *Thomas Duke of Gloucester*, Constable of *England*, *Richard Earl of Arundel* and *Surrey*, and *Thomas Earl of Warwick*, and divers others, were to have been put to death by Treachery.

32. Also for performance of this High-Treason, the last named Three caused the King to send for Safe-Conducts to the King of *France*; some for himself and for the Duke of *Ireland*, and others for *John Salisbury* and *John Lancaster* Knights, with other People with them, who were to go into *France*, to put in execution this wicked Purpose and Treason; which Safe-Conducts were ready to be produc'd.

33. Also the aforesaid *Nicholas Brambre*, false Knight of *London*, by the Assent and Advice of the said *Alexander*, &c. *Robert de Vere*, &c. *Michael*, &c. and *Robert Trefilian* false Justice, encroaching to themselves Royal Power (as before) some of them went personally into *London*, and without the Assent and Knowledge of the King, there openly in his Name made all the Crafts or Trades of that City to be sworn, to hold and perform divers Matters not lawful, as is contained in the said Oath upon record in Chancery: And a-

mongst other Things, that they should keep and maintain the King's Will and Purpose to their Power, against all such as were, or should be Rebels against the King's Person or his Royalty, and that they should be ready to live and die with him in destruction of all such who did or should design Treason against the King in any manner; and that they should be ready and come speedily to their Mayor for the time being, or that afterwards should be, when and at what Hour they should be requir'd, to resist, so long as they lived, all such as did or should design any thing against the King in any of the Points aforesaid; at which time the King, by evil Information of the said Misdoers and Traitors, and by the false Answers of the Justices, firmly held the said Lords and others who contrived the said Statute, Ordinance and Commission, to be Rebels, Enemies, and Traitors, which false Information was then unknown to the People of *London*; and also by obscure Words contained in the said Oath, the Intent of the Misdoers and Traitors being to engage the People of *London* to raise their Power to destroy the said loyal Lords and others.

34. Also the said *Nicholas*, *Alexander*, *Robert de Vere*, and *Michael*, as Traitors to the King and Kingdom, encroaching to themselves Royal Power, did of their own Authority, without Warrant from the King, or his great Council, cause to be proclaimed thro' the City of *London*, that none of the King's Lieges should aid or comfort *Richard Earl of Arundel* and *Surrey* a Peer of the Land, and one of the Lords of the King's Great Council during the Commission; nor should sell him Armour, Victuals, or other things necessary, but should avoid all of his Party as Rebels, upon pain of being proceeded against as Rebels, and on forfeiture of all they were worth; shewing Letters Patents from the King for making such Proclamation, being to the Destruction of the King's Liege Subjects.

35. Also the said *Nicholas Brambre*, by Assent and Counsel of the said *Alexander*, *Robert de Vere*, and *Michael*, caused it to be proclaimed in the City of *London*, That no Person should be so hardy as to presume to speak any Ill of the said Misdoers and Traitors, upon pain of forfeiting to the King whatever they were worth.

36. Also the said five Traitors to the King and Kingdom, caused the King to make certain Persons to be Sheriffs thro' the Kingdom, named and recommended to him by the said Evil-doers and Traitors, to the Intent that they might get such Persons as they should name return'd for Knights of the Shire to serve in Parliament; to the undoing of the loyal Lords and Commons, and also the good Laws and Customs of the Kingdom.

37. Also the said five Misdoers and Traitors, during the time of Protection, to hinder the Appeal against them, falsely counsell'd and prevail'd with the King to command by his Letters divers Knights and Esquires, Sheriffs, and other Ministers of several Counties, to levy and assemble all the Power they could to join with the Duke of *Ireland* against the Lords Appellants, to make sudden War upon and destroy them.

38. Also during the time of the said Protection of the said *Robert de Vere*, *Michael*, &c. *Alexander*, *Nicholas*, &c. they caused the King by his Letters, to signify to the Duke of *Ireland*, that they were all appealed of Treason by *Thomas Duke of Gloucester*, Constable of *England*, *Richard Earl of A-*

rundel

Arundel and *Surrey*, and *Thomas Earl of Warwick*, and how he had given them Day until the next Parliament, and how he had taken into his special Protection both Parties, with all their Goods and Chattels: And it was further contain'd in the King's Letters, That if the Duke of *Ireland* should have sufficient Power, he should not cease to march on with all his Force to come to him. And soon after they caused the King to write to the said Duke that he should take the Field with all the Force he could get together; and that he would meet him with all his Troops, and that he would adventure his Royal Person with him, and that he was in great danger, as also the whole Nation, if he was not relieved by him: and this the Duke ought to declare to all the People with him, and that the King would pay the Wages and Costs of the said Duke, and all the People assembled with him. By virtue of which Letters, and the wicked and traitorous Instigations, as well of the Duke and his Adherents, as of all the other Misdoers and Traitors, he raised a great number of Men at Arms, and Archers, as well in the Counties of *Lancaster* and *Chester*, as in *Wales* and other Places of the Kingdom, to destroy and put to death the said loyal Lords, and all others who had assented to the making of the said Statute, Ordinance and Commission, in defence of the King and his Kingdom.

39. Also the said *Robert de Vere*, Duke of *Ireland*, as a false Traitor to the King and Kingdom, assembled a great Power of Men at Arms and Archers in *Lancashire*, *Cheshire*, *Wales*, and many other Places, to the Intent to have traitorously destroy'd with all his Power the said Lords, *Thomas Duke of Gloucester*, Constable of *England*, *Henry Earl of Derby*, *Richard Earl of Arundel* and *Surrey*, *Thomas Earl of Warwick*, and *Thomas Earl Marshal*, with divers others the King's Lieges, to the undoing and ruin of the King and the whole Kingdom; and so rode and march'd with a great Force of Men at Arms, and Archers, from the County of *Chester* to *Ratcot Bridge*, accroaching to himself Royal Power, and displaying the King's Banner in his Army, against the State of the King and his Crown.

This Impeachment was exhibited on Monday the third of *February*, being the first Day of the Parliament; when the Lords Appellants also affirm'd they were ready to prove every Article of it as should be awarded in Parliament, to the Honour of God, and the Advantage and Profit of the King and the whole Realm.

Whereupon all the Persons appealed, were by command of the King and Lords solemnly summon'd in the great Hall at *Westminster*, as also at the Gate of the said Palace, to come and answer the said Appellants; but upon their Non-appearance, the said Duke and Lords Appellants pray'd, that their Default might be recorded. Then upon the said Appellants alledging, that the Accused had full Notice of the said Appeal, and the King and Lords being satisfy'd it was so, by reason they did not appear, their Default was recorded accordingly: Whereupon the said Duke and Earls Appellants pray'd the King and Lords, that they might be adjudged and convicted of the Treasons contained in the said Appeal. Then the King and Lords took time to consider and examine the Articles, after which they would give such Judgment in this Case, as should be to the Honour of God, the Advantage and Profit of the King and the

whole Kingdom. Then the King commanded the said Lords to examine the Articles severally, which they did with great Labour and Diligence, until Thursday the 13th of *February*.

During this Interval, the Justices, Serjeants, and other Sages of the Law, both of the Realm and Law Civil, were charg'd by the King to give their faithful Advice to the Lords of Parliament how they ought to proceed in the above-said Appeal. Then the said Justices, Serjeants, and Sages of both Laws having taken these Matters into their Deliberation, answer'd the said Lords of Parliament, that they had seen and well understood the Tenor of the said Appeal, and affirm'd that it was not made nor brought according as the one Law or other requir'd. Upon which the said Lords of Parliament having taken Deliberation and Advice, it was by the assent of the King with their common Accord declared, That in so high a Crime as is laid in this Appeal, and which touches the Person of the King and the Estates of this Realm, and is perpetrated by Persons who are Peers thereof, together with others, the Cause cannot be tried elsewhere but in Parliament, nor by any other Law or Court, except that of Parliament; and that it belongs to the Lords of Parliament, and to their free Choice and Liberty, by antient Custom of Parliament, to be Judges in such Cases, and to judge of them by the Assent of the King; and thus it shall be done in this Case by Award of Parliament, because the Realm of *England* is not, nor ever was (neither is it the Intent of the King and Lords of Parliament that it shall ever be) ruled and govern'd by the Civil Law; and therefore it is not their Intent otherwise to proceed in so high a Case as this Appeal, which cannot be try'd or determin'd any where else than in Parliament, since the Process or Order used in inferior Courts is only as they are intrusted with the Execution of the antient Laws and Customs of the Realm, and the Ordinances and Establishments of Parliament: And it was the Judgment of the Lords of Parliament, by assent of the King, that this Appeal was well and duly brought, and the Process upon the same was good and effectual, according to the Laws and Course of Parliament, and by which they will award and judge it. Upon this the Appellants again moved the King and Lords to record their Default; and that *Nicholas Brambre* (who was the only Person in Custody) might be brought to answer.

Then the other Persons appealed were again summon'd to come in and make Answer, but they did not appear; nevertheless the King and Lords took time to deliberate till the next Day, being the 5th of *February*; at which time the said Appellants again prayed that the Default of the Appealed might be recorded, which was done accordingly. After which the Lord *Chancellor, in the Name of the Clergy, in open Parliament, made an Oration, shewing, *That they could not by any means be present at Proceedings where any Censure of Death is to be passed*; for the Confirmation whereof the Clergy deliver'd in a Protestation, which being read, they declar'd, "That neither in respect of
" any Favour, nor for fear of any Man's Hate,
" nor in hope of any Reward, they did desire to
" absent themselves; but only that they were
" bound by the Canon not to be present at any
" Man's Arraignment or Condemnation." They likewise sent their Protestation to the Chappel of the Abbey where the Commons sat, which was allow'd of.

* The Bishop of Ely; Tyrrel says, the Archbishop of Canterbury.
VOL. V.

And then, on the 13th of February, the King and Lords of Parliament being met again in the *Whitehall*, the said Appellants pray'd that the last Default of the said Archbishop, Duke, and Earl, and *Robert Tresilian*, should be recorded. Then the Persons accused being again summon'd (*the third time*) and not appearing, the Lords proceeded to Judgment, and declared, that divers of the Articles therein contain'd were Treason; as the *First, Second, Eleventh, Twelfth, Fifteenth, and Seventeenth*, as also the *Eighteenth, Twentieth, Thirtieth, Thirty first, Thirty second, Thirty seventh, Thirty eighth, and Thirty ninth* Articles: and then upon due Information of their Consciences, they pronounced the said Archbishop, Duke, and Earl, with *Robert Tresilian*, to be notoriously guilty of each of the said Articles that concern'd them, and that they were also culpable of all the rest of the Articles contain'd in the said Appeal, not yet declar'd Treason.

Then in Presence of the King, and Lords assembled at the Day and Place aforesaid the said Duke and Earls Appellants pray'd the King, and the Lords there present, that the Persons so appeal'd as aforesaid should be adjudged convicted of the High-Treasons contain'd in the said Appeals. Wherefore the said Lords of Parliament there present, as Judges in Parliament in this Case, by assent of the King pronounced their Sentence; and did adjudge the said Archbishop, Duke, and Earl, with *Robert Tresilian*, so appeal'd as aforesaid, to be Guilty and convicted of Treason, and to be *drawn and hang'd as Traitors and Enemies to the King and Kingdom*; and that their Heirs should be disinherited for ever, and their Lands and Tenements, Goods and Chattels forfeited to the King, and that the Temporalities of the Archbishop of *York* should be taken into the King's Hands.

On this Day Sir *Nicholas Brambre* Feb. 17. was brought by the Constable of the *Tower* into Parliament; and being charged with the aforesaid Articles of Treason, he desired longer time, that he might advise with Counsel Learned in the Law, and might make a more full Answer to his Accusation, but he was refus'd, in that he requir'd a thing not usual, nor allowable by Law in a Case of this Nature; whereupon the Judges requir'd him then to answer severally and distinctly to every Point in the Articles of Treason contain'd. Whereunto *Brambre* answer'd, "Whosoever hath branded me with "this ignominious Mark, with him I am ready "to fight in the Lists to maintain my Innocency "whenever the King shall appoint." And this he spake with such a Fury, that his Eyes sparkled with Rage, and he breath'd as if an *Aetna* lay hid in his Breast, chusing rather to die gloriously in the Field, than disgracefully on a Gibbet.

The Appellants hearing this courageous Challenge, with resolute Countenance answer'd, that they would readily accept of the Combat, and thereupon flung down their Gages before the King; and on a sudden the whole Company of Lords, Knights, Esquires, and Commons flung down their Gages so thick, that they seem'd like Snow in a Winter's Day, crying out, "We also "will accept of the Combat, and will prove these "Articles to be true to thy Head, most damnable Traitor." But the Lords resolved that Battle did not lie in that Case, and that they would examine the Articles touching the said *Nicholas*, and take due Information by all true, necessary and convenient Ways, that their Consciences might be truly directed what Judgment to give in this Case, to the honour of God, the advantage and profit of the King and his Kingdom, and as they would answer it before God, according to the Course and Law of Parliament.

This Day, to aggravate the Appellation against the Conspirators, there Feb. 19. came divers Companies of the City of *London*, complaining of the manifold Injuries they had suffer'd from *Brambre*, and other Extortions and Exactions wherewith they had been daily charg'd; and yet they protested, that they did not accuse him either for hate to his Person, or for love, fear or hope of Reward from his Enemies, but they charg'd him only with the Truth. Before they could proceed with his Trial, they were interrupted by unfortunate *Tresilian*, who being got upon the top of an Apothecary's House adjoining to the Palace, and descended into a Gutter to look about him and observe who went into the Palace, was discover'd by certain of the Peers, who presently sent some of the Guard to apprehend him; who entering into the House where he was, and having spent long time in vain in looking for him, at length one of the Guard stept to the Master of the House, and taking him by the Shoulder with his Dagger drawn, said thus, *Shew us where thou hast hid Tresilian, or else resolve thy Days are accomplish'd*. The Master trembling, and ready to yield up the Ghost for Fear, answer'd, *Yonder is the place where he lies*; and shew'd him a round Table cover'd with branches of Bays, under which *Tresilian* lay close cover'd. When they had found him, they drew him out by the Heels, wondering to see him wear his Head and Beard overgrown, with old clouted Shoes and patch'd Hose, more like a miserable poor Beggar than a Judge.

When this came to the Ears of the Peers, the five Appellants suddenly rose up, and going to the Gate of the Hall, they met the Guard leading *Tresilian* bound, crying as they came, *We have him, we have him* *.

Tresilian

* Froissart's Chron. Part 2. fol. 110. relates the manner of his Discovery thus, "Understanding that the King's Uncles, and the new Council at England would keep a secret Parliament at Westminster, he (*Tresilian*) thought to go and lie there to learn what should be done; and so he came and lodg'd at Westminster the same Day their Council began, and lodg'd in an Ale-House right over against the Palace-Gate, and there he was in a Chamber looking out at a Window down into the Court, and there he might see them that went in and out to the Council, but none knew him because of his Apparel. At last on a Day, a Squire of the Duke of Gloucester's knew him, for he had oftentimes been in his Company; and as soon as Sir Robert *Tresilian* saw him, he knew him well, and withdrew himself out of the Window. The Squire had Suspicion thereof, and said to himself, Methinks I see yonder Sir Robert *Tresilian*; and to the intent to know the Truth, he enter'd into the Lodging, and said to the Wife, Dame, who is that, that is above in the Chamber? is he alone or with Company? Sir, quoth she, I cannot shew you, but he has been here a long space. Therewith the Squire went up the better to advise him, and saluted him, and saw well it was true; but he feign'd himself, and turned his Tale and said, God save you good Man, I pray you be not discontented, for I took you for a Farmer of mine in *Essex*, for you are like him. Sir, quoth he, I am of *Kent*, and a Farmer of Sir *John* of *Hollandes*, and there be Men of the Bishop of *Canterbury's* that would do me wrong; and I am come hither to complain to the Council. Well, quoth the Squire, if you come into the Palace, I will help to make your way, that you shall speak with the Lords of the Council. Sir, I thank you, quoth he, and I shall not refuse your Aid. Then the Squire call'd for a Pot of Ale, and drank with him, and paid for it, and bad him farewell and departed; and never

Tresilian being come into the Hall, was ask'd what he could say for himself, why Execution should not be done according to the Judgment pass'd upon him for his Treasons so often committed: but he became as one struck dumb, he had nothing to say, and his Heart was harden'd to the very last, so that he would not confess himself Guilty of any thing. Whereupon he was without delay led to the *Tower*, that he might suffer the Sentence pass'd against him: his Wife and his Children did with many Tears accompany him to the *Tower*; but his Wife was so overcome with Grief, that she fell down in a swoon as if she had been dead.

Immediately *Tresilian* is put upon an Hurdle, and drawn thro' the Streets of the City, with a wonderful Concourse of People following him. At every Furlong's end he was suffer'd to stop, that he might rest himself, and to see if he would confess or acknowledge any thing; but what he said to the Frier his Confessor, is not known. When he came to the place of Execution, he would not climb the Ladder, until such time as being soundly beaten with Bats and Staves, he was forc'd to go up; and when he was up, he said, so long as I do wear any thing upon me, I shall not die: wherefore the Executioner strip'd him, and found certain Images painted like to the Signs of the Heavens, and the Head of a Devil painted, and the Names of many of the Devils wrote in Parchment; these being taken away, he was hang'd up naked, and after he had hang'd some time, that the Spectators should be sure he was dead, they cut his Throat, and because the Night approached, they let him hang till the next Morning, and then his Wife having obtain'd a License of the King, took down his Body, and carried it to the *Gray-Friers*, where it was buried.

On this Day *Brambre* was brought *Feb. 20.* again before the Parliament; but not being able to make any Answer to the Articles wherewith he was charg'd, the like Sen-

tence was pronounc'd against him, as had been before against the other Conspirators. After which he was drawn upon an Hurdle from the *Tower* to *Tyburn*, thro' the City, when he shewed himself very penitent, humbly craving Mercy and Forgiveness at the Hands of God and Men, whom he had so grievously offended, and so injuriously wrong'd in Times past, earnestly desiring all Persons to pray for him: When the Rope was about his Neck, and he was ready to be turn'd off, a certain young Man, the Son of one *Northampton*, ask'd him if he had done Justice to his Father or not [for *Northampton* was some time Mayor of the City of *London*, more ' 1385. wealthy and substantial, than any else in the City; him did *Brambre* and *Holin. Vol. 3. Tresilian* accuse of Treason and Conspiracy against the State, and condemn'd P. 446. him to die, being despoil'd of his Estate, he himself at length hardly escap'd] To whom *Brambre* answer'd, and confess'd with bitter Tears, that what he did was most vile and wicked, and with an intent only to murder and overthrow the said *Northampton*; for which craving Pardon of the young Man, he was suddenly turn'd off, and the Executioner cutting his Throat, he died*.

Robert Belknap, John Holt, Roger Fulthorpe, William Burleigh, John Carey, and John Lockton, being impeached by the Commons, were call'd to answer for their Conspiracy against the Commissioners at *Nottingham*. They could not gainsay, but that the *Questions* were such as were then asked them, but denied the *Answers* to be so: and Sir *Robert Belknap* pleaded in particular, that the Archbishop of *York*, in his Chamber at *Windsor*, told him that he had devised and drawn up the Commission and Statute, whereby the Government was wholly taken out of the King's Hands, and that he therefore hated him above all Men; and that if he found not some way to make void the said Statute and Commission, he should be slain as a Traitor. He answer'd, that the Inten-

" ceased till he came to the Council Chamber-door, and call'd the Usher to open the Door. Then the Usher demanded what he would, because the Lords were in Council: he answer'd and said, I would speak with my Lord and Master the Duke of Gloucester, for a matter that right near toucheth him and all the Council. Then the Usher let him in, and when he came before his Master, he said, Sir, I have brought you great Tidings. What be they, quoth the Duke? Sir, quoth the Squire, I will speak aloud, for it toucheth you and all my Lords here present. I have seen Sir Robert Tresilian disguised in a Villain's Habit, in an Alehouse here without the Gate. Tresilian, quoth the Duke? Yea truly Sir, quoth the Squire, you shall have him ere you go to Dinner, if you please. I am content, quoth the Duke, and he shall show us some News of his Master the Duke of Ireland; go thy way and fetch him, but look that thou be strong enough so to do, that thou fail not. The Squire went forth and took four Serjeants with him, and said, Sirs, follow me afar off; and as soon as I make to you a Sign, and that I lay my Hand on a Man, that I go for, take him and let him not escape. Therewith the Squire enter'd into the House where Tresilian was, and went up into the Chamber; and as soon as he saw him, he said, Tresilian, you are come into this Country for no Goodness; my Lord the Duke of Gloucester commandeth, that you come and speak with him. The Knight would have excus'd himself, and said, I am not Tresilian, I am a Farmer of Sir John of Hollands. Nay, nay, quoth the Squire, your Body is Tresilian, but your Habit is not; and therewith he made Tokens to the Serjeants, that they should take him. Then they went up into the Chamber, and took him, and so brought him to the Palace. Of his taking, the Duke of Gloucester was right joyful, and would see him; and when he was in his Presence, the Duke said, Tresilian, what thing makes you here in this Country? where is the King? where left you him? Tresilian, when he saw that he was so well known, and that none excusation could avail him, said, Sir, the King sent me hither to learn Tidings, and he is at *Bristol*, and hunteth along the River *Severn*. What, quoth the Duke, you are not come like a wise Man, but rather like a Spy; if you would have come to have learnt Tidings, you should have come in the State of a Knight. Sir, quoth Tresilian, if I have trespass'd, I ask Pardon, for I was caus'd this to do. Well, Sir, quoth the Duke, and where is your Master the Duke of Ireland? Sir, quoth he, of a Truth he is with the King. It is shewed us here, quoth the Duke, that he assembleth much People, and the King for him; whither will he lead that People? Sir, quoth he, it is to go into Ireland. Into Ireland, quoth the Duke of Gloucester! Yea, Sir, truly, quoth Tresilian: and then the Duke studied a little, and said, Ah, Tresilian! Tresilian! your Business is neither fair nor good; you have done great Folly to come into this Country: for you are not beloved here, and that shall well be seen; you and such other of your Affinity have done great Displeasure to my Brother and me, and you have troubled to your Power, and with your Counsel, the King, and divers others, Nobles of the Realm; also you have moved certain good Towns against us. Now is the Day come, that you shall have your Payment; for he that doth well, by Reason should find it. Think on your Business, for I will neither eat nor drink till you be dead. That word greatly abash'd Tresilian; he would fain have excus'd himself with fair Language, in lowly humbling himself; but he could do nothing to appease the Duke. So Sir Robert Tresilian was deliver'd to the Hangman, and so led out of Westminster, and there beheaded, and after hanged on a Gibbet.

* Grafton, p. 379. and from him, *Holinshed*, Vol. 3. p. 463. say, that in his Mayoralty he caused great and monstrous Stocks to be made to imprison Men in, as also a common Axe to strike off the Heads of such as should resist his Will and Pleasure; and that he was sentenc'd by the Parliament to be beheaded with his own Axe. *Froisart's Chron.* Part 2. fol. 113. But it appears by the Parliament Rolls, 11 Rich. II. Par. 3. N^o 15. that both he and Tresilian were drawn and hanged.

tion of the Lords, and such as assisted at the making of them, was, that they should be for the Honour and good Government of the State of the King and Kingdom; that he twice parted from the King dissatisfied, and was in doubt of his Life; and said *these Answers* proceeded not from his Good-will, but were made against his Mind, and were the Effects of the Threats of the Archbishop of York, Duke of Ireland, and Earl of Suffolk; and that he was sworn, and commanded in the Presence of the King, upon pain of Death, to conceal this Matter, as the Counsel of the King; and prayed for the Love of God that he might have a gracious and merciful Judgment.

Sir John Holt alledged the same matter of Excuse, and made the same Prayer, so did Sir William Burgh, and Sir John Cary; who all made the same Excuse, and made the same Requests, as did also Sir Roger Fulthorpe, and John Locton Serjeant at Law.

To all which the Commons answer'd, that they were taken and holden for Sages in the Law; and the King's Will was, that they should have answer'd the Question as the Law was, and not otherwise, as they did, with Design, and under Colour of Law, to murder and destroy the Lords, and Loyal Lieges, who were aiding and assisting in making the Commission and Statute in the last Parliament, for the good Government of the State of the King, and Kingdom; and therefore the Commons pray'd they might be adjudg'd, convicted, and attainted as Traitors. Upon which the Lords Temporal took time by good Deliberation to examine the Matter and Circumstances of it; and for that they were present at the making of the said Statute and Commission, which they knew were contrived for the Honour of God, and for the good Government of the State of the King and whole Kingdom, and that it was the King's Will, that they should not have otherwise answered them, than according to Law, and had answered as before, they were by the Lords Temporal, by the Assent of the King, adjudg'd to be *Drawn and Hang'd as Traitors*, their Heirs disherited, and their Lands and Tenements, Goods and Chattels to be forfeited to the King.

Whilst the Peers were trying them, the Clergy were retir'd into the King's Chamber; but when word was brought to them of the Condemnation of the Judges, the Archbishop of Canterbury, the Bishop of Winchester, the Chancellor, the Treasurer, the Lord Keeper of the Privy-Seal, arose hastily and went into the Parliament House, pouring forth their Complaints before the King and Peers, humbly upon their Knees beseeching them, that for the Love of God, the Virgin Mary, and all the Saints, even as they hop'd to have Mercy at the Day of Judgment, they should shew Favour, and not put to Death the said Judges then present.

The Duke of Gloucester likewise, with the Earls of Arundel, Warwick, Derby, and Nottingham, whose Hearts began to be mollified, joined with them in their Petition. At length thro' their Intercession, the Execution upon their Persons was spar'd, and their Lives granted them; but they were sent back to the Tower to be kept close Prisoners, and afterwards were sent into Ireland there to remain for Term of Life*.

On Tuesday, March 3. John Blake, and Thomas Uske were brought into Parliament: and first John Blake was impeached by the Commons, That being retained of Council for the King, he drew up the Questions, to which the Justices made Answer, and contrived with the Persons appealed, that the Lords, and other the King's Loyal Lieges that caused the said Commission and Statute to be made in the last Parliament, should be indicted in London and Middlesex for Treason, and that they should be arrested, and traitorously and wickedly murdered; and that he was aiding and advising in the Treasons aforesaid, with the appealed already executed.

Then Thomas Uske was accused for procuring himself to be made Under-Sheriff of Middlesex, to the end to cause the said Lords, and Loyal Lieges, to be arrested and indicted, as had been said before; and was aiding and counselling the Appealed in the Treasons aforesaid.

John Blake answered, That he was retain'd of Council for the King, by his Command, and sworn to keep secret his Advice, and whatever he did, it was by the King's Command, whom he ought to obey. And Thomas Uske gave the same Answer. Whereupon the Lords Temporal took Deliberation till the morrow, being the 4th of March, when the said John and Thomas were again brought into Parliament; and good Advice and Deliberation having been taken by the Lords, they pronounced them Guilty of the Things whereof they were accused. And whereas they alledged for their Excuse the King's Command, it made the Crime the greater, for that they knew well the Persons appealed and condemned, had encroached to themselves Royal Power, as is said before, and it was their Command, and not the King's. Then the Lords awarded, by Assent of the King, that they should both be *Hanged and Drawn as Traitors*, as open Enemies to the King and Kingdom, and their Heirs disherited for ever, and their Lands and Tenements, Goods and Chattels forfeited to the King: and they were executed the same Day.

On the 6th of March, Thomas Bishop of Chichester was impeached and accused by the Commons, that he was present at the Places and Times when the said Questions were put to the Justices, &c. and the Answers made; and excited them by Threats to answer as they did, and knew the false Purposes and Treasons design'd by the Traitors adjudged, and aided and assisted them, and would not make Discovery to any of the Lords, that caused the said Commission to be made last Parliament, whereby Remedy might have been had for the Safety of the King and Kingdom. To which the Bishop answer'd, That of his own Free-will, he had not excited them to do or say any thing; and further said, they were not excited or charged to say any thing but what the Law was: and touching the Concealment of the Treason, he had made such Assurance as he could not discover: and said further, that the Traitors were about the King, and had such Power over him before, that he had not so great Interest in the King as to prevent those Mischiefs, that now came upon him. The Commons reply'd, He had upon the Matter

* They were thus distributed; Robert Belknap and John Holt in the Village of Dromore in Ireland; not to live as Justices, but as banish'd Offenders, nor to go out of Town above the space of two Miles upon pain of Death. But the King out of his Bounty was pleased to give a yearly Annuity of 40 Pounds to Robert Belknap, and of 20 Marks to John Holt, during their Lives.

Roger Fulthorpe, and William Burleigh in the City of Dublin, with the yearly Allowance of forty Pounds to each during Life, with the Liberty of going two Miles to Burleigh, and of three to Fulthorpe for their Recreation.

John Carey, and John Locton in Waterford, with the yearly Allowance of twenty Pounds to each during Life, with the like Liberty, and like Penalty.

confess'd himself Guilty, and pray'd he might be attainted. Upon this Answer of the Bishop, the Replication of the Commons, and all Circumstances of the Accusation, the Lords took time to give such Judgment, as might be for the Honour of God, and Profit of the King, and Kingdom.

Simon de Burleigh, John de Beauchamp, James Barroverse, and John Salisbury, were brought into the Parliament House, where they were impeach'd at the Instance of the Commons. The Articles exhibited against them were sixteen; the first Article was the first Article in the former Impeachment; in the second Article they were accused as Traitors and Enemies of the Kingdom, for that they knew of all the Treasons in the Appeal mentioned, and that they were aiding, assisting, counselling and assenting to all the Traitors attainted; and that *Simon Burleigh*, and *John Beauchamp* were principal Actors in all the said Treasons. In the eighth Article they were accused for conspiring and designing with the five Persons appealed, to destroy and put to Death those who were assenting to the making of the said Commission and Statute in the last Parliament. Another Article was, That the said *Simon Burleigh* being King's Chamberlain, and being oblig'd to counsel the King for the best, to the Advantage of him and his Realm, he the said *Simon* by his wicked Contrivance and Procurement, advised the King to entertain in his Household great Numbers of Aliens, *Bohemians* and others, and to give them large Gifts out of the Revenues and Profits of the Realm, whereby the King was greatly impoverish'd, and the People otherwise oppress'd. The other Articles are of less Moment, but all relating to the Articles of the Appeal, to which they all pleaded *Not Guilty*.

The Commons replied they were Guilty, and the Lords took time to examine and consider the Impeachment. Upon this and the Bishop of *Chichester's* Impeachment, the Lords adjourn'd until the 20th of *March*, on which Day the whole

Parliament was adjourn'd until the 13th of *April*, on which Day the Lords further adjourn'd till the 5th of *May*; the time between was taken up with the Affair of *Sir Simon Burleigh*: for three Appellants, viz. the Duke of *Glocester*, the Earls of *Arundel* and *Warwick*, with the whole House of Commons, urg'd that Execution should be perform'd according to the Law: On the other side the King and Queen, the Earls of *Derby* and *Nottingham*, and the Prior of *St. John* his Uncle, with the major part of the House of Lords, did labour to have him sav'd.

There was also some muttering among the common People, and it was reported to the Parliament, that the Commons did rise in divers parts of the Realm, but especially about *Kent*, in favour of *Sir Simon Burleigh*, which when they heard, those that before spake and stood for him, now clean left him.

By joint Consent of the King and the Lords, Sentence was pronounc'd *May 5.* against the said *Sir Simon Burleigh*, That he should be drawn from the *Tower* to *Tyburn*, and there be hang'd till he be dead, and then have his Head struck from his Body: but because he was a Knight of the Garter, a gallant Courtier, powerful, and once a * Favourite of the King's, and much respected of all the Court, the King was pleas'd to mitigate his Doom, that he should only be led to *Tower-Hill*, and there be beheaded.

John Beauchamp, Steward of the Household to the King, *James Barroverse*, and *John Salisbury* Knights, *May 12.* Gentlemen of the Privy-Chamber, were in like manner condemn'd; the two first were beheaded on *Tower-Hill*, but *John Salisbury* was drawn from *Tower-Hill* to *Tyburn*, and there hang'd. On the same Day also was condemn'd the Bishop of *Chichester*, the King's Confessor, but because of his great Dignity he was pardon'd, but was banish'd to *Cork* in *Ireland*.

* See a particular account of his Advancement and Greatness, Holin. Vol. 3. p. 464.



The Trial of Sir JOHN PERROT, Lord Deputy of Ireland, at Westminster, for High-Treason, April 27, 1592.
34 Eliz.

The COMMISSIONERS were,

*The Lord Chamberlain,
The Lord Buckhurst,
Sir Robert Cecil,
Secretary Woolley,
Mr. Fortescue,
The Master of the Rolls,*

*Sir Edmund Anderson, Lord Chief
Justice of the Common-Pleas.
Justice Periamé,
Justice Gawdie,
Justice Fenner,
Mr. Rockeby, one of the Masters of her
Majesty's Court of Request.*



IR John Perrot being brought to the King's-Bench-Bar, accompany'd with the Lieutenant of the Tower, and Sir Henry Lee; and Proclamation for Silence being made, the Lieutenant was commanded to return his Writ of *Habeas-Corpus*.

Then was Sir John commanded to hold up his Hand. Here Sir John Perrot made low Obedience, and desir'd he might be heard to speak before he held up his Hand.

He protested that he never had thought of Treason against her Majesty, and desir'd that the Witnesses might be good and sufficient: He knew well the Place whereunto he was brought, and therefore he would submit himself humbly to their Honours, and said, Sithence it was God's Will, and her Majesty's, he gave God hearty Thanks therefore.

Then was he bid to hold up his Hand again. Whereunto he answer'd, Look what is to be done; and here is as true a Man's Hand as ever came in this Place.

The Effect of the Indictment.

"That the last of January 1587, in the 30th Year of the Queen's Majesty, he the said Sir John Perrot falsely and traiterously, &c. did imagine in his heart to deprive, depose, and disinherit the Queen's most excellent Majesty from the Royal Seat, to take her Life away, to make slaughter in her Realm, to raise Rebellion in England and Ireland; and that he did procure a foreign Power to invade the two Realms.

"That one James Eustace, Viscount Baltinglas, being a false Traitor to her Majesty and the State, sent Letters of Treason from Madrid to the said Sir John Perrot by one Dennis Oroughan an Irish Priest.

"That the said Sir John sent Letters of Treason to the said Viscount Baltinglas into Spain, by the said Dennis Oroughan.

"That whereas the Queen's Majesty, in April the 27th of her Majesty's Reign, did write her Letters to the said Sir John Perrot, signifying unto him that her Pleasure was, that the said Sir John should not proceed in any Matters of Government, without the Advice of some of her Majesty's Council in Ireland, wherein she gra-

ciously advised him not to murmur, but to take the same dutifully, and in good part; notwithstanding he the said Sir John, shortly after the Receipt of the said Letters, did send for the Archbishop of Dublin, and reading the same Letters unto him, in a great fury said these words, *If she will use Men thus, she will have cold Service, and some one Day she will have need of me.*

"That in the 29th Year of the Queen's Majesty he did maintain horrible and unknown Traitors, not doing Justice upon them.

"That Pope Gregory XIII. and the King of Spain prepared an Army to invade England; at which time the said Sir John sent Letters to the King of Spain, promising him Aid and Assistance in the Army: which Letters Dennis Oroughan carry'd into Spain, and received of the said Sir John divers Sums of Money therefore.

"That Sir Bryan Oricke, a notorious false Traitor, was procured and animated by the said Sir John to move and stir up Rebellion in Ireland."

Here again Sir John desir'd to speak, and said that he was 64 Years old, and had been long imprison'd, yet very honourably used at my Lord Treasurer's, but found fault with his Lodging in the Tower; and said he was by nature Cholerick, and knew not what Imperfections his Imprisonment might work in him; and therefore if he should happen to fall into any extraordinary Speeches in that honorable Place, he craved Pardon, alledging that the same should not proceed for want of Duty or Obedience.

Then Mr. Sands, Clerk of the Crown, asked him if he were guilty of this first Indictment.

He answer'd, clapping his Hand upon the Bar, in these words; *I am not guilty of any Part of that which is laid down.*

Then was he willed to hold up his Hand again: Whereunto he said, (holding up his Hand) *What again? here is a true Man's Hand.*

The Effect of the second Indictment.

"That the 15th Day of May, in the 27th Year of the Queen, Sir John Perrot being at Dublin, received Letters from Alexander Duke of Parma, craving his Furtherance in giving Aid

"Aid to the King of Spain's Power.

"That the 20th of June, in the 28th year of the Queen, he sent for Sir William Stanley to entreat and confer with him touching his traitorous Purposes; and that on the 30th of June, 28 Eliz. he talked with the said Sir William Stanley to that effect."

Then he was asked if he were guilty of this Indictment: whereunto he answered these words, viz. *Even as guilty as you are in speaking, Mr. Sands.*

Mr. Sands asked him by whom he would be tried.

I will be tried, said Sir John, by God and good Men, and I shall not remember the most of the Points.

Serj. Puckering. Then said Mr. Serjeant Puckering unto him; you shall be remembered of every matter piecemeal.

Sir John Perrot said, I pray God the Lord be not angry with these Courses; there is a Judge in Heaven who knoweth all.

Here the Sheriff was commanded to return the Precept directed unto him for the summoning of the Jury for our Sovereign Lady the Queen, and an O yes made that every Juror should answer to his Name.

The Names of the Jurors.

Richard Martyn Kt.
Hugh Offley Esq;
Christopher Read,
John Macbell,
John Hautrey,
William Kinton,
Henry Row,
William Meggee,
Thomas Fowler,
Richard Weekes,
Henry Holford,
John Powell,

Robert Carr,
John Stone,
Bartholomew Quenye,
John Padge,
John Vavasour,
Humphrey Wylde,
Henry Goodyer,
William Hickcooke,
Thomas Ruffel,
William Paggenton,
Richard Edlyn,
George Millot.

Out of these twenty four were twelve taken, whereof the Foreman was Hugh Offley Esq;

Then Mr. Sands willed Sir John to mark the Jurors well as they were called to be sworn, to see if he knew Cause of Challenge to any of them, before they were sworn between our Sovereign Lady the Queen and him.

Whereunto he answered: Woe is me that she is made a Party against me! And then he demanded of my Lord Chief Justice of the Common Pleas how many he might challenge.

The Lord Chamberlain answer'd, that they of the Bench were not to give Counsel to the Prisoner.

Then said my Lord Buckburst unto Sir John, If you have any just Cause of Challenge against any of them, you may challenge; if not, why should you challenge?

Then he challenged two of the Jurors, and said, Lord send me Justice, and for God's sake let me have good Men; and wished he might have Men of his own fort, and such as knew Service, and feared God; and desired that none might go upon him that had any suit in Law with Sir Thomas Perrott his Son; and wished for more good Aldermen: yet if they that were sworn feared God, he cared not.

Here the Indictment was read unto the Jury, and after that an O yes made to know if any Man

were there to give Evidence against the Prisoner at the Bar in behalf of her Majesty.

Then Serjeant Puckering rehearsed to the Jury the principal Points contained in the Indictment aforesaid. But before he handled the same, he opened unto the Jury, that the Original of his Treasons proceeded from the Imagination of his Heart; which Imagination was in it self High-Treason, albeit the same proceeded not to any overt Fact: and the Heart being possessed with the abundance of his traitorous Imagination, and not being able so to contain it self, burst forth in vile and traitorous Speeches, and from thence to horrible and heinous Actions; for Mr. Serjeant said, *Ex abundantia cordis os loquitur.*

Then Sir John pray'd Serjeant Puckering to lay aside words, and to proceed to the matter of the Indictment. Whereunto he answered, he would proceed by degrees; but would first begin with his contemptuous Words, which contained in them High-Treason.

Then Serjeant Puckering shewed, That Sir Nicholas Bagnol, Marshal of Ireland, being with Sir John Perrot in his House, and entring in Communication together, and falling into hot words, Sir John brake forth into these Speeches, *If it were not for yonder pild and paltry Sword that lieth in the Window, I would not brook these Comparisons:* Speaking of her Majesty's Sword of Justice carried before him.

To this he answered; That he termed the same after that sort, because the Scabbard of the same Sword was old and worn; and within one Week after he caused a new Scabbard to be made. And then falling from that Point to other idle Discourse, my Lord of Buckburst told him, he was before a Bench very wise and learned, and before a wise Jury; and therefore if he spoke not to purpose it would but hurt his Cause, and give them all occasion to think that he had nothing to speak in his own Defence: for if he had, he would not go from the same, and follow other frivolous and unnecessary matters.

Then it was shewed that the Queen's Majesty having directed her Letters of Commandment to Sir John Perrot in the behalf of Sir Tibert Butler, for the placing of the said Sir Tibert Butler in the Barony of Kaire, he the said Sir John being moved therein by the said Sir Tibert Butler, at the Council-Table in the Castle of Dublin, used these Speeches, *Stick not so much upon the Queen's Letters of Commandment, for she may command what she will, but we will do what we list.*

To this matter Sir John answered; He remembered not what Speeches he then used, and said it might be he used some Speeches cholerickly, as naturally he used to do, for it was his Disposition: but notwithstanding any Speeches whatsoever, yet he said he executed her Majesty's Commandment therein; and added, that he did always from time time to execute her Majesty's Commandments or Warrants in all things whatsoever.

Then said my Lord Chamberlain, You are not charged with not executing her Majesty's Commandment, but with contemptuous Speeches used against her Majesty in the matter.

Then Sir John going from the matter, and speaking more than was needful, my Lord Anderson willed him to have patience to hear all, and then to answer all.

Then was it shewed, that Sir John calling a Parliament at Dublin, among other matters he

moved to suppress the Cathedral Church of St. Patrick in Ireland; and her Majesty then sending Letters to the contrary, he used these words with a stern Countenance, *Nay, God's Wounds I think it strange she should use me thus.* With these words the Bishop of Meath was moved, and found fault with his undutiful demeanour; and said, he spoke as tho the Kingdom were his own, and not the Queen's.

To this matter Sir John answered by way of Excuse, and said, that the Archbishop of Dublin was his mortal Enemy, and that the Reason why he was moved to suppress the said Cathedral Church, was to have an University erected thereupon; but he said he was withstood by the said Archbishop, because he and his Children received by the said Cathedral Church 800 Marks a year: And he said further, that the said Archbishop bare him the greater Malice, for that the Queen's Majesty sending her Letters unto him for the discharging of many idle and unnecessary Pensions, he discharged among the rest one of the Archbishop's Sons.

It was then declared, that whereas the Office of the Clerk of the Exchequer was void, and that Mr. Errington had made humble suit unto her Majesty to be preferred to the said Office, in consideration of his good and dutiful Service; her Majesty directing her Letters to Sir John for admitting the said Mr. Errington into the said Office, he the said Sir John Perrott used these undutiful Speeches upon the Receipt of the said Letters, *This fiddling Woman troubles me out of Measure; God's Wounds he shall not have the Office, I will give it to Sir Thomas Williams.* This was proved by the Oath of Philip Williams.

Against Philip Williams Sir John took Exceptions; affirming the said Williams to be his mortal Enemy; and said he was a naughty leud Man, of no Credit, and had abused my Lord Treasurer in a Letter; for the which he said he did beat him in his Chamber: And further he said, he did write to the Master of the Rolls, and to Mr. Powle, touching the leud and undutiful behaviour of the said Williams.

Then it was shewed that Sir John Perrott having received Letters from her Majesty, wherein she checked him for divers Complaints, having read the same Letter, he used these undutiful Speeches; *It is not safe for her Majesty to break such unkind and sour Bread to her Servants;* he being Lord Deputy, and a Servant of Trust. This was spoken to Philip Williams.

Afterwards Philip Williams being his Secretary, writing to her Majesty in Sir John Perrot's Name, among other things he said, *he would be sacrific'd for her;* which words Sir John reading, bad Williams put them out; saying, *he had little cause to be sacrific'd for her:* adding, *that he could not forget her ever since the time he could not get Justice of her, against some of her Guard, for murdering some of his Men.*

When it was bruited abroad that the Spanish Fleet was in preparation for the invading of England, Sir John entring into Communication with Philip Williams touching the said Army, Philip Williams said, *he hoped God would bless us for her Majesty's sake:* whereunto Sir John Perrot answered, *God's Wounds, and why for her sake? never the more for her sake.* This was proved by the Deposition of Williams.

Here Sir John called for Williams, that they might speak face to face: whereunto Mr. * Attorney said, that Williams was in the Tower in the same State that he was, and was to answer to matters of his Treason as well as he.

* Sir John Popham.

Then it was shewed, how the Queen sent him a Letter, wherein she wrote very favourably unto him, advising him to look well unto his Charge, about the time the Spaniards should come: whereupon he spake these words; *Ab silly Woman, now she shall not curb me, she shall not rule me; now God's Lady dear, I shall be her white Boy now again; doth she think to rule me now?*

Shortly after John Garland brought a Letter from her Majesty to Sir John Perrot; whereat he conceived great discontentment, insomuch that he broke forth into these undutiful Terms following, *God's Wounds, this it is to serve a base Bastard Pifs-kitchin Woman; if I had served any Prince in Christendom, I had not been so dealt withal.* Here he prayed the Devil might take him Body and Soul, if ever he uttered such words, and exclaimed against Garland. Sir John talking with Nathaniel Dillan Clerk of the Council of Ireland, asked him this Question, viz. *If her Majesty should be distressed, dost not thou think that I am the fittest Man in England to have the keeping of her Body?* This was verified by the Oath of Nathaniel Dillan.

Talking with the Archbishop of Dublin in his Chamber touching the coming of the Spaniards, Sir John said, *God's Wounds, let them do in England what they can, we shall do well enough in Ireland; if her Majesty were gone, we should do here in Ireland better than they in England should do.* This was justified by the Oath of the Archbishop of Dublin.

Whereunto he said, he renounced God's Mercy if he ever spake any such words.

And all this, Serjeant Puckering said, did declare his malice against her Majesty.

My Lord Buckburst told him that those Speeches did shew a disloyal mind.

Here Sir John exclaimed against the Witneses, calling them leud and wicked Men, and saying he was bought and sold.

When Sir John Perrot said, that he wrote his Letters to her Majesty, desiring to be revoked and called home, and made suit to Sir Francis Walsingham to that effect; Mr. Popham told him, that when he saw him curbed, as himself termed it, by the Council, and that he could do nothing without their privity; then he sought to come away, with an intent to make himself a Ruler in Wales.

Here they proceeded to the Treasons.

Mr. Attorney declared that Doctor Craugh being a known Traitor, and a Man that had maintained Religion from time to time, and had seduced many People in Ireland, and was a dangerous Instrument to be suffered in those Parts; and Sir John being given hereof to understand, did not use that diligence in the apprehending of him, as became his place: for after he had given out Warrants for the seeking of him, then he gave out a countermand they should use all diligence in apprehending of him in all places, except in the white Knights Country, where Sir John knew the said Craugh to be; which did manifestly shew he would not have him taken.

My

My Lord *Buckhurst* said to Sir *John*, that he granted Warrants to take him where he was not.

Sir *John* said, there was a God that knew all ; marvelling that he having known Religion these forty six Years, should be charged with favouring of Priests and Massmongers.

Mr. *Attorney* willed him not to stand upon Religion, for then said he we shall prove you irreligious. Will any Man of Religion seek to have Men murder'd ? Will any Man of Religion stab a Man in the Cheek, and after bring him to the Fire to be roasted, to make him confess that he knoweth not, and afterwards hang him by martial Law ?

Mr. *Attorney*, to prove Sir *John* of no Religion, further shewed, that Sir *John* being in his Chamber at the Castle of *Dublin* looked out at the Window, and espied Sir *Dennys Oroughan*, who knew all his secret Treasons, and willed his Chamberlain to call unto him *Stephen Seager* ; who being come, Sir *John* commanded away his Chamberlain, and locked the Chamber, and willed *Seager* to look out at the Window, and said, seest thou not one beneath in a black Mantle ? *Seager* said he saw none there ; Sir *John* said there is one there : you see how I am crost by some of the Council here, and he is going to the North with Letters from some of the Council to move them against me ; I would have thee take these Letters from him, kill him, cast him aside, and bring those Letters to me. *Stephen Seager* hereunto answered, that he would rob him of the Letters, but he would not kill him with his hands ; or if he would give Commandment to hang him by martial Law, he would see it done. Whereupon Sir *John* said, *Go thy ways, thou art a paltry Fellow, I did it but to prove thee.* This was proved by the Oath of *Seager*.

Sir *John* then called for *Seager*, to speak with him Face to Face, who justified all that he had said.

My Lord *Chamberlain* said, now you see you bad him kill one.

Then said Sir *John*, because he hath sworn it I will not reprove him ; it may be I spake such words, but I remember it not.

Mr. *Attorney* said, we have alledged these matters against you, to shew you to be a Man of no Religion.

Whereat Sir *John* stormed, and was angry ; saying, they went about not only to make him a Traitor to his Prince, but a Traitor to God, which he said they should never do.

* Mr. *Egerston*. * Mr. *Solicitor* told him that all the Papists desired his Government there.

Mr. *Attorney* then declared further, that one *Richard Morrice*, a Priest, a notorious Traitor, being a Passer from *Ireland* to Viscount *Baltinglas* in *Spain*, and from thence to *Rome*, to confer of Rebellions and Invasions for *England* and *Ireland*, Sir *John Perrot* knowing the said *Morrice* to be a most dangerous Person to the State, would not give Order for the taking of the said *Morrice*, as he should have done : but the Bishop of *Cashell* caused him to be apprehended of his own Authority, and sent him to Mr. *Poor* the Sheriff, to be sent to the Castle of *Dublin* ; whereupon the Friends of the said *Morrice* told them that *Morrice* had better Friends than all they had ; and shortly after *Morrice* was discharged, and never called more in question. And all this was affirmed by the Oath of the Archbishop of *Cashell*, and of the said *Poor*, *viva voce*.

V O L. V.

Then said Mr. *Attorney*, that *Halie* being a Man that conversed with *Craugh*, and dealt with him in his Treasons, told him that *Poor* had a Warrant to apprehend him and others : Whereupon he told him, that he could be better trusted then twenty such as *Poor* was that should take him ; presuming upon the Favour of Sir *John Perrot*.

The Archbishop of *Cashell* did complain to Sir *John*, that the said *Halie* was a notorious Traitor, and thereupon delivered to Sir *John* Articles against him and others, and desired Sir *John* to grant him a Commission for the apprehending of them ; praying him in the mean time to keep the said Articles secret until they were apprehended : Notwithstanding, before they could be apprehended, within three days, the self-same Articles were taken from one *Patrick Young*, being a Partner with the said *Halie* in his Treasons ; and thereupon they all escaped.

Mr. *Solicitor* then said unto the Jury, You see *Halie* was accused of Treasons, and the Accusations being delivered to Sir *John* in secret, he sent them to *Halie* before he could be apprehended, which was plain Treason. And this was verified by the Bishop of *Cashell*'s Oath.

The Lord *Chamberlain* said, you ought to have acquainted no body with the Cause, until they had been apprehended.

Sir *John* protested, and took God to his Record, he was ignorant what was become of him.

Then Mr. *Attorney* turning to the Jury said, By this which hath been proved, you may see how he hath always been a Confederate and Maintainer of notable Traitors against her Majesty ; namely these three, *Craugh*, *Morrice*, and *Halie*, with others their Confederates.

At what time a Rebellion was raised in the North part of *Ireland*, divers of the said Rebels made Rhymes of her Majesty, wherein they shewed themselves Rebels and Traitors, as concerning her Birth ; Traitors as concerning her Person ; and Traitors to her Royal Dignity : which Rhymes came to the Hands of Sir *Richard Bingham*, and the Rhymers taken and committed to Prison, and one of the said Rhymers sent to Sir *John Perrot* by *Woodhouse*. Sir *Richard Bingham* sent them to Sir *John Perrot*, certifying him what he had done, and prayed Sir *John Perrot* to write his pleasure what should be done with them : whereupon Sir *John* sent him word to discharge them all. Howbeit Sir *Richard* detained the chiefest of them in Prison ; but Sir *John* afterward sent a special Warrant to the said Sir *Richard* to discharge him, taking Bonds of him for his Appearance by a Day : All which he confessed to be true, saying, that by virtue of his Patent he might pardon them. This was proved to be true by *Marbury* and *Woodhouse viva voce*.

Whereunto Mr. *Attorney* answered, that he could pardon no Traitors to her Majesty's Person, but ought rather to have proceeded in Justice against them. And here he willed the Jury to consider upon this Point.

Sir *John* then said to Mr. *Attorney*, By God I never saw such a Man since I was born. I pray you sit down and let me speak ; and so he turned his talk to *Woodhouse*, and said, he had spoiled the North part of *Ireland* ; with other frivolous Speeches.

Sir *Brian Orurke* a notable Traitor, and executed of late at *Tyburn*, about that time, in a *Christmas*, disposing himself to Villany, took down

down a Picture, and did write *Elizabeth* thereupon ; and using the same in most contemptuous and despiteful manner, tied the same to a Horse-tail, and he with others dragged it in the dirt, and hacked it with Gallow-glass Axes, signifying how they would have used her Majesty if they had her in their Power. This traitorous Act being made known to Sir John Perrot, he would not give Order for the apprehending of the said *Orurke*, to do Justice upon him for so horrible a Treason ; whereas he might have had him if he had sent but his Horse-boy for him, and after he was known to be in Company with him. To this he said little.

Sir Dennis Oroughan being called to testify against Sir John Perrot, and the Book being offered him to swear, Sir John said it was no matter whether he were sworn or not, for his Word and his Oath were all one ; for there was neither Truth nor Honesty in him.

My Lord Buckhurst said he must be sworn, for it was for the Queen.

The said Sir Dennis Oroughan told Mr. Poor, that he had been in *Spain*, and had brought Letters from Viscount *Baltinglass* to *Feugh Mackbeugh* in *Ireland*, and divers others ; and said that he had News to tell the Lord Deputy, that would save the Queen one hundred thousand Pounds. Poor discovered this to Sir John Perrot, and Dennis was committed to Prison in the Castle of *Dublin*.

Sir John knowing that Dennis was in Prison, sent for him to come unto his Bed-chamber, where he had Conference with him, and told Sir John he had brought him a Letter from Viscount *Baltinglass* in *Spain*.

Sir John demanding of Dennis why he gave him not the Letter at his first coming out of *Spain* ? he answered, for fear of being executed as one Doctor *Halie* late was : and he sent a Letter and a Token to his Wife that she should bring him the same which was in a Box ; which Letter and Box *Margaret Leonard* Wife of Sir Dennis did shortly after deliver to Sir John Perrot in his Bed-chamber. For Proof whereof one *Rice Thomas*, and *Margaret Leonard* both deposed, that the said Letter was delivered to Sir John Perrot as declared. *Feugh Mackbeugh's* Wife affirmed, that Dennis brought her Husband a Letter from *Baltinglass* in *Spain*.

Now Dennis being known to have had Conference with a notable Traitor in *Spain*, and to bring two notable Traitors in *Ireland*, and committed to the Castle for Treason, was nevertheless set at Liberty in the Castle, and had access to Sir John early ; and they sat for a long time together, and he had his meat and drink in the Porter's Lodge in the withdrawing Chamber, next to his Bed-chamber, and other places, and commandment to have Wine and whatsoever he wanted, and had a private way to his Bed-chamber. This did Sir Dennis testify himself ; to whom Sir John said, A mischief on thee, I pray God ! Woe be to the time that ever thou wert born, or that ever I saw thee ! One *John London* also justified, that the said Dennis had the favour and maintenance of Sir John Perrot for half a year together.

Here Sir John Perrot being pressed by the Queen's Counsel, said unto them, No one Man can answer such three grave learned Men as you are, you cloy me now I cannot speak.

Then said my Lord Buckhurst unto him, Truth will answer it self, and Innocency defend it self.

Then my Lord Chamberlain said, That never was any Man that came to that place dealt withal so favourably as he was : And greater Men than he have not had that favour, as to bring their Writings and Letters with them.

Then Sir John said, He thanked God and the Nurse of Mercy, the Queen's Majesty, whom he called the Handmaid of *Jesus* ; and said, he always carried so reverend an opinion of her, that had she not been a Queen, he would have made her one, if it had lain in his power.

Then was touched the extreme Malice Sir John shewed against the *Cavener* : and the better to execute his purpose, Sir John found means that the *Cavener* should offend the Law, by making an escape out of Prison ; and so being escaped, was after taken and hanged.

This matter being urged against Sir John, he said, you win Mens Lives away with words.

My Lord Chamberlain said, I fear me the *Cavener's* Blood will light upon you.

Now Sir John Perrot began to discredit the Testimony of Dennis the Priest, saying, he had changed his Religion five times in six years ; and he did counterfeit himself a regish Bishop.

The Queen's Attorney then said, If he were so leud a Man of his Life, I marvel you would commerce with him, and repose your self so much upon his honesty.

A Man of no Religion can be no Witness, said Sir John ; he is a Sorcerer and a Witch.

To which he was answer'd, If he were so defamed, why did you favour him so much ? how many Pardons have you given him ? It was said he had given him two.

Sir John proceeded against Sir Dennis, and said he had counterfeited his Hand above eight times ; was a common Drunkard, a common Liar, and had been forsworn a thousand times.

The Attorney then said, If he were the worst Man in the World, yet was he worse for Sir John Perrot.

Dennis was then called again, and said, that Sir John delivered him two Letters to carry to the King of *Spain*, signifying that he would be a Mean to help him to *England* and *Ireland*, so he might have *Wales* : but he would have it as the Princes of *Germany* have their Dukedoms, that is *jure regio*, to be a Prince and Lord himself, and not to depend on any other. And here withal he deliver'd to the said Dennis fifty Pounds, and so the said Dennis departed to *Rosse*.

The said Dennis did farther swear, that Sir John Perrot and Sir *Brian Orurke* were Confederates together in the Parliament ; and that each of them swore to other to further the King of *Spain* in the Action of *England*.

Here Sir John Perrot waxed hot against Sir Dennis, and said, he was a lousy Villain, and a Rogue, and bad the Pox upon him.

One *Francis White*, and others of *Rosse*, said, that true it was that the said Dennis was at *Rosse*, ready to go for *Spain*, and came to him to change Silver into Gold ; but after fearing and suspecting some body in the Ship, he would not go himself, but procured one *Davie* to carry the said Letters into *Spain*, with great Charge for the safe delivery thereof, and gave him five pounds for his pains. It was further declared, that Sir John having Conference with Sir *William Stanley* in *Ireland*, Sir John wished him to revolt, assuring him that the *Irishmen* would live and die with him.

Sir William Stanley going from Ireland to have 1600 Men for the Low-Countries, Feugh Mackheugh, being a known Traitor, brought him certain Men, and bad his Men do as Sir William Stanley would have them to do, whether it were right or wrong; and thereupon they shook hands and parted.

To this Sir John Perrot said, if Stanley be a Traitor, what is that to me?

It was proved that Sir Thomas Williams sent Letters from Ireland into England, to Sir John Perrot, with strict charge given to the Bearer that he should deliver them safely to his own hands; and made them to be sowed to the lining of his Doublet within his Bosom: which Letters were delivered to Sir John Perrot at York House.

John Burgh of Abson had Conference with Sir William Stanley at the Groine, who amongst other Speeches asked him what places in England were fittest for Landing, if the King of Spain should invade England again? Burgh answered, Portsmouth; Sir William Stanley disliked of that, saying he knew nothing, but rather thought Milford-haven the fittest place; affirming they should find better Friends in Wales than the Queen had, and some of them were near the Queen.

Letters were sent from the Duke of Parma to Sir John Perrot by one Browne, and an Answer from the said Sir John to the said Duke by the said Browne, to whom the Duke gave a Bark. It was likewise proved that he sent Letters to Sir William Stanley.

When Sir John Perrot was to come to England, he went about to get a Pardon for all his Actions before he would come over, wherein he shewed his guilty Conscience.

Here the Queen's learned Counsel prayed the Jury to consider well of that which had been said, and willed them to go together.

Then Sir John Perrot willed them to consider their Charge, and have a Conscience in the matter; and to remember that his Blood would be required at their hands, if they dealt further than their Conscience did warrant them.

Then the Jury departed from the Bar, and within three quarters of an hour returned to the Bar; and being demanded whether the Prisoner were guilty or not of the several Treasons comprised in the Indictment, they answered Guilty.

Then Serjeant Puckering in the Queen's Name began to pray Judgment; and Sir John Perrot desired most humbly that he might speak with some of their Honours before Sentence should be pronounced.

Whereunto they condescended, and commanded he should be brought to talk with them in the Chancery; where after some Communication had among them, they all repaired to their places, and Sir John came to the Court of King's-Bench being with them, and Judgment was stayed, until her Majesty's Pleasure were further known.

Then was the Court adjourned to the Tuesday next, being the second of May; and so the Court ended, and every Man said, God save the Queen.

For the better understanding of the aforesaid Arraignment of Sir John Perrot and the Judgment that followeth, it is to be known that at the time of his Arraignment, being the 27th of April, Anno 34 Eliz. Mr. Puckering was the Queen's Serjeant at Law, Mr. Popbam the Attorney General, and Mr. Egerton Solicitor.

But before the day he was brought to receive Judgment, her Majesty's said learned Counsel were removed as followeth; that is to say, Mr. Puckering was made Lord Keeper of the great Seal of England; Mr. Popbam was made Lord Chief Justice of the Queen's-Bench, and Mr. Egerton of Solicitor was made Attorney General.

This making and removing of Officers was done at the Court of Greenwich on Saturday the 28th of May 1592.

My Lord Keeper went to Westminster to take his Oath very honourably, with Lords, Knights and Gentlemen, on Saturday the 4th of June 1592. Anno Eliz. 34. And that Day took his Oath, and sat first in the Chancery. On Wednesday following he first sat in the Starchamber.

On Friday the 26th of June Sir John Perrot appear'd before the Commissioners; who were,

The Lord Chamberlain,	The Lord Chief Justice of the Common-Pleas,
The Lord Buckhurst,	Justice Gawdie,
Sir Robert Cecil,	Justice Pennel,
Secretary Woolley,	Mr. Rookebie one of the Masters of the Court of Requests.
Mr. Fortescue,	

First the said Sir John Perrot that Morning was brought in a Coach from the Tower to the Old Swan, and thence conveyed by Water to Westminster-bridge.

Between the hours of eight and nine of the Clock he landed at Westminster-bridge, and was brought into Westminster-Hall, being accompanied with Mr. Crooke, Son in Law to the Lieutenant of the Tower, on his right Hand, and Mr. Blunt, Son to the Lieutenant on his left Hand, and being strongly guarded by divers of the Yeomen of the Guard, with Halberds, and the Lieutenant's Men with Weapons all round about him: and in that sort he was brought up to the Queen's-Bench Bar, where he stood for a quarter of an hour bare-headed, expecting the coming of the Commissioners. But Mr. Rookebie one of the Commissioners was set, who had taken his place before the coming of Sir John Perrot into the Hall, and tarried for the coming of the rest of his Associates.

The said Sir John Perrot was clothed in a Doublet and Hose of black Sattin plain, and a Gown of wrought Velvet furred, and a square or flat crowned black felt Hat, with a small Band, and a plain white Ruff.

The said Mr. Crooke, and Mr. Blunt supplied the room of the Lieutenant, for that he was sick, and could not be there in Person.

Divers of the Queen's Commissioners, and her learned Counsel being come to the Hall, staid until the coming of the Lord Chamberlain, at whose coming they all took their places and sat in Judgment.

Then an O yes was made, and the Lieutenant of the Tower call'd to return his Writ, or Warrant directed unto him for the bringing of the Prisoner forth.

Then Mr. Crooke having the said Warrant, which was written in Parchment, and having four or five Seals of red Wax annexed to the same by slit Labels, delivered in the same to the Court; and humbly craved that the Lieutenant might be excused for his absence, and declared the cause thereof.

Whereupon

Whereupon Mr. *Sands*, Clerk of the Crown, taking the said Writ, and turning his Face to the Lord Chamberlain, read the Return thereof, being in Latin, the common and ordinary Return of an *Habeas Corpus*.

Then Serjeant *Snagg* for the Queen, being one of her Majesty's learned Counsel, moved the Lords to this effect, That whereas Sir *John Perrot* was before that time indicted of Treason and arraigned, pleaded not Guilty, and put himself on the Country, who found him guilty of High-Treason, therefore he pray'd, on her Majesty's behalf, that Judgment might be given accordingly.

Then *Sands*, Clerk of the Crown, spoke unto Sir *John*, saying, Thou hast been heretofore indicted of High-Treason by the Name of *John Perrot* late of *London* Knight, and being thereupon arraigned, thereunto didst plead not Guilty; and didst put thy self upon the Country, who found thee guilty of High-Treason: what hast thou now to say for thy self, why thou shouldst not have Judgment to die?

Sir *John* making low Obeisance, answered; First whether he might be permitted to take any Exception against the Indictment, and if he might, then he requested he might be thereunto permitted.

To this the Lord Chief Justice *Anderson* answered, he might not be permitted.

Then Sir *John* made a protestation of a quarter of an hour long, wherein he included the Mercy of her Majesty toward him, extolling her to be the only mirror of Mercy of all the Princes in the World; and said, God forbid that ever his Heart should imagine Treason or utter such unreverend Speeches of her sacred Majesty, who had exalted him so highly from the estate of a Gentleman, and of whose Bounty and gracious Favour he had so liberally tasted; but complained of the hard and false dealings of the Witnesses towards him in these Causes, who he said, falsely, maliciously, and perjuriously accused him, but said he found no fault in the Proceedings of the Law, but that he had good and orderly Proceeding therein: and then again extolling her Majesty's great Mercy and Favour towards him, protested his Innocency in the Cause to be such, that he forsook God's Mercy and his Saviour's Merits, if ever he meant any Treason or Treachery towards that gracious Queen *Elizabeth*; and said, that he knew her Majesty's great Clemency and Mercy towards him proceeded from her Majesty's own Heart, by the mere Providence of God, who knew his Innocence in this Cause, in staying him so long from Judgment, which he affirmed to be now six times; especially after such heinous matters being proved against him, but, as he said, most falsely and untrue.

Whereupon my Lord Chamberlain conceiving these words to tend, that her Majesty had so long deferred Judgment, being persuaded thereunto of his Innocency in the Fact, and that her Majesty was persuaded that he had been hardly dealt withal, and unworthily condemned; wherefore my Lord Chamberlain said, he was much to blame to use any such Speeches to that end or purpose; and said, That the conceit of his Innocency was not the cause her Majesty deferred his Judgment so long; and used very vehement Speeches against the said Sir *John Perrot* in that point, saying his Treasons were most manifest and apparent, and

for his Trial he received more favour than any other Traitor that ever he saw, and there were more Witnesses of his own Men and others than ever he saw against any other Traitor.

Whereupon Sir *John* said, I pray your Lordship interrupt me not: for the Lord Chamberlain began these Speeches in the midst of Sir *John's* matter.

Then said my Lord Chamberlain, you must be interrupted in this Point; and proceeded more vehement and earnest against him than before.

Sir *John Perrot* pray'd his Lordship not to misconstrue his meaning, and said, he meant no such matter touching her Majesty's conceit of his hard usage, as his Lordship took his words to be; for, said he, I can recite my words again, which in effect were, that her Majesty being the only Prince of Mercy, had dealt with him most graciously, in forbearing thus long with him for his Judgment.

Mr. *Egerton*, now Attorney, then stood up, and directing his Speeches to my Lord Chamberlain and the rest of the Bench said, he had thought to have moved their Lordships touching Sir *John Perrot's* Speeches in that point, which, as he said, were by protesting his Innocency to seduce and deceive the Audience to think him innocent, and not guilty of Treason, and that he had been injuriously condemned; whereas it was most manifest that he was most justly condemned of most heinous Treasons; and that in his Trial he received most favourable hearing.

Whereunto Sir *John Perrot* replied and said, Mr. Attorney, you did me wrong now as you did me before.

I never did you wrong, said Mr. Attorney.

You did me wrong, said Sir *John*.

Instance wherein I did you wrong, said Mr. Attorney.

You did me wrong, said Sir *John*.

I never did you wrong, said Mr. Attorney.

All these Speeches were spoken with great vehemency each to the other.

My Lord *Buckburst* directed his Speeches towards Sir *John* to the like effect, touching his Guiltiness and Trial, as my Lord Chamberlain had said before; adding further, That whereas he went about to persuade the Audience, that the Cause which moved her Majesty to defer his Judgment, was her conceit of some hard Proceeding against him at his Arraignment, which was not the Cause indeed, that therein he did injury to the Judges, Jury and Witnesses; and said it was very evilly done of him, to utter any Speeches to any such end: saying further, that my Lord himself had been at and upon the Trial of divers Traitors before that time, far Sir *John's* Betters, and said he had seen divers Traitors condemned of Treason upon the tenth part of the Evidence that was against him, and yet justly condemned of Treason; and you Sir *John* are condemned justly of a Mass of Treasons: and the said Lord said, in his Conscience he thought him guilty of most heinous Treasons, and that he was worthily condemned: and he said also, that divers and sundry Witnesses, very sufficient, had proved Treason against him most manifest; and said withal, Sir *John* would you have all these, being so many in number, as testify'd against you, to be all perjured, and you only believed? No, no, it is not possible to be true, neither will any Man believe it, Sir *John*.

My Lord Chamberlain spake again, and said, There had been thirty Witnesses produced against him at his Arraignment, who proved Treason against him; and that he was a Traitor worthily condemned of Treason; and said, he never saw any Traitor have such indifferent Trial, and such sufficient Proofs produced against him: adding further, that he might speak his Will, but no Man would believe him; and that he had spoken much already, but not a true word of all he spake.

Then Sir *John* alledged that the Matter was set forward and followed by his Enemys in *Ireland*, and that he was condemned by *Irish* Witnesses all, and that no one *English* Witness had proved Treason against him.

My Lord *Buckburst* said, He had both *Irish* and *English* Witnesses, and those his own Men.

Sir *John* said, It was more than he knew.

Sands said, *Philip Williams* was an *Englishman*.

Sir *John Perrot* said, He proved no Treason: and further he said, That the *Irish* Witnesses had no respect of an Oath; and that for a small value, a Man might procure a number to swear any thing. And for proof thereof, he appealed to some of the Bench that had been in *Ireland*, and threw his Hand towards Mr. *Rookeby*, that they knew the same to be true; he also said, that God would plague the Prosecutors of this Cause against him for their corrupt dealing therein.

He also, with great protestation in the midst of his Speeches, utterly denied that ever he intended or meant to murder any Man, as he was falsely accused; and said, that now lately he had found among his Writings a Letter of that wicked fellow's that accused him thereof, *Stephen Seager*, and said he had that Letter about him to prove his Testimony false; and said that that Matter grieved him more than any other Matter. He also with great protestation denied that he was ever a Papist in Heart or Soul, or ever favoured any of them, but was of a sound Religion these 45 Years, ever since the second Year of King *Edward*; and for trial thereof, he referred himself to divers there present that were old Parliament-Men of his Speeches touching Religion in divers Parliaments.

My Lord Chamberlain answered him, That he was not charged for murdering or intending to murder any Person, altho the same was proved to his face by his own Man.

Sir *John* said, Altho the same was not objected to his Charge, it was laid open against him to make him infamous to the World, which grieved him most of all; and said, that *Seager* in the end denied it again.

My Lord Chamberlain said, he denied it not, but justified it to his face.

Sir *John* said, that *Seager* said Sir *John* told him that he did it but to prove him what he would do.

Then my Lord *Anderson* Chief Justice of the Common Pleas, asked him whether he had any thing to say in Arrest of Judgment?

Sir *John* answered, Seeing it pleased God and the Queen he should come to that pass, he had nothing to say, but humbly submitted himself to the Law and their Lordships.

My Lord *Anderson* then asked if he had the Queen's Pardon? Then he said he had no Pardon.

Then my Lord *Anderson* proceeding to pronounce Judgment, began with a long Discourse, reciting divers good Blessings of God upon this

Realm, namely the establishing of true Religion, and to be governed with so gracious a Prince, and many other good Blessings of God bestowed upon us; yet notwithstanding, divers wicked and traitorous Persons, discontented with the State, had practised divers and sundry Treasons, which by the great and mighty Providence of God, had been from time to time revealed. And omitting divers foreign Treasons, many Treasons had been practised here at home; and said, That he himself had been at the Arraignment of divers, as namely of *Babington*, *Abington*, with others; adding, that the Treasons of Sir *John Perrot* far surpassed them all, most wickedly conspiring her Majesty's Death and Deprivation, and Invasion of this Realm by foreign Enemies, and taking in the *Spaniards* to the Destruction of so many thousands of good and natural Subjects. Lord *Anderson* consented with the two other Lords, that he was worthily and justly condemned of Treason, of good and sufficient Proof; and said, that at his Arraignment he had Indifferency with Favour, and commended the Goodness and Substantialness of the Jury that tried him at his Arraignment. And then he proceeded to Judgment, which was by him pronounced to this effect:

That he should be carried by the Lieutenant of the Tower, to the Tower, which was the place from when he came, and from thence to be drawn upon a Hurdle thro' the City of *London* to the place of Execution, and there to be hanged, and to be cut down alive, and his Bowels and Privy-Members to be cut off, and cast in the Fire in his sight, his Head to be cut off, and his Body to be cut in four quarters, to be disposed at the Queen's pleasure, and God have Mercy upon thee.

Then said Sir *John*, Seeing it pleased God and the Queen that he should be thus judged, his Life stood in her Majesty's merciful Hands, whose Life he wished, and prayed God that it might be three times, yea five times as long as she hath lived already; with divers other good and godly Wishes to her Majesty; and he prayed God that among her Subjects the innocent Lambs might be known from the scabbed Goats; and if the living God who knew his Innocency would put it into her Princely Heart to be merciful unto him for his Life, that he would, as always heretofore he did, serve her Majesty most faithfully against her malicious Enemies; yea and to stop the mouth of a Cannon, and fight against the Dogs the *Spaniards*; and said he knew her Majesty to be the Fountain of Mercy, and wished that utter Destruction might ensue to him and his Progeny, if ever he meant Treason against Queen *Elizabeth*: which very words he uttered and wished divers times before and after, and said that shortly God doubtless would make manifest his Innocency, and that to her Majesty and the World.

He also said, that he wished not now to live, by reason of his Infamy in his Country, and that his Name and Blood was corrupted, which had been of antient continuance, and never before that time spotted: and said, Wo be unto me that am the first of my House and Name that ever was attainted or suspected, and shook his Hand: and having a Carnation in his Hand, he said, I care not for Death the value of this Flower, I fear it not; and wished that he had never offended God more than he had offended the Queen's Majesty. Which Words he pronounced contrary at the first, but presently reformed them.

Then

Then he declared he had certain Petitions, which he humbly desired their Lordships to move her Majesty in on his behalf.

The first Petition was, That it would please her Majesty of her abundant Mercy to pardon his Life, that he might have a better Room, for his Lodging was a short Chamber only room for his Bed and a Table, and that he never went out of Doors, nor had any Air to comfort him.

To this my Lord *Chamberlain* answered, that the Room was such as was fit for such a Man as he was.

The second Petition was, that he might have a Preacher appointed unto him; and that he might be permitted to receive the Sacrament, which he said he did not since his Commitment to the Tower, but said he received the same in my Lord Treasurer's House.

To this Petition my Lord *Chamberlain* answered, that he never heard that he desired or wished any such thing before, which if he had it might have been granted him. Sir *John Perrot* said that he had requested the Lieutenant for the same twenty times; and said, here is a Man that knoweth the same, meaning and pointing at Mr. *Crooke*, standing next him on his Right Hand: which thing Mr. *Crooke* voluntarily and without asking disavowed; and said he knew no such thing. Then said Sir *John*, Mr. Lieutenant well knoweth it, and will confess the same.

My Lord *Chamberlain* said, he should have his Petition herein granted: And that they, the Justices and Commissioners, had Authority to grant the same without moving her Majesty therein.

The third Petition was, that if he should suffer Death, that then their Lordships would be humble Suitors to her Majesty, that seeing he was a Gentleman born, and that he had been advanced to Place and Calling by her Majesty, and served her Majesty in place of Honour, he might die a Gentleman's Death, and be spared from drawing thro' the Streets, and the rest of the Judgment; and said, he was a Gentleman of antient Descend, and but a Gentleman.

The fourth Petition was, that they would move her Majesty to be good and gracious to his Son, meaning Sir *Thomas Perrot*, and that they would put her Majesty in remembrance of her gracious Promise made unto Sir *Philip Sidney* and Sir *Thomas Perrot*, that her Majesty would be good to them; especially that her Majesty would be good to that virtuous and gracious Lady my Lady *Dorothy*: and then said, that he never received any penny of her Marriage, nor ever assured her any Jointure, for which he was now very sorry; and said, that something moved him so to do, which now grieved him very fore.

He also said, that he had made Estates of his Lands, a dozen, sixteen, and twenty Years past; for that he had Children by divers Venters, and that he would have his Lands to remain in his Name, and now he had but one Son, the other having died in her Majesty's Service. He said, peradventure Holes may be now found in the same;

therefore he again requested that their Lordships would move her Majesty to be good to his Son and his Wife, and as he heard to a little Son which they had, and which hereafter may do her Majesty Service.

He also oftentimes protested with great protestation that he never meant evil, and wished Confusion to him and his Posterity if he were guilty of Treason. And if he were, he utterly renounced the Merits and Mercy of his Saviour Jesus Christ.

And then speaking to my Lord *Chamberlain*, said, he excepted his Lordship for that he sat Commissioner for her Majesty, otherwise he was as true a Subject as any in *England* whosoever; and herewith clapped his Hand upon the Bar mightily.

And as he was departing from the Bar, he returned again towards the Lords and said, he could not dispend 1200*l.* a Year, altho it was bruited he could dispend many thousands.

He also made mention he was in debt.

Then was he conveyed away from the Bar in the same manner he was brought thither, and brought by Water to the *Old Swan*, for that he could not shoot the Bridge, and all the Guard and others attending him in Wherry's; and from the *Old Swan* he was conveyed in a Coach into the Tower, as he was brought from the Tower to *Westminster* that Morning.

He also seemed in his Speeches to refer all things to God, who as he said best knew the secret of this Cause. Again and very zealously he wished and hoped that all things should be by him made manifest; and in all his Protestations and Speeches referred him and his to God alone.

Then the Lords and Commissioner sitting a little space after Sir *John's* departure, and until he took Barge, an O Yes was made, and the Commission of Oyer and Terminer was determined by Proclamation made in these words following:

All manner of Persons of *England* and *Ireland*, that had any thing to do before my Lords the Queen's Majesty's Justices of Oyer and Terminer in this present Cause, may depart hence in God's Peace, and the Queen's Majesty's, and keep their Day again upon a new Summons, for my Lords the Queen's Justices do determine their Commission; and then they all cried, *God save the Queen. Amen.*

Then my Lords arose, and it was at the stroke of ten of the Clock at Night.

Afterwards the Queen began to be appeas'd towards him, and was often heard to applaud that Rescript of *Theodosius*, *Honorius*, and *Arcadius*: *If any Person speak ill of the Emperor thro' a foolish rashness and inadvertency, it is to be despis'd, if out of Madnes it deserves Pity; if from Malice and Aversion, it calls for Mercy.* But while he thus had hopes of his Life, he fell sick, and died in the Tower in *September* following; but the Queen granted his Desire, in suffering his Estate to go to his Son who had married the Earl of *Essex's* Sister.

The Trial of Sir Christopher Blunt, Sir Charles Davers, Sir John Davis, Sir Gilly Merrick, and Henry Cuffe, for High-Treason, March 5. 1600. 43 Eliz.

The COMMISSIONERS were,

*The Earle of Nottingham, Ld. High Admiral.
The Lord Hunston, Lord Chamberlain.
Mr. Secretary Cecil.
The Lord Chief Justice Popham.*

*Sir John Fortescue, Chancellor of the Exchequer.
Mr. Secretary Herbert, and divers of the Judges.*



HE Commission being read, the Court proceeded to the reading of the Indictment.

After which the Clerk ask'd them if they were guilty of the Indictment, or not guilty.

Sir Christopher Blunt. My Lords, we desire to know whether we may not confess part of the Indictment, and plead guilty as to the rest.

L. C. J. Your pleading must be general to the whole, either Guilty or not Guilty.

Whereupon they all pleaded *not Guilty*, and a substantial Jury was impannell'd, which consisted of Aldermen of London, and other Gentlemen of good Credit.

Sir Christopher Blunt, Sir Charles Davers, and Sir John Davis, confess'd, That it was their design to come to the Queen with so strong a Force, that they might not be resisted, and to require of her divers Conditions and Alterations of Government; nevertheless they intended no personal harm to the Queen herself, and that was the reason why they could not confess the whole Indictment, because the Indictment charges *that they intended and compassed the Death and Destruction of the Queen.*

L. C. J. Wherever the Subject rebelleth, or riseth in a forcible manner to over-rule the Royal Will and Power of the King, the Wisdom and Foresight of the Laws of this Land maketh this Construction of his Actions, that he intendeth to deprive the King both of Crown and Life; for the Law judgeth not of the Fact by the Intent, but of the Intent by the Fact.

Queen's Counsel. This Construction is no Mystery or Quiddity of Law, but an infallible Conclusion warranted by Reason and Experience: for the Crown is not a Garland, or mere outward Ornament, but consists of Preeminence and Power; and therefore when the Subject will take upon him to give Law to the King, and to make the Sovereign and commanding Power become subject and commanded, such Subject layeth hold of the Crown, and taketh the Sword out of the King's hand. The Crown is so fasten'd upon the King's head, that it cannot be pulled off, but Head and Life will follow, as all Examples both at home and abroad do manifest; and therefore when their words testify one thing, and their deeds another, they are but like the Protestation used by *Mantius* Lieutenant of *Catiline*, who conspir'd against the State of *Rome*, and yet began his

* *Salust.*

Letter, * *Deos hominesq; testamur, nos nihil aliud, &c.* denying they intended

any thing against their Country, but only to provide for their own Safety.

But admitting that the Protestation of the Prisoners was so far true, that they had not at that time in their minds a form'd and distinct Cogitation to have destroyed the Queen's Person, yet nothing is more variable and mutable than the mind of Man; and especially, *Honores mutant mores*; when they were once aloft, and had the Queen in their hands, and were Peers in my Lord of *Essex's* Parliament, who could promise of what mind they would then be? especially when it is consider'd that my Lord of *Essex* at his Arraignment defended his first Action of imprisoning the Privy Counsellors, by pretence that he was forc'd to it by his unruly Company: so that if themselves would not have had, or would not seem to have had that extreme and devilish wickedness of Mind, as to lay violent Hands on the Queen's sacred Person; yet what must be done to satisfy the Multitude and secure their Party, must then be the question. The Example of *Richard* the Third may be remember'd, who (tho he were King in possession, and the rightful Inheritors but Infants) could never sleep quiet in his Bed till they were made away; much less is it to be expected, that a Catilinary Knot and Combination of Rebels (who have made an Insurrection without so much as the fume of a Title) would ever indure, that a Queen, who had been their Sovereign, and had reigned so many years in such Renown and Policy, should continue longer alive, than should make for their own turn.

After this the aforesaid *Sir Christopher Blunt, Sir Charles Davers, and Sir John Davis* said, That now they were better inform'd, and had enter'd into a deeper consideration of the matter, they were sorry they had given the Court so much trouble, and had not confess'd the Indictment at first.

However, the Queen's Counsel produc'd their Evidence to the Jury, which consisted principally of their several Confessions, and the rest of the Evidence used at the Trial of the Earls of *Essex* and *Southampton*, as mention'd before in the said Trial.

Against *Henry Cuffe* was given in Evidence *Sir Charles Davers's* Confession, who charged him, when there was a debating of the several Enterprises which they should undertake, that he did ever bind firmly and resolutely for attempting the Court.

Also the Earl of *Essex's* Accusation under his Hand avouched by him to his Face, that he was a principal Instigator of him in his Treasons. But the chief Evidence was a Declaration of *Sir Henry Nevil,*

Nevil, which described and set out the whole manner of his practising with him.

Cuffe. If my being within *Effex-house* the day of the Rebellion be a foundation to charge me with High-Treason, you may as well charge a Lion that is within a Grate with Treason: And for the Consultation at *Drury-house*, it is no more Treason than the Child in the Mother's Belly is a Child.

* *Sol. Gen.* As to his being in *Effex-house*, he was not there by Force and Compulsion, but freely and voluntarily: there was a distribution in the Action, some were to make good the House, and others to enter the City; and the one part held Correspondence with the other; and in Treasons there can be no Accessaries, all are Principals.

As to the Consultation at *Drury-house*, it was a perfect Treason in it self, because the compassing the Queen's Destruction, which by Judgment of Law was concluded and implied in that Consultation, was Treason in the very Thought and Cogitation, so as that Thought be proved by an overt Act: that same Consultation was an overt Act, tho' it had not been upon a list of Names and Articles in writing, much more being upon matter in writing: and again, the going into the City was a pursuance and carrying on of the Enterprize against the Court, and not a desisting or departing from it.

L. C. J. If many do conspire to execute Treason against the Prince in one manner, and some of them do execute it in another manner, yet their Act (tho' differing in the Manner) is the Act of all of them who conspire, by reason of the general Malice of the Intent.

Against Sir *Gilly Merrick* the Evidence produc'd prov'd him guilty of open Rebellion; for that he was as a Captain or Commander over the House, and took upon him the charge to keep it and make it good as a place of Retreat, for those who issued out into the City; and fortify'd and barricadoed the same House, making Provision of Muskets, Powder, Pellets, and other Ammunition and Weapons for the holding and defending it; and was a busy, forward and noted Actor in that defence and resistance, which was made against the Queen's Forces brought against it by her Majesty's Lieutenant. It was further proved, that some few days before the Rebellion, he had with great heat and violence displac'd certain Gentlemen who were lodg'd in an House close by *Effex-house*, and there posted divers of my Lord *Effex's* Followers and Accomplices.

It was also proved that the Afternoon before the Rebellion, *Merrick* with a great Company of others, who were all afterwards in the Action, had procur'd to be play'd before them the Play of deposing King *Richard* the Second; neither was it casual, but a Play bespoke by *Merrick*: and when it was told him by one of the Players, that the Play was old, and they should have Loss in playing it, because few would come to it, there were forty Shillings extraordinary given for it, and so it was play'd.

Upon this Evidence the Jury went from the Bar, and after some time returned and brought them in all Guilty: and accordingly they receiv'd Sentence of death; and were all executed at *Tyburn*, except Sir *Christopher Blunt*, and Sir *Charles Davers*, who (being nobly descended) were beheaded upon *Tower-Hill*.

On the 13th of *March*, *Merrick* and *Cuffe* were drawn to *Tyburn*: when they were come to the Gallows, *Cuffe* spake as follows;

' I am brought hither to pay my last Debt to Nature, and to suffer for Crimes committed against God, my Prince and my Country; and as I cannot but discern the infinite Justice of God, when I reflect on the multitude of my Offences, so can I as little doubt but the severity of my Punishment will make way for my admission into the Embraces of his Mercy. We are expos'd here as sad Spectacles and Instances of human Frailty; the Death we are to undergo carries a frightful Aspect, (for even the best of Men desire Life) besides that it is as full of Ignominy as Terror; however, 'tis the Portion of the best of Saints, with whom I assuredly hope to rise again in Christ: not that I would be thought by any one to depend on my own Merits, which I absolutely discard, but I place my entire Trust and Dependance in the Atonement of my Saviour's Blood. I am fully persuaded, that whoever feels a secret Consolation within himself, whilst he groans under the infliction of any earthly Punishment, is chastis'd by God with a paternal Tendernefs, and not in an angry and judicial way.

' But to come to the Cause of my Death; there is no body here can possibly be ignorant what a wild Commotion was rais'd on the 8th of *February* by a particular great but unadvised Earl. I do here call God, his Angels, and my own Conscience to witness, that I was not in the least concerned therein, but was shut up that whole Day within the House, where I spent the time in very melancholy Reflections.'

Here he was interrupted, and advis'd not to disguise the Truth by Distinctions, nor palliate his Crime by specious pretences. Then he proceeded, ' I confess 'tis a Crime as black as Treason for a Subject who has lost his Prince's favour, to force his way to the Royal Presence: for my own part, I never persuaded any Man to take up Arms against the Queen, but am most heartily concerned for being an Instrument in bringing that worthy Gentleman, Sir *Henry Nevil*, into danger, and do most earnestly intreat his Pardon. And whereas I said that one and twenty Aldermen out of the twenty four were devoted to the Earl's Interest, I only meant that they were his Friends, and ready to serve him, but not in the way of open Rebellion.'

Here he was again interrupted, and so began to apply himself to his Devotions, which he manag'd with a great deal of fervour: and then making a solemn profession of his Creed, and asking Pardon of God and the Queen, he was dispatch'd by the Executioner.

After him Sir *Giles Merrick* suffer'd in the same way, and with a most undaunted Resolution: for, as if he were weary of living longer, he once or twice interrupted *Cuffe*, and advis'd him to spare a Discourse, which however rational was not very seasonable, when he was taking leave of the World. He clear'd the Lord *Mountjoy* from having any acquaintance with the Design; and intreated those Noblemen who stood by, to intercede with the Queen, that there might not be any farther Proceedings against such as had unwarily espoused this unhappy Cause.

Five days after, *March* 18. Sir *Christopher Blunt*, and Sir *Charles Davers* were executed on *Tower-Hill*. *Davers* bore his death with a most christian Calmness and Composure, having first crav'd God's Pardon and the Queen's, to whom

he wish'd all Prosperity ; as also the Lord Grey's, who was there present, to whom he acknowledg'd he had been ill affected, not from any Injury he had suffer'd from him, but purely on the Earl of Southampton's account, to whom the Lord Grey profest an absolute Enmity.

When Sir Christopher Blunt came upon the Scaffold, he express'd himself in the following manner.

MY Lords, and you that be present, altho I must confess, that it were better fitting the little time I have to breathe, to bestow the same in asking God forgiveness for my manifold and abominable Sins, than to use any other Discourse, especially having both an imperfection of Speech, and God knows, a weak Memory, by reason of my late grievous Wound : yet to satisfy all those that are present, what Course hath been held by me in this late Enterprize, because I was said to be an Instigator, and Setter on of the late Earl, I will truly, and upon the peril of my Soul, speak the Truth.

It is true, that the first time that ever I understood of any dangerous Discontentment in my Lord of Essex, was about three Years ago at Wansted, upon his coming one day from Greenwich. At that time he spake many things unto me, but descended into no Particulars, but in general Terms.

After which time he never brake with me in any matter tending to the alteration of the State, (I protest before God) until he came into Ireland, other than I might conceive, that he was of an ambitious and discontented Mind. But when I lay at the Castle of Thomas Lee, called Reban, in Ireland, grievously hurt, and doubted of my Life ; he came to visit me, and then began to acquaint me with his Intent.

As he thus spake, the Sheriff began to interrupt him, and told him the Hour was past. But my Lord Grey, and Sir Walter Raleigh Captain of the Guard, called to the Sheriff, and requir'd him not to interrupt him, but to suffer him quietly to finish his Prayers and Confessions. Sir Christopher Blunt said, Is Sir Walter Raleigh there ? Those on the Scaffold answered, yea ; to whom Sir Christopher Blunt spake on this manner.

Sir Walter Raleigh, I thank God that you are present ; I had an infinite desire to speak with you, to ask you forgiveness ere I died, both for the wrong done you, and for my particular ill intent towards you : I beseech you forgive me. Sir Walter Raleigh answer'd, that he most willingly forgave him, and besought God to forgive him, and to give him his divine Comfort ; protesting before the Lord, that whatsoever Sir Christopher Blunt meant towards him, for his part, he never had any ill intent towards him : And further said to Sir Christopher Blunt, I pray you without offence, let me put you in mind that you have been esteemed, not only a principal Provoker and Persuader of the Earl of Essex in all his undutiful Courses, but especially an Adviser in that which hath been confessed of his purpose to transport a great part of her Majesty's Army out of Ireland into England, to land at Milford, and thence to turn it against her sacred Person. You shall do well to tell the Truth, and to satisfy the World. To which he answered thus,

Sir, if you will give me patience, I will deliver a Truth, speaking now my last, in the presence of

God, in whose Mercy I trust. And then he directed himself to my Lord Grey, and my Lord Compton, and the rest that sat on Horseback near the Scaffold.

When I was brought from Reban to Dublin, and lodged in the Castle, his Lordship and the Earl of Southampton came to visit me ; and to be short, he began thus plainly with me : *That he intended to transport a choice part of the Army of Ireland into England, and land them in Wales, at Milford, or thereabouts ; and so securing his Descent, thereby would gather such other Forces, as might enable him to march to London.* To which I protest before the Lord God, I made this or the like answer ; that I would that Night consider of it, which I did.

And the next Day the Earls came again ; I told them that such an Enterprize, as it was most dangerous, so would it cost much Blood, and I could not like of it ; besides many hazards which at this time I cannot remember unto you, neither will the time permit it. But I rather advised him to go over himself with a good Train, and make sure of the Court, and then make his own Conditions.

And altho it be true, that (as we all protested in our Examinations and Arraignments) we never resolved of doing hurt to her Majesty's Person ; (for in none of our Consultations was there set down any such purpose) yet, *I know, and must confess, if we had failed of our Ends, we should (rather than have been disappointed) even have drawn Blood from her self.* From henceforward he dealt no more with me herein, until he was discharged of his Keeper at Essex-house. And then he again asked my Advice, and disputed the matter with me ; but resolved not. I went then into the Country, and before he sent for me (which was some ten Days before his Rebellion) I never heard more of the matter. And then he wrote unto me to come up, upon pretence of making some assurances of Land, and the like. I will leave the rest unto my Confessions, given to that honourable Lord Admiral, and worthy M. Secretary, (to whom I beseech you Sir Walter Raleigh commend me) I can requite their favourable and charitable dealing with me, with nought else but my Prayers for them. And I beseech God of his Mercy to save and preserve the Queen, who hath given Comfort to my Soul, in that I hear she hath forgiven me all but the Sentence of the Law, which I most worthily deserved, and do most willingly imbrace ; and hope that God will have Mercy and Compassion on me, who have offended him as many ways as ever sinful Wretch did. I have led a Life so far from his Precepts, as no Sinner more. God forgive it me, and forgive me my wicked Thoughts, my licentious Life, and this right Arm of mine, which (I fear me) hath drawn Blood in this last Action. And I beseech you all bear witness that I die a Catholick, yet so, as I hope to be saved only by the Death and Passion of Christ, and by his Merits, not ascribing any thing to mine own Works. And I trust you are all good People, and your Prayers may profit me. Farewel my worthy Lord Grey, and my Lord Compton, and to you all, God send you both to live long in Honour. I will desire to say a few Prayers, and imbrace my Death most willingly. With that he turned from the Rail towards the Executioner : and the Minister offering to speak with him, he came again to the Rail, and besought that his Conscience might not be troubled, for he was resolved ; which he desired for God's sake. Whereupon Commandment was

given, that the Minister should not interrupt him any further. After which he prepared himself to the Block, and so died very manfully and resolutely.



The Trial of GEORGE SPROT in Scotland, for High-Treason, in conspiring with John Earl of Gowry to murder King James I. 12 Aug. 1608. 6 Jac. I.

GEORGE SPROT, a Notary*, inhabiting at *Aymouth*, having given cause of Suspicion by some Words which fell from him, and afterwards by some Papers found upon him, that he was privy to, and acquainted with the † Plotting of the late Earl of *Gowrie* and *Robert Logane*, for the cruel murdering of King *James*, was seized and committed to Prison; and after divers Examinations, being moved with remorse of Conscience for the long concealing his Fore-knowledge of this Conspiracy, confesseth, declareth, and deponeth, That he knew perfectly, that *Robert Logane*, late of *Restalrig*, was privy, and upon the Fore-knowledge of *Gowrie's* treasonable Conspiracy. And for the greater Assurance of his Knowledge, deponeth, That he knew that there were divers Letters interchanged betwixt them, anent the treasonable Purpose aforesaid, in the beginning of the Month of *July* 1600. Which Letters, *James Bour*, called *Laird Bour*, Servitor to *Restalrig*, (who was employed Mediator betwixt them, and privy to all that Errand) had in keeping, and shewed the same to *Sprot* in the Place of *Fast-Castle*. The first of *Gowrie's* Letters, containing in effect, as followeth:

‘ **G**OOD Laird of *Restalrig*, you understand what Conditions should have been betwixt us, of before. Indeed I purposed to have come by your House, but understanding of your Absence in *Lotbiane*, I came not. Always I wish you either your self to come West, or else to send some sure Messenger, who may confer with me anent the Purpose you know. But rather would I wish your self to come, not only for that Errand, but for some other thing that I have to advise with you.

To the which Letter *Restalrig* wrote an Answer, and sent the same to the Earl of *Gowrie*, by the said *James Bour*, of the Tenure following:

‘ **M**Y Lord, my most humble Duty and Service heartily remembred. At the Receipt of your Lordship's Letter I am so comforted, that I can neither utter my Joy, nor find my self sufficiently able to requite your Lordship with due Thanks. And persuade your Lordship in that Matter, I shall be as forward for your Lordship's Honour, as if it were my own Cause. And I think there is no living Christian that would not be content to revenge that *Machiavellian* Maf-
sacring of our dear Friends; yea, howbeit it should be, to venture and hazard Life, Lands, and all other things else. My Heart can bind

me to take part in that Matter, as your Lordship shall find better Proof thereof. But one thing would be done, namely, That your Lordship should be circumspect and earnest with your Brother, that he be not rash in any Speeches touching the Purpose of *Padua*. My Lord, you may easily understand, that such a Purpose as your Lordship intendeth, cannot be done rashly, but with Deliberation. And I think, for my self, that it were most meet to have the Men your Lordship spake of, ready in a Boat or Bark, and address them as if they were taking Pastime on the Sea, in such fair Summer-time. And if your Lordship could think good, either your self to come to my House of *Fast-Castle* by Sea, or to send your Brother, I should have the Place very quiet and well provided after your Lordship's Advortisement, where we should have no scant of the best Venison can be had in *England*: And no others should have Access to haunt the Place, during your Lordship's being here, but all things very quiet. And if your Lordship doubt of safe landing, I shall provide all such Necessaries as may serve for your Lordship's Arrival, within a Flight-shot of the House. And persuade your Lordship you shall be as sure and quiet here, while we have settled our Plot, as if you were in your own Chamber: for I trust and am assur'd we shall hear Word within few days from them your Lordship knoweth of; for I have care to see what Ships comes home by. Your Lordship knoweth I have kept the Lord *Bothwell* quietly in this House in his greatest Extremity, say both King and Council what they liked. I hope (if all things come to pass, as I trust they shall) to have both your Lordship and his Lordship at one good Dinner afore I die. *Hæc jocosè*, to animate your Lordship: I doubt not, my Lord, but all things shall be well. And I am resolved, whereof your Lordship shall not doubt, of any thing on my part, yea to peril Life, Land, Honour and Goods; yea, the Hazard of Hell shall not affray me from that, yea altho the Scaffold were already set up. The sooner the Matter were done, it were the better, for the King's Buck-hunting will be shortly; and I hope it shall prepare some dainty Cheer for us to dine against the next Year. I remember well, my Lord, and I will never forget, so long as I live, that merry Sport which your Lordship's Brother told me of a Nobleman at *Padua*; for I think that a *Parasceve* to this purpose. My Lord, think nothing that I commit the Secrecy hereof, and Credit to this Bearer; for I dare not only venture my Life, Lands, and all other things I have else, on

* Spotswood's History of the Church of Scotland, p. 509.

† Ibid. p. 459.

his Credit, but I durst hazard my Soul in his keeping, if it were possibly in earthly Men; for I am so perswaded of his Truth and Fidelity. And I trow (as your Lordship may ask him if it be true) he would go to Hell-Gates for me; and he is not beguiled of my Part to him. And therefore I doubt not but this will perswade your Lordship to give him Trust in this Matter, as to my self. But I pray your Lordship direct him home with all possible haste, and give him strait Command, that he take not a Wink sleep, while he see me again, after he come from your Lordship. And as your Lordship desireth in your Letter to me, either rive or burn, or else send back again with the Bearer; for so is the Fashion, I grant.*

Which Letter written every word with *Restalrig's* own Hand, was subscribed by him after his accustomed manner, *Restalrig*, and was sent to the Earl *Gowrie* by the said *James Bour*. After whose Return, within five days, with a new Letter from *Gowrie*, he staid all night with *Restalrig* in * *Gunnies-Green*; and *Restalrig* rode to *Lothiane* the Morn thereafter, where he staid five or six days. Then after his returning, past to *Fast-Castle*, where he remained a certain short Space.

And farther deponeth, that he saw and heard *Restalrig* read the last Letter, which *Bour* brought back to him from *Gowrie*, and their Conference there-ament. And heard *Bour* say; Sir, if ye think to make any Commodity by this Dealing, lay your Hand to your Heart. And *Restalrig* answer'd, that he would do as he thought best. And farther said to *Bour*, Howbeit he should sell all his own Land that he had in the World, he would pass thorow with the Earl of *Gowrie*, for that Matter would give him greater Contentment, nor if he had the whole Kingdom: and rather or he should falsify his Promise, and recal his Vow that he had vowed to the Earl of *Gowrie*, he should spend all that he had in the World, and hazard his Life with his Lordship. To whom *Bour* answer'd: You may do as you please, Sir, but it is not my Counsel, that you should be so sudden in that other Matter. But for the Condition of *Dirlton*, I would like very well of it. To whom *Restalrig* answer'd, Content your self, I am at my Wit's-end.

And farther, *Sprot* deponeth, that he enter'd himself thereafter in Conference with *Bour*, and demanded what was done betwixt the Laird and the Earl of *Gowrie*. And *Bour* answer'd, that he believ'd that the Laird should get *Dirlton* without either Gold or Silver, but feared that it should be as dear unto him. And *Sprot* inquiring how that could be; *Bour* said they had another Pie in hand, nor the selling of any Land: but prayed *Sprot*, for God's sake, that he would let be, and not trouble himself with the Laird's Business; for he feared, within few days, the Laird would be either Land-less or Life-less.

And the said *George Sprot* being demanded if this his Deposition was true, as he would answer upon the Salvation and Condemnation of his Soul; and if he will go to death with it, seeing he knoweth the time and hour of his Death to approach very near; deponeth for Answer, That he hath not a Desire to live, and that he knows the Time to be short, having care of no earthly Thing, but only for clearing of his Conscience in the Truth of all

these Things, to his own Shame before the World, and to the Honour of God, and Safety of his own Soul; that all the former Points and Circumstances contained in this his Deposition, with the Deposition made by him the 5th Day of *July* last, and the whole remainent Depositions made by him sen that Day are true, which he will take on his Conscience, and as he hopeth to be saved of God, and that he would seal the same with his Blood.

And farther, being demanded where this above-written Letter, written by *Restalrig* to the Earl of *Gowrie*, which was return'd again by *James Bour*, is now; deponeth that he abstracted it quietly from *Bour*, in looking over and reading *Bour's* Letters, which he had in keeping of *Restalrig's*; and that he left the above-written Letter in his Chest among his Writings, when he was taken and brought away, and that it is closed and folded within a piece of Paper.

This aforesaid Deposition was made by him the tenth of *August* 1608, written by *James Primerose*, Clerk of his Majesty's Privy-Council, and subscribed with the said *George Sprot's* own Hand, in the Prefence of

The Earl of *Dunbar*,
The Earl of *Lothiane*,
The Bishop of *Rosse*,
The Lord *Scbune*,
The Lord *Halyrudebouse*,
The Lord *Blantyre*,

Sir *Will. Hart*, his Majesty's Justice,
Mr. *John Hall*,
Mr. *Patrick Galoway*,
Mr. *Peter Hewart*, Ministers of the Kirks of *Edinburgh*.

Subscribed with all their Hands.

And also the 11th Day of the aforesaid Month and Year, the said *George Sprot* being re-examin'd, in the Prefence of a Number of the Council and Ministers aforesaid, and it being declar'd to him, that the time of his Death now very near approached, and that therefore they desir'd him to clear his Conscience with an upright declaration of the Truth; and that he would not abuse the holy Name of God, to make him, as it were, a Witness to Untruths; and specially being desired that he would not take upon him the innocent Blood of any Person dead or quick, by making and forging Lyes and Untruths against them:

Deponeth, that he acknowledgeth his grievous Offences to God (who hath made him a reasonable Creature) in abusing his holy Name with many Untruths, sen the beginning of this Process: but now being resolv'd to die, and attending the hour and time when it shall please God to call him, he deponeth with many Attestations, and as he wisheth to be participant of the Kingdom of Heaven, where he may be countable and answerable, upon the Salvation and Condemnation of his Soul, for all his Doings and Speeches in this Earth, that all that he hath deposed sen the fifth Day of *July* last, in all his several Depositions, were true in every Point and Circumstance of the same; and that there is no Untruth in any Point thereof.

And having desired Mr. *Patricke Galoway* to make a Prayer, whereby he might be comforted now in his Trouble; which was done:

The said Deponer, with many Tears after the Prayer, affirmed this his Deposition to be true; and for the Confirmation thereof, declared, that he would seal the same with his Blood.

And

* A House of *Restalrig's*.

And the next Day thereafter, being the 12th of the aforefaid Month of *August*, upon the aforefaid Confession, the faid *George* was brought forth and presented in Judgment upon Panel, within the Tollbooth of *Edinburgh*, before Sir *William Hart* of *Preston*, his Majesty's Justice, and there in a fenced Court holden by him that Day, (assisted by the honourable Persons following, his Assessors in that Errand: They are to say,

Alexander Earl of *Dumfermling*, Lord Chancellor,

George Earl of *Dunbar*, Treasurer,

John Archbishop of *Glasgow*,

David Bishop of *Rosse*,

Gawin Bishop of *Galloway*,

Andrew Bishop of *Brechin*,

David Earl of *Crawford*,

Mark Earl of *Lothbaine*,

John Lord *Abirneby* of *Saltoun*,

James Lord of *Balmerineth*, Secretary,

Walter Lord *Blantyre*,

John Lord *Halyrudehouse*,

Michael Lord *Burley*,

Sir *Richard* *Cokburne* of *Clarkintoun*, Knight,

Mr. *John* *Preston* of *Fenton Barnes*, Collector-General,

Sir *John* *Skeyne* of *Currbil*, Knight, Clerk of Register :)

was delated, accused, and pursued by Sir *Thomas Hamilton* of *Binning*, Knight, Advocate to our Sovereign Lord for his Highness's Entries, of the Crimes contained in his Indictment, produced by the said Advocate; whereof the Tenure followeth:

G *George Sprot*, Notary in *Ayemouth*, You are indicted and accused, forsomuch as *John*, sometime Earl of *Gowrie*, having most cruelly, detestably, and treasonably conspired in the Month of *July*, the Year of God 1600 Years, to murder our dear and most gracious Sovereign the King's most excellent Majesty: And having imparted that devilish Purpose to *Robert Logane* of *Restalrig*, who allowed of the same, and most willingly and readily undertook to be Partaker thereof: The same coming to your Knowledge at the times and in the manner particularly after specified, you most unnaturally, maliciously, and treasonably concealed the same, and was art and part thereof in manner following. In the first, in the said Month of *July* sixteen hundred Years, after you had perceiv'd and known, that divers Letters and Messages had past betwixt the said sometime Earl of *Gowrie*, and the said *Robert Logane* of *Restalrig*, you being in the House of *Fast-Castle*, you saw and read a Letter written by the said *Robert Logane* of *Restalrig*, with his own Hand, to the said *John* sometime Earl of *Gowrie*, of the Tenure following.

MY Lord, my most humble Duty and Service heartily remember'd. At the Receipt of your Lordship's Letter I am so comforted, that I can neither utter my Joy, nor find my self sufficiently able to requite your Lordship with due Thanks. And persuade your Lordship in that Matter, I shall be as forward for your Lordship's Honour, as if it were mine own Cause. And I think there is no living Christian that would not be content to revenge that *Machiavellian* massacring of our dear Friends, yea, howbeit it should be, to venture and hazard Life, Lands and all other thing else. My

Heart can bind me to take part in that Matter, as your Lordship shall find better Proof thereof. But one thing would be done: namely, That your Lordship should be circumspect and earnest with your Brother, that he be not rash in any Speeches touching the Purpose of *Padua*.

And a certain Space after the execution of the aforefaid Treason, the said *Robert Logane* of *Restalrig*, having desired the Laird of *Bour* to deliver to him the aforefaid Letter, or else to burn it; and *Bour* having given to you all Tickets and Letters, which he then had either concerning *Restalrig*, or others; to see the same, because he could not read himself, you abstracted the above-written Letter, and reteined the same in your own hands, and divers times read it, conteining farther in substance nor is formerly set down, according to the words following:

My Lord, you may easily understand, that such a Purpose as your Lordship intendeth, cannot be done rashly, but with Deliberation. And I think for my self, that it were most meet to have the Men your Lordship spake of, ready in a Boat or Bark, and address them as if they were taking Pastime on the Sea, in such fair Summer time. And if your Lordship could think good, either your self to come to my House of *Fast-Castle* by Sea, or to send your Brother, I should have the Place very quiet, and well provided after your Lordship's Advertisement, where we should have no scant of the best Venison can be had in *England*. And no others should have access to haunt the Place during your Lordship's being here, but all things very quiet. And if your Lordship doubt of safe landing, I shall provide all such Necessaries as may serve for your Lordship's Arrival, within a Flight-shot of the House. And persuade your Lordship you shall be as sure and quiet here, while we have settled our Plot, as if you were in your own Chamber: for I trust, and am assured, we shall have word within few days from them your Lordship knoweth of; for I have care to see what Ships comes home by. Your Lordship knoweth I have kept the Lord *Botbwell* quietly in this House in his greatest Extremity, say both King and Council what they liked. I hope (if all things come to pass, as I trust they shall) to have both your Lordship and his Lordship at one good Dinner afore I die. *Hæc jocosè*, to animate your Lordship: I I doubt not my Lord but all things shall be well. And I am resolved, whereof your Lordship shall not doubt, of any thing on my part, yea, to peril Life, Land, Honour and Goods; yea, the Hazard of Hell shall not affray me from that, yea, altho the Scaffold were already set up. The sooner the Matter were done, it were the better; for the King's Buck-hunting will be shortly; and I hope it shall prepare some dainty Cheer for us to dine against the next Year. I remember well, my Lord, and I will never forget, so long as I live, that merry Sport which your Lordship's Brother told me of a Nobleman at *Padua*: for I think that a *Parasceve* to this Purpose. My Lord, think nothing that I commit the Secrecy hereof and Credit to this Bearer; for I dare not only venture my Life, Lands, and all other things I have else, on his Credit, but I durst hazard my Soul in his keeping, if it were possible in earthly Men; for I am so persuaded of his Truth and Fidelity. And I trow (as your Lordship may ask him if it be true) he would go to Hell-gates for

for me; and he is not beguiled of my Part to him. And therefore I doubt not but this will persuade your Lordship to give him Trust in this Matter, as to my self. But I pray your Lordship direct him home with all possible haste, and give him strait Command, that he take not a Wink sleep, while he see me again, after he come from your Lordship. And as your Lordship desireth in your Letter to me, either rive or burn, or else send back again with the Bearer; for so is the Fashion, I grant.

Which Letter written every word with the said *Robert Logane* his own Hand, was subscribed by him after his accustomed manner, with this Word, *Restalrig*.

And albeit by the Contents of the aforesaid Letter, you knew perfectly the Truth of the said most treasonable Conspiracy, and the said *Robert Logane* of *Restalrig*, his Fore-knowledge, Allowance, and Guiltiness thereof; like as you were assured of the same by his receiving of divers Letters sent by *Gowrie* to him, and by his sending of Letters to *Gowrie* for the same Purpose, and by sundry Conferences betwixt the said *Robert Logane* of *Restalrig*, and the said *James Bour*, in your Presence and Hearing concerning the said Treason, as well in the said Month of *July* immediately preceding the attempting of the said Treason, as at divers other times shortly thereafter, as likewise by the revealing thereof to you by the said *James Bour*, who was upon the Knowledge and Device of the said Treason, and was employed as ordinary Messenger by the said *Robert Logane* of *Restalrig*, to the said sometime Earl of *Gowrie*, in the Traffick of the said damnable Treason, whereby your Knowledge, Concealing and Guiltiness of the said Treason was undeniable: yet, for further Manifestation thereof, about *July* 1602 Years, the said *Robert Logane* of *Restalrig* shewed to you that *Bour* had told him, that he had been somewhat rash to let you see a Letter which came from the Earl of *Gowrie* to the said *Robert Logane* of *Restalrig*, who then urged you to tell what you understood by that Letter. To whom you answer'd, That you took the meaning of it to be, that he had been upon the Counsel and Purpose of *Gowrie's* Conspiracy. And he answer'd you, whatever he had done, the worst was his own: But if you would swear to him, that you should never reveal any thing of that Matter to any Person, he should be the best Sight that ever you saw; and in token of farther Recompense he then gave you twelve pound of Silver. Nevertheless, albeit you knew perfectly the whole Practices and Progress of the said Treason, from the beginning thereof as said is, as well by the sight of the said Letters, as also by your Conferences with the said *James Bour*, called *Laird Bour*, and *Robert Logane* of *Restalrig*; yet during all the days of their Life-times, who lived till the Year of God 1606 Years, or thereby, and so by the space of six Years after that, you knew the guiltiness of the treasonable Conspiracy aforesaid, you most treasonably concealed the same; and so you was and is art and part of the said most heinous, detestable and treasonable Conspiracy, and of the Knowledge and Concealing thereof; and therefore you ought and should incur, underlie and suffer the Sentence and Pain of High-Treason. To the Token, that ye have not only by your Depositions subscribed with your Hand, and solemnly made in Presence of many of the Lords of his Majesty's Council, and of the Ministers of the Borough of *Edin-*

burgh, of the Dates, the 5th, 15th and 16th days of *July* last by-past, and 10th and 11th days of *August* Instant, confessed every Head, Point, and Article of the Indictment above written, but also by divers other your Depositions subscribed likewise with your Hand, you have ratify'd the same, and sworn constantly to abide thereat, and to seal the same with your Blood, which you cannot deny.

Which Indictment being read openly in Judgment to the said *George Sprot*, before he was put to the Knowledge of an Inquest, he confessed in the Presence of the said Lord Justice and whole Assessors above-named, the same and every Point thereof to be true and of Verity. And therefore the Justice ordained the same Indictment to be put to the Knowledge of a condign Inquest of the honest, famous and discreet Persons under-written. They are to say:

William Trumbill of *Ardr*.

William Fisher, Merchant, Burges of *Edinburgh*.

Robert Stuart, there.

Edward Johnston, Merchant, Burges there.

Harbert Maxwell of *Cavens*.

James Tennent of *Linhouse*.

William Trumbill, Burges of *Edinburgh*.

George Brown in *Gorgymill*.

John Hucheson, Merchant, Burges of *Edinburgh*.

John Leyis, Merchant, Burges there.

James Somervell, Merchant, Burges there.

William Simintoun, Burges there.

John Cunnison in *Dirlton*.

Tho. Smith, Merchant, Burges of *Edinburgh*.

And *John Cowtis*, Burges there.

Which Persons of Inquest being chosen, sworn and admitted, after the Accusation of the said *George Sprot*, before them of the said treasonable, heinous, and detestable Crimes contained in the Indictment aforesaid, and reading of the said Indictment of new again in his and their Presence; the said *George Sprot* of new confessed in the Audience of the said Inquest the foresaid Indictment and every Point thereof to be true and of Verity. Whereupon the said Sir *Thomas Hamilton* of *Binning* Knight, his Majesty's Advocate, as before, asked Act and Instrument: And in respect thereof protested, in case the said Inquest cleansed him of the said Crimes for wilful and manifest Error. And therefore the whole fornam'd Persons of Inquest remov'd all together forth of Court to the Inquest House, where they being inclosed, by Plurality of Votes elected and made choice of the said *Harbert Maxwell* of *Cavens* to be Chancellor, or Foreman. And having with great Deliberation gravely consider'd the Effect and whole Circumstances of the said Indictment, and constant judicial Confession made by the Party pannelled, as well before the said Lord Justice and his Assessors, as thereafter in Presence of the Inquest themselves, they all voted upon the whole Effect of the said Indictment. And being ripely and well advised therewith, re-enter'd again in Court, where they all in one Voice by the Mouth of the said Chancellor or Foreman, found, pronounced, and declar'd the said *George Sprot* (according to his own Confession judicially made in their Presence and Audience) to be guilty, culpable, filed and convict of art and part of the said most heinous, detestable and treasonable Conspiracy contained in his Indictment above-written, and of the Knowledge and Concealing thereof. For the which Cause the said Justice, by the Mouth of the Dempster of Court, by his Sentence and Doom decerned and ordeined the said *George Sprot* to be taken to the Market Cross of *Edinburgh*,

Edinburgh, and there to be hanged upon a Gibbet till he be dead, and thereafter his Head to be stricken from his Body, and his Body to be quartered and demeaned as a Traitor, and his Head to be affixed and set up upon a Prick of Iron upon the highest part of the Tollbooth of *Edinburgh*, where the Traitor *Gowrie*, and others of the Conspirators Heads stand; and his whole Lands, Heritages, Tacks, Stedings, Rooms, Possessions, Goods and Geere to be forfeited and eschet to our Sovereign Lord his use, for his treasonable and detestable Crimes above specify'd. Which was pronounc'd for Doom.

Extractum de libro Actorum Adiornalis S. D. N. Regis per me D. Johannem Cobburne de Ormestoun militem, Clericum Justitiaræ ejusdem generalem. Sub meis signo & subscriptione manualibus.

The Doom being pronounced, the said *George* was conveyed to a privy House, where he remain'd at his secret Meditation, and afterwards in Conference with the Ministers and others, unto the time all things was provided necessary for his Execution: and being brought to the Place where he was to die, he in publick Audience of the whole People, at the three sides of the Scaffold, ratify'd the former Depositions made by him concerning the treasonable Practices intended and devised betwixt *Gowrie* and *Restalrig*, for the murdering of our most gracious Sovereign, and bereaving his Highness of his Life, and his own Knowledge, and concealing of their Guiltiness. For the which he humbly craved God and his Majesty Forgiveness, being most sorry and grieved that he had offended God and the King's Majesty in concealing such a vile, detestable and unnatural Treason, enterprized by them against his gracious Sovereign, who hath been ever so good and gracious to his Subjects; protesting that if he had a thousand Lives to render, and were able to suffer ten thousand Deaths, it were not a sufficient Satisfaction and Recompense for his Offence. And that God had preserved him from many great Perils, when his Life was in extreme Danger, to bring him to this publick Declaration of that detestable and horrible Fact, in Presence of all the People, uttered by him in these words following: *To my own Shame, and to the Shame of the Devil, but to the Glory of God.* And for Satisfaction of the Consciences of all those that have or can make any doubt of the Truth of this so clear a Matter, he acknowledged that his haunting with *Restalrig*, who was a Man without Religion, and subject to many other Vices, as also his continual being in Company with the Laird of *Bour*, who likewise was irreligious and without fear of God, and his being ingyred by them into their Matters after his first sight of *Restalrig's* Letter written by him to *Gowrie*, brought him from one Sin to another, and consequently upon this grievous Crime, for the which most justly, worthily and willingly, he is now to render his Life. And thereupon he desired all the People there present to beware of evil Company, and namely of the Society of those who are void of Religion; saying to them, That this was the most glorious Day that ever his Eyes did see. In the midst almost of these Speeches, he did prostrate himself, and fell upon his Knees in Presence of the whole People, making a very pithy Prayer, in the Form following.

‘ O Father, how shall I call Thee Father, that am so unworthy to be called thy Son? I

‘ have wandred astray like a Lost-Sheep, and thou
‘ of thy Mercy hast brought me home unto Thee,
‘ and hast preserv'd my Life from many Dangers
‘ until this Day, that I might reveal these hidden
‘ and secret Mysteries to mine own Shame, and
‘ thy Glory. Thou hast promised, that whenso-
‘ ever a Sinner from his Heart will repent and call
‘ to Thee, that thou wilt hear him, and grant him
‘ Mercy.’

And thus he continued a good Space in a most fervent Prayer, to the great Admiration of all the Standers-by. And having ended the same, one of the Ministers prayed again, and the Prisoner joined with him, *That God would forgive his Sins, and receive his Soul to Mercy.* After which, *Sprot* standing up made divers Requests: First, that what he had deliver'd by this Confession on the Scaffold, might be put into his Process, that the World might take notice of it. Secondly, that such as were present (as they might have Opportunity) would be Suiters unto the King, that his Majesty would forgive him this Offence; for the which, he said, *He craved Pardon of God, of his Sovereign, and the World.* And thirdly, he desired those of the Ministry which were present, that wheresoever they came they would proclaim in the Pulpit his Confession of his Crime, his Sorrow for the same, and his full Hope that God would pardon him. And to the end that this might be perform'd, he took the Hands of such Ministers as stood near about him, so binding a Promise on them. And here, being told by the said Ministers and other Persons of Quality, that being so near his Departure out of the World, it concerned him to speak nothing but the Truth, and that upon the Peril of his Soul: he answer'd, That to the end they should know, that he had spoken nothing but the Verity, and that his Confession was true in every Respect, he would (at the last Gasps) give them some apparent Token for the Confirmation of the same. Then fitting himself to the Ladder, the Executioner cometh to him, and, as the manner is, asking Forgiveness of him; *With all my Heart*, saith he, *for you do but your Office, and it is the thing I desire; because suffering in my Body, I shall in my Soul be joined unto my Saviour.*

Afterward ganging up the Ladder with his Hands loose and untied, being on the upper Part thereof, he desired Liberty to sing the sixth Psalm, and requested the People to accompany him in the singing thereof. Which being granted, he took up the Psalm himself with a very loud and strong Voice, far by his accustomed Form, being before his coming to the Scaffold a weak spirited Man, of feeble Voice and Utterance; and was assisted with the Number of a Thousand Persons at the least, who accompany'd him in singing that Psalm. After the ending whereof he again openly repeated and ratified his said former Confession: and with that, recommending his Soul to God, he fastened a Cloth about his own Eyes, and was cast over the Ladder, so ending this mortal Life.

Before his last Breath, when he had hung a pretty Space, he lift up his Hands a good height, and clapped them together aloud, three several times, to the great Wonder and Admiration of all the Beholders. And very soon thereafter he yielded his Spirit.

Proceedings in Parliament against Francis Bacon Lord Verulam, Viscount St. Albans, Lord Chancellor of England, upon an Impeachment for Bribery and Corruption in the Execution of his Office, March 19, &c. 1620. 18 and 19 Jac. I.

PROCEEDINGS in the House of Commons.

Jovis 15^o die Martii 1620.



IR Robert Phillips reports from the Committee appointed to enquire into Abuses in the Courts of Justice, viz.

I am commanded from the said Committee to render an Account of some Abuses in the Courts of Justice, which have been presented unto us. In that which I shall deliver, are three Parts.

First, The Person against whom it is alledged.

Secondly, The Matter alledged.

Thirdly, The opinion of the Committee.

1. The Person against whom it is alledged, is no less than the Lord Chancellor *, a Man so endued with all Parts, both of Nature and Art, as that I will say no more of him; being not able to say enough.

2. The Matter alledged, is *Corruption*,

3. The Persons by whom this is presented to us, are two, viz. *Awbrey* and *Egerton*.

Awbrey's Petition saith, that he having a Cause depending before the Lord Chancellor, and being tir'd by Delays, was advised by some that are near my Lord, to quicken the way by more than ordinary Means, viz. by presenting my Lord with one hundred Pounds.

The poor Gentleman, not able by any means to come to his wish'd-for Port, struck Sail at this, and made a shift to get an hundred Pounds from the Usurer; and having got it, went with Sir *George Hastings* and Mr. *Jenkins* to *Grays-Inn*: and being come to my Lord's House, they took the Money of him, and carry'd it in to my Lord Chancellor, and came out to him again, saying, my Lord was thankful, and assured him of good Success in his Business.

Sir *George Hastings* acknowledgeth the giving of Advice, and carrying in of the Money to my Lord, and saith he presented it to my Lord as from himself, and not from *Awbrey*.

This is all confirm'd by divers Letters, but it wrought not the Effect which the Gentleman expected; for notwithstanding this, he was still delay'd.

Egerton sheweth, that he desiring to procure my Lord's Favour, was perswaded by Sir *George Hastings* and Sir *Richard Young*, to present my Lord with a Sum of Money.

Before this Advice, he had given a Present of 52 *l.* and odd Shillings in Plate, as a Testimony of his Love; but is doubtful whether before his calling to the Seal, or since: But now by mortgaging his Estate he got up 400 *l.* and sends for Sir *George Hastings* and Sir *Richard Young*, desires their Assistance in presenting this Money, and told them how much it was.

They took it and carry'd it to my Lord Chancellor as a Gratuity from the Gentleman; for that my Lord (when he was Attorney) stood by him. My Lord (as they say) started at first, saying it was too much, he would not take it; but at length was perswaded, because it was for Favours past, and took it, and the Gentlemen return'd him Thanks; saying that their Lord said, that he did not only enrich him, but laid a Tie on him to assist him in all just and lawful Business.

Sir *George Hastings* and Sir *Richard Young* acknowledged the Receiving and Delivery of the Purse; but said they knew not what was in it.

Then a Question was proposed, Whether there were any Suit depending during those Offerings, either in the Chancery, or the Star-Chamber; but there was no certain Evidence of it.

Thus you see *Corruption* laid to the Charge of a Judge too, a great Judge; nay, to the Great Keeper of the King's Conscience.

Another Point came in by the by, shewing that some indirect Means are sometimes open (I fear too often) to the Courts of Justice.

It concerns no less a Man than a Divine, (who is now a Bishop †) but then called Dr. *Field*. Mr. *Egerton* and he being acquainted, and Mr. *Egerton's* Mind being troubled with the ill Success of his Business, vented it to the Divine, who (contrary to his Profession) took upon him to broke for him, in such a manner as was never preceded by any.

* Francis Lord Verulam, Viscount St. Albans.
VOL. V.

† Bishop of Landaffe.

He made *Egerton* to acknowledge a Recognizance of 10000 Marks, with a Defeazance, that if my Lord Chancellor did decree it for him, 6000 Marks was to be distributed among those honourable Persons that did solicit it for him: But if it did not go as they desired, he promis'd, *in Verbo Sacerdotis*, that he would deliver up the Bonds.

This appear'd by Letters from the now Reverend Bishop, but then Practical Doctor.

Mr. *Jabnfen* (a moral honest Man) perceiving that Mr. *Egerton* finding no Relief, did intend to prefer a Petition against the Lord Chancellor by one *Heales's* means; took occasion to talk with Mr. *Egerton*; asking him why he would prefer such a scandalous Petition against my Lord; he would have him take the Money out of the Petition, and then his Cause by the Mediation and Conference of some other Judge with my Lord, might be brought to a good End; and for Money, if he had lent any, he might be satisfy'd again.

Afterwards upon a Petition to the King by Sir *Rowland Egerton*, there was a Reference of this Matter to the Lord Chancellor, and Mr. *Edward Egerton* enter'd into a Bond for ten thousand Marks.

He had treated with one Dr. *Sharp*, that if he would give 1100 l. he should have his Desire.

We sent for *Sharp*, but he deny'd that he ever contracted with him.

The Desire of the Committee was, to reform that which was amiss; and they thought fit to give as much Expedition as might be, because so great a Man's Honour is soiled with it, and therefore do think meet that farther Inquisition be made this Afternoon, and when the Truth of the Matter is found, then to be sent to the Lords.

Thus I have faithfully related what hath passed, and with as much Duty and Respect, as I might, to my Lord Chancellor; I desire it to be carry'd out of the House with a favourable Construction.

Order'd,

That this Matter be further consider'd by the Committee this Afternoon.

Then the House adjourn'd.

Sabbati 17^o die Martii, 1620.

Sir *Robert Phillips* made Report from the Committee of the Abuses in the Courts of Justice, *viz.*

We met on *Thursday* in the Afternoon; the principal Thing wherein I desir'd to be satisfy'd was, whether at the Time of giving those Gifts to the Lord Chancellor there were any Suit depending before him.

In *Awbrey's* Case it appear'd plainly there was: Something accidentally fell out in this Examination, and that is, a Declaration of Sir *George Hastings*, who hath been struggling with himself betwixt Gratitude and Honesty; but publick and private Goods meeting, he prefer'd the Publick, and own'd, that he taking Pity on *Awbrey's* Suit, did give in a Box of 100 l. to the Lord Chancellor, in these Terms or the like, *That it was to help Awbrey in his Cause.* Notwithstanding, not long after, a very prejudicial and murdering Order was made against *Awbrey* in his Cause; whereupon Sir *George Hastings* moved my Lord Chancellor to rectify this Order. My Lord promised to do it, but did it not.

The Order was put into the Hands of one *Churchil* (one of the Registers in Chancery) by a Servant of the Lord Chancellor's.

There are Letters of *Awbrey's* to the Lord Chancellor touching this Business.

Now for Mr. *Egerton's* Case: As the Matter was of more Weight, so the Sum was of larger Extent, for there was 400 l. given then, and a Suit then depending in the *Star-Chamber*; about which time Sir *Rowland Egerton* did prefer a Petition to the King for a Reference unto the Lord Chancellor: Whereupon my Lord caused him to enter into a Bond for six thousand Marks to stand to his Award. An Award was afterwards made, which was refused by Mr. *Edward Egerton*; thereupon a Suit by the Lord Chancellor's Direction was commenced against him, and the Bond of six thousand Marks assign'd over to Sir *Rowland Egerton*.

About this time *Edward Egerton* became acquainted with Dr. *Field*, and related his Cause unto him; who pitying him, sent him to two worthy Gentlemen, Mr. *Damport* and Sir *John Butler*, (who is now dead;) he makes known his Case to them, and desires them to be a means to put off his Cause from Hearing, because his Witnesses were not here.

Whereupon *Damport* wrote to the Duke of *Buckingham* to have had his Letter to the Lord Chancellor to stop it: But the Duke said he would not write, because the Matter was already decreed, and he would not receive it.

Mr. *Egerton* was drawn into a Bond of 10000 Marks for the Payment of 6000; and Mr. *Damport* being asked what he and Dr. *Field* should have had of this Money, he said, he did not remember what certain Sum; but he said it was more than any Cause could deserve in any Court of Justice.

In *Awbrey's* Case this is to be said,

That Sir *George Hastings* being at *Hackney*, where he dwelt, was sent for by the Lord Chancellor, and accordingly he came to him and found him in Bed, who bid him come near him, and willed the rest to depart the Room; and then said unto him, Sir *George*, *I am sure you love me, and I know that you are not willing that any thing done by you shall reflect any Dishonour upon me. I hear, that one Awbrey pretends to petition against me; he is a Man that you have some Interest in; you may take him off if you please.*

Sir *George Hastings* afterwards met with *Awbrey*, and asked him whether he intended any such thing, and desired to see it, to shew my Lord Chancellor; which Sir *George* accordingly did, and desir'd my Lord to do the poor Man Justice.

My Lord promised to do it, and bad him bring his Council; and they did, but could have no Remedy, so the Petition went on.

Sir *George Hastings*, some time since, had Conference with my Lord Chancellor; and he told him, *He must lay it upon his Lordship.* If you do, *George*, (said he) *I must deny it upon my Honour.*

Thus you see the Relation of what hath passed.

Now for our Proceedings in it; it is a Cause of great Weight, it concerns every Man here: For if the Fountains be muddy, what will the Streams be?

If the great Dispenser of the King's Conscience be corrupt, who can have any Courage to plead before him?

I will

I will present one thing unto you, and then make a Request.

That which I move, is, That we present his Business singly to the Lords, and deliver it without Exasperation, 1st. Because there is but one Precedent * for it, in the like Case, for a Chancellor in a Cause of Corruption. 2^{dly}. Because the Party accused is a Peer of the Kingdom, sitting in the higher House, whom we cannot meddle with. 3^{dly}. Because we have no Power to give an Oath.

That which I request is, that those People which have been fetter'd with much Calamity by these Courses, may by Petition to his Majesty, or otherwise, have their Cause Revived and Revised.

Sir *Edward Sackvill*. This honourable Lord stands but yet suspected, and I hold not those Gentlemen that have testified against him competent Witnesses.

First, Because they speak to discharge themselves.

Secondly, Because if he be guilty, they were those that tempted him.

But yet, if notwithstanding you resolve to send it up to the Lords, let it be presented without any prejudicial Opinion, to be weighed in the Balance of their Lordships Judgments.

And if they think fit to examine these Witnesses, let them.

Sir *George Hastings*. This adds to my Grief; but this is my Resolution, I had rather perish with a just Sentence here, than escape with a guilty Conscience.

Some moved that Sir *George Hastings* and Sir *Richard Young* should be sequestred from Parliament till the Matter was ended; but there was nothing order'd therein.

Mr. *Nevill*. After some Reluctation within me, I am resolv'd to speak what my Conscience leads me unto.

I speak for the good of my Country, the honour of my King, and advancement of Justice.

Justice is the Fountain, the King the Head thereof, clear as the Waters of *Siloab*, pure as the River of *Damascus*: but there is a derivative Justice brought unto us by Channels, those are often muddy and more bitter than the Waters of *Marah*: Such Waters flow abundantly in Chancery.

I will not touch upon the Person of him that sits in Court, for he is the Dispenser of the King's Conscience; but because some Motions are made against the Testimony of those Gentlemen, I will say this, I think them fit to sit here, because they are neither Delinquents nor Accused.

My Lord means to deny it upon his Honour: But I would not have that serve his Turn, for he himself hath made the Nobility swear in Chancery.

Therefore I would have their Lordships informed what Privileges they have lost.

Next, I would have them note the luxuriant Authority of that Court, and how it is an inextricable Labyrinth, wherein resideth such a Monitor as gormandizeth the Liberty of all Subjects whatsoever.

Mr. *Recorder Finch*. If we shall make but a Presentation of this, we do in a fort accuse him, nay judge him: if the Gentlemen be admitted to give Testimony, before it shall condemn another it must agree with it self.

First, I heard him say, he gave it as a Present from himself: Yet afterwards he saith, he told my Lord Chancellor he had it from *Awbrey*.

Again, *Awbrey* speaks not of any Delivery of Money himself to my Lord Chancellor.

Then again it's urg'd, that a discontented Suitor writ Letters to my Lord; The Letters are reject-ed, not hearken'd unto; what doth this but free him?

In the other Case, if *Egerton*, out of a Desire to congratulate him at his coming to the Seal, made my Lord a Present for his Kindnesses and Pains in former Businesses, what Wrong hath he done if he hath received a Present? and tho a Suit were depending, yet who keeps a Register in his Heart of all Causes? Nay, who can amongst such a Multitude?

And for the six thousand Marks there is no Colour to say that ever he was to have any Part thereof.

For taking away the Privilege of the Nobility in requiring an Oath, he found the Court possessed of it before he came there; so that we have no sufficient Grounds to accuse so great a Lord upon that Account.

But if we shall present Articles to the Lords, what do we (as I said before) but accuse him?

Sir *Edward Coke*. It is objected, that we have but one single Witness; therefore no sufficient Proof.

I answer, That in the 37th of *Eliz.* in a Complaint against *Soldier-Sellers*, for that having Warrant to take up Soldiers for the Wars, if they press'd a rich Man's Son they would discharge him for Money, there was no more than *singularis testis* in one Matter; but tho they were single Witnesses in several Matters, yet agreeing in one and the same third Person, it was held sufficient to prove a Work of Darknes.

For in such Works it is a Marvel there are any Witnesses.

But some object, that these Men are culpable; and therefore no competent Witnesses.

I answer, They came not to accuse, but were interrogated.

If I be interrogated, I had rather speak Truth than respect any Man; and you will make *Bribery* to be unpunish'd, if he that carrieth the *Bribe* shall not be a Witness.

In this, one Witness is sufficient: He that accuseth himself, by accusing another, is more than three Witnesses: and this was wrought out of them.

Order'd,

That the Complaint of *Awbrey* and *Egerton* against the Lord Chancellor and the Bishop for *Corruption*, for the 100*l.* and 400*l.* and the Recognizance, should be drawn up by Sir *Robert Phillips*, Sir *Edward Coke*, Mr. *Noy*, and Sir *Dudley Diggs*; and that the same be related to the Lords without Prejudice or Opinion at a Conference; and that a Message be sent to the Lords for this Purpose on Monday next.

Adjourn'd, &c.

Lunt 19^o die Martii 1620.

A Message was sent to the Lords by Sir *Robert Phillips*, to desire a Conference touching the Lord

* This seems to be the Case of Cardinal Wolsey. See 3 Co. Inst. 148.
VOL. V.

Chancellor and the Bishop of Landaff, being petition'd against by *Awbrey* and *Egerton*.

Sir *Robert Phillips* reports that the Lords had agreed to a Conference.

Mr. Secretary *Calvert* brings a Message from the King, that this Parliament hath sat a long time, and *Easter* is near come, and thinks it is fit there should be a Cessation for a time; yet the King will appoint no time, but leaves it to your selves.

But for the beginning again, he thinketh the 10th of *April* a fit time, but will appoint none; only he would have you take care that there be no Impediment in the Subsidies.

The King also took notice of the Complaints against the Lord Chancellor, for which he was sorry, for it hath always been his Care to have plac'd the best; but no Man can prevent such Accidents: But his Comfort was, that the House was careful to preserve his Honour.

And his Majesty thought not fit to have the Affair hang long in suspense; therefore would not have any thing to hinder it.

But for the Furtherance thereof, he propos'd a Commission of six of the higher House, and twelve of the lower House, to examine it upon Oath.

This Proposition if we liked well, he would send the like to the Lords, and this he thought might be done during this Cessation: and tho he hoped the Chancellor was free, yet if he should be found guilty, he doubted not but you would do him Justice.

Sir *Edward Coke* said, We should take heed the Commission do not hinder the Manner of our Parliamentary Proceedings.

The Answer return'd to the King was, To render him Thanks for the first Part of his gracious Message.

And for the second, we desired that the like Message may be sent to the Lords; for there being so great a Concurrence betwixt us, we may have Conference with them about it.

And then Adjourn'd, &c.

Martis 20^o die Martii 1620.

Sir *Edward Giles* made a Motion that one *Churchil* should be called in.

Whereupon there was a Petition of one *Montacute*, *Wood*, &c. against the Lord Chancellor for taking 300 *l.* of the Lady *Wharton*, and making Orders, &c. which was read.

Churchil and *Keeling* were said to be Witnesses, and a Committee was appointed to examine them.

Sir *Robert Phillips* reports from the Conference, that according to the Commandment of this House he had deliver'd those Heads which were agreed on at the Conference Yesterday; excusing himself if he had failed in any Point.

That the Lords accepted it with a great deal of Affection, as sensible of the Wrongs done to the Commonwealth; and return'd Answer by the Lord Treasurer: First, By way of Question, Whether we would not reduce them into Writing. Resolv'd No, for no Cause; this only consisting of two or three Points, clear and plain: and as for the Letters and other things which the Lords desir'd, we would acquaint the House, and doubted not but it would be yielded.

The Lords further return'd for Answer, That they would proceed in this Matter with Care, Diligence and Expedition.

A Message from the Lords to signify, that they have taken into Consideration the last Conference, and shall need the Testimony of two Members of this House; and therefore desire, that voluntarily, and without ordering, as private Persons, they make Declaration upon Oath, and the like for others if occasion were.

The Answer return'd was, That the Gentlemen would attend voluntarily as private Gentlemen, and upon private Notice be examined.

Sir *Robert Phillips* reports from the Committee appointed to examine *Churchil*; from which Particular a General may be extracted, conducing to the Discovery of Corruption in the Lord Chancellor.

The Lady *Wharton* having a Cause depending in Chancery, many Orders were made in it.

Amongst the rest, there was an Order made for the Dismission of the Bill, by the consent of the Council on both sides; which my Lady disliking, took *Churchil* the Register into her Coach, and carry'd him to my Lord Chancellor's, and so wrought that he was willed not to enter the last Order; so that my Lady was left at liberty to prosecute it in Chancery, brought it to a Hearing, and at length got a Decree.

Keeling being examin'd, saith, That near about the time of passing this Decree, my Lady took an hundred Pound (he saw it) and she made him set down the Words and Style which she should use in the Delivery of it.

Then she goes to *York-house*, and deliver'd it to my Lord Chancellor, as he told him.

She carry'd it in a Purse.

My Lord asked her, *What she had in her Hand?* She reply'd, *A Purse of my own making*, and presented it to him; who took it and said, *What Lord could refuse a Purse of so fair a Lady's Working?*

After this my Lord made a Decree for her, but it was not perfected; but 200 *l.* more being given (one *Gardiner* being present) her Decree had Life.

But after the giving of the 100 *l.* because she had not 200 *l.* ready in Money, one *Shute* dealt with her to convey the Land to my Lord Chancellor and his Heirs, reserving an Estate to herself for Life: But she knowing no Reason to disinherit her own Children, asked *Keeling* her Man what he thought of it; he (like an honest Servant) was against it.

Shute knowing this, sets upon *Keeling*, and brings him to be willing my Lady should do it, with Power of Revocation upon the Payment of 200 *l.* but that not being liked, they made a shift to pay 200 *l.* in a reasonable time.

Keeling lets fall some Speeches, as if he had left *York-house* for the Corruption which was there, which he himself knew in part.

Gardiner, *Keeling's* Man, confirm'd the Payment of the 300 *l.* for the Decree, viz. 100 *l.* before, and 200 *l.* after.

This purchas'd Decree being lately damn'd again by my Lord Chancellor, was the Cause of this Complaint.

Keeling saith, Sir *John Trevor* did present my Lord Chancellor with 100 *l.* by the Hands of Sir *Richard Young*, for a final End to this Cause.

Sir *Richard Young* answer'd, That when he attended my Lord Chancellor, Sir *John Trevor's* Man

Man brought a Cabinet and a Letter to my Lord Chancellor, and intreated me to deliver it, which I did openly; and this was openly done, and this was all I knew of it.

Sir *Edward Coke*. Strange to me that this Money should be thus openly deliver'd, and that one *Gardiner* should be present at the Payment of the 200 l.

Order'd,

That Sir *Robert Phillips* do deliver to the Lords this Afternoon the Bishop of *Landaff* and *Awbrey's* Letters, and all other Writings that he hath.

And then Adjourn'd, &c.

Mercurii 21^o die Martii 1620.

Sir *Robert Phillips* reports from the Committee appointed to examine *Keeling* and *Churchil*, who inform'd many Corruptions against the Lord Chancellor.

1. In the Cause betwixt *Hull* and *Holeman*, *Hull* gave or lent my Lord one thousand pound since the Suit began.

2. In the Cause between *Wrotb* and *Manwaring*, there were one hundred Pieces given, of which *Hunt* had 20 l.

3. *Hoddy* gave a Jewel which was thought to be worth 500 l. but he himself said it was a Trifle of a hundred or two hundred Pound Price: It was presented to the Lord Chancellor by Sir *Thomas Peryn* and Sir *Henry Holmes*.

4. In the Cause between *Peacock* and *Reynell*, there was much Money given on both sides.

5. In the Cause of *Barker* and *Bill*, *Barker* said he was 800 l. out in Gifts since this Suit began.

6. In the Cause between *Smithwick* and *Welfs*, *Smithwick* gave 300 l. yet my Lord decreed it a-

gainst him; so he had his Money again by piece-meal.

In this and other Causes, my Lord would decree Part; and when he wanted more Money he would send for more, and then decree another Part.

In most Causes my Lord's Servants have undertaken one Side or another; insomuch as it was usual for Council, when their Clients came unto them, to ask what Friend they had at *York-house*.

Mr. *Mewtys*. Touching the Persons that inform, I would intreat this honourable House to consider that *Keeling* is a common Solicitor (to say no more of him) *Churchil* a guilty Register by his own Confession: I know that Fear of Punishment, and Hopes of lessening it, may make them to say much, yea more than is true.

For my own part, I must say I have been an Observer of my Lord's Proceedings; I know he hath sown the good Seed of Justice, and I hope that it will prove that the envious Man hath sown those Tares.

I humbly desire that these Generals may not be sent up to the Lords, unless these Men will testify them in particular.

Order'd,

That a Message be sent to the Lords by Sir *Robert Phillips*, to relate the Case of the Lady *Wharton*, and the Informations of *Churchil*.

Sir *Robert Phillips* reports from the Lords, that they acknowledged the great Care of this House in these important Businesses; return Thanks for the Correspondence of this House with them, and assure the like from them for ever to this House. In these and all other things they will advise, and return Answer as soon as possible.

And then Adjourn'd, &c.

PROCEEDINGS in the House of Lords.

ON Monday the 19th Day of March 1620. in the Afternoon the Commons had a Conference with the Lords: which Conference was reported the next Day by the Lord Treasurer; That it was the desire of the Commons to inform their Lordships of the great Abuses of the Courts of Justice, the Information whereof was divided into these three Parts.

First, The Persons accused.

Secondly, The Matters objected against them.

Thirdly, The Proofs.

The Persons are the Lord Chancellor of *England*, and the now Bishop of *Landaffe*, being then no Bishop, but Dr. *Field*.

The incomparable good Parts of the Lord Chancellor were highly commended, the Place he holds magnified, from whence Bounty, Justice and Mercy were to be distributed to the Subjects, with which he was solely trusted; whither all great Causes were drawn, and from whence no Appeal lay for any Injustice or Wrong done, save to the Parliament.

That the Lord Chancellor was accused of great Bribery and Corruption * committed by him in this eminent Place; whereof two Cases were alledged. * 3 Co. Inst. 148.

The one concerning *Christopher Awbrey*, and the other concerning *Edward Egerton*.

1. In the Cause depending in the Chancery between the said *Awbrey* and Sir *William Bronker*, *Awbrey* feeling some hard Measure, was advised to give the Lord Chancellor 100 l. the which he delivered to his Counsel, Sir *George Hastings*, and he to the Lord Chancellor: This Business proceeding slowly notwithstanding, *Awbrey* did write divers Letters, and delivered them to the Lord Chancellor, to which he never obtained any Answer from his Lordship; but at last delivering another Letter, his Lordship answered, *If he importuned him, he would lay him by the Heels*.

The Proofs of this Accusation are five.

First, Sir *George Hastings* related it long since unto Sir *Charles Montague*.

Secondly,

Secondly, The Lord Chancellor fearing this would be complained of, desired Silence of Sir George Hastings.

Thirdly, Sir George Hastings's Testimony thereof, which was not voluntary, but urged.

Fourthly, The Lord Chancellor desired Sir George Hastings to bring the Party *Awbrey* unto him, and promised Redress of the Wrongs done him.

Fifthly, That the Lord Chancellor said unto Sir George Hastings, if he should affirm the giving of this 100 l. his Lordship would and must deny it upon his Honour.

2. The Case of Sir Edward Egerton is this: There being divers Suits between Edward Egerton and Sir Rowland Egerton in the Chancery, Edward Egerton presented his Lordship, a little after he was Lord Keeper, with a Baſon and Ewer of the Value of 50 l. and upwards; and afterwards he delivered unto Sir George Hastings, and Sir Richard Young, 400 l. in Gold.

Sir Richard Young presented it to his Lordship, who took it, and poſed it, and said it was too much; and returned Answer, that Mr. Egerton had not only enriched him, but had laid a tye upon his Lordship to do him Favour in all his juſt Cauſes.

The Proofs for this are the Testimony of Sir George Hastings, and the Testimony of *Merefill* a Scrivener thus far, that he took up 700 l. for Mr. Egerton; Mr. Egerton then telling him that a great part of it was to be given to the Lord Chancellor, and that Mr. Egerton afterwards told him that the 400 l. in Gold was given to the Lord Chancellor.

At this Conference was farther declared somewhat relating to a Bishop, who was touched in this Buſineſs upon the bye, whose Function was much honoured, but his Person touched herein: The Buſineſs depending between the Egertons being order'd against Edward Egerton, he procured a new Reference thereof from the King to the Lord Chancellor; his Lordship demanded the Parties to be bound in 6000 Marks to stand to his Lordship's Award; they having entred into that Bond, his Lordship awarded the matter against Edward Egerton for Sir Rowland Egerton; but Edward Egerton refusing to stand to the said Award, a new Bill was exhibited in the Chancery, and thereupon his Lordship ordered that this Bond of 6000 Marks should be assigned unto Sir Rowland Egerton, and he to put the same in Suit in his Lordship's Name.

The Bishop of Landaff, as a Friend to Mr. Edward Egerton, adviſeth with Randolph Dampont and Butler (which Butler is now dead) that they would procure a stay of the Decree of that Award, and procure a new Hearing; upon which it was agreed, that the said 6000 Marks should be given for this by Edward Egerton, and shared amongst them, and amongst certain Noble Persons.

A Recognizance of 10000 Marks was required from Mr. Egerton to the Bishop for the Performance hereof: the Bishop his Share of this 6000 Marks was so great, as no Court of Justice would allow.

To prove this, they produce Letters of the Bishop, naming the Sum, and setting down a Course how these 6000 Marks might be rais'd, viz. the Land in Question to be decreed for Mr. Egerton, and out of that the Money to be levied; and if

this were not effected, then the Bishop *in Verbo Sacerdotis* promised to deliver up this Recognizance to be cancelled; the new Recognizance is sealed accordingly, and Randolph Dampont rides to Court, and moved the Lord Admiral. * Duke of Buckingham. for his Lordship's Letter to the Lord Chancellor herein; but his Lordship denied to meddle in a Cause depending in Suit.

Then the said Randolph Dampont assayed to get the King's Letter, but failed therein also; so that the Good they intended to Mr. Egerton was not effected, and yet the Bishop tho required, refused to deliver up the said Recognizance, until Mr. Egerton threatened to complain thereof unto the King.

The Lord Treasurer shewed also that the Commons do purpose, that if any more of this kind happen to be complained of before them, they will present the same to your Lordships, wherein they shall follow the antient Precedents, which shew that great Persons have been accused for the like in Parliament.

They humbly desire, that forasmuch as this concerneth a Person of so great Eminency, it may not depend long before your Lordships, that the Examination of the Proofs may be expedited, and if he be found Guilty, then to be punished; if not Guilty, the now Accusers to be punished.

This being reported, the Lord Admiral presented to the House a Letter written unto their Lordships; the Tenor whereof follows.

My very good Lords,

I Humbly pray your Lordships all to make a favourable and true Construction of my Absence; it is no feigning nor fainting, but sickness both of my Heart, and of my Back, tho joined with that Comfort of Mind, that persuades me, that I am not far from Heaven, whereof I feel the first Fruits: and because whether I live or die, I would be glad to preserve my Honour and Fame as far as I am worthy; hearing that some Complaints of base Bribery are coming before your Lordships, my Requests unto your Lordships are,
First, That you will maintain me in your good Opinion without Prejudice, until my Cause be heard.

Secondly, That in regard I have sequester'd my Mind at this time in great part from worldly Things, thinking of my Accompt and Answer in a higher Court, your Lordships would give me convenient Time, according to the Course of other Courts, to advise with my Council, and to make my Answer; wherein nevertheless my Council's part will be the least, for I shall not by the Grace of God trick up an Innocency with Cavillations, but plainly and ingenuously, as your Lordships know my manner is, declare what I know or remember.

Thirdly, That according to the Course of Justice, I may be allowed to except to the Witnesses brought against me, and to move Questions to your Lordships for their cross Examination, and likewise to produce my own Witnesses for discovery of the Truth.

And Lastly, That if there come any more Petitions of like Nature, that your Lordships would be pleased not to take any Prejudice or Apprehension of any Number or Muster of them, especially

especially against a Judge, that makes two Thousand Orders and Decrees in a Year; not to speak of the Courses that have been taken for hunting out Complaints against me; but that I may answer them according to the Rules of Justice severally and respectively. These Requests I hope appear to your Lordships no other than Just; and so thinking my self happy to have so Noble Peers, and Reverend Prelates to discern of my Cause, and desiring no privilege of Greatness for subterfuge of Guiltiness, but meaning, as I said, to declare fairly and plainly with your Lordships, and to put my self upon your Honours and Favours, I pray God to bless your Counsels, and your Persons; and rest

Your Lordships

March. 19.

1620.

Humblest Servant,

Fra. St. Alban.

Upon which Letter, Answer was sent from the Lords unto the said Lord Chancellor on the said 20th of March, viz. *That the Lords received his Lordship's Letter delivered unto them by the Lord Admiral: They intend to proceed in his Cause now before their Lordships, according to the right Rules of Justice; and they shall be glad, if his Lordship shall clear his Honour therein; to which End they pray his Lordship to provide for his just Defence.*

And afterwards, on Wednesday the 21st of March, the Commons sent a Message unto the Lords concerning their further Complaint against the said Lord Chancellor; which consisted of these four Points, viz.

1. The First in Chancery being between the Lady Wharton Plaintiff, and Wood and others Defendants, upon Cross-Bills; the Lord Chancellor upon hearing wholly dismissed them, but upon entry of the Order, the Cross-Bill against the Lady Wharton was only dismissed, and afterwards for a Bribe of 300 l. given by the Lady Wharton to the Lord Chancellor, his Lordship decreed the Cause further; and then hearing that Wood and the other Defendants complained thereof to the House of Commons, his Lordship sent for them, and damned that Decree as unduly gotten; and when the Lady Wharton began to complain thereof, his Lordship sent for her also, and promis'd her Redress; saying, the Decree is not yet entered.

2. Secondly, In a Suit between Hall Plaintiff and Holman Defendant, Holman deferring his Answer was committed to the Fleet, where he lay twenty Weeks; and petitioning to be delivered, was answered by some about the Lord Chancellor, the Bill shall be decreed against him (*pro confesso*) unless he would enter into 2000 l. Bond to stand to the Lord Chancellor's Order; which he refusing, his Liberty cost him one way or other one Thousand Pounds. Holman being freed out of the Fleet, Hall petition'd to the Lord Chancellor, and Holman finding his Cause to go hard with him on his side, complained to the Commons; whereupon the Lord Chancellor sent for him, and to pacify him, told him, *He should have what Order he would himself.*

3. Thirdly, In the Cause between Smithwick and Wells, the matter in question being for Accompts, it was referred to certain Merchants, who certified in the behalf of Smithwick; yet Smithwick to obtain a Decree, was told by one Mr. Burrough, one near to the Lord Chancellor, that it must cost him 200 l. which he payed to Mr. Burrough or Mr. Hunt to the use of the Lord Chancellor, and yet the Lord Chancellor decreed but one part of the Certificate; whereupon he treats again with Mr. Burrough, who demanded another 100 l. which Smithwick also paid to the use of the Lord Chancellor. Then his Lordship referred the Accounts again to the same Merchants, who certified it again for Smithwick; yet his Lordship decreed the second part of the Certificate against Smithwick; and the first part, which was formerly decreed for him, his Lordship made doubtful. Smithwick petitioned to the Lord Chancellor for his Money again, and Smithwick had all his Money again, save 20 l. which was kept back by Hunt for a Year.

The Lord Chief Justice * also deliver'd three Petitions, which his Lordship receiv'd yesterday from the Commons, the first by the Lady Wharton, the second by Wood and others, and the third by Smithwick.

* Sir James Ley.

The Fourth part of the Message consists only of Instructions delivered unto the Commons by one Churcheil a Register, containing divers Bribes and Abuses in the Chancery, which the Commons desire may be examined.

The Lords in the mean time proceeded to the Examination of the Complaints, and took divers Examinations of Witnesses in the House, and appointed a select Committee of themselves, to take Examinations of Witnesses to the Briberies and Corruptions of the Lord Chancellor; which being ended and collected, were order'd to be transcribed with the Proofs, and were as follows.

That in the Cause between Sir Rowland Egerton and Edward Egerton, his Lordship received on the part of Sir Rowland Egerton before he decreed for him, ———	300
Item, Of Edward Egerton in the said Cause, ———	400
Item, In the Cause between Hodie and Hodie, a dozen of Buttons (after the Cause ended) of the value of ———	50
Item, Of the Lady Wharton, ———	310
Item, Of Sir Thomas Monk, ———	100
Item, Of Sir John Trevor, ———	100
Item, Of one Young, ———	100
Item, Of one Fisher, ———	106
Item, In the Cause of Kenday and Valore, of Kenday a Cabinet worth ———	800
Of Valore (borrow'd at two times) ———	2000
Item, In the Cause between Scot and Lentball, of Scot ———	200
Item, of Lentball, ———	100
Item, Of one Wroth, who had a Cause between him and one Manwaring, ———	100
Item, Of Sir Ralph Hansby, ———	500
Item, In the Lord Mountaine's Cause, of the Lord Mountaine, and more promis'd at the end of the Cause, ———	600 or 700
Item, Of one Mr. Dunch, ———	200

Item.

Item, In a Cause between Reynell and Peacock, 200 <i>l.</i> in Money, and a Diamond Ring worth 5 or 600 <i>l.</i> — — — — —	700 or 800
Item, Of Peacock, — — — — —	100
Item, In a Cause of Barker, — — — — —	700
Item, There being a Reference from his Majesty to his Lordship of a Business between the Grocers and Apothecaries, he had of the Grocers — — — — —	200
Of the Apothecaries, (besides a rich Present of Ambergrease) — — — — —	150
Item, Of the French Merchants, to constrain the Vintners of London to take 1500 Tuns of Wine; to accomplish which, he used very indirect means, by colour of his Office and Authority, without Bill or other Suit depending, as threatening and imprisoning the Vintners, for which he receiv'd of the Merchants — — — — —	1000
Lastly, That he had given way to great Exactions by his Servants, in respect of private Seals, and sealing Injunctions.	

On Tuesday the 24th of April, the Prince his Highness signified unto their Lordships, that the said Lord Chancellor had sent a Submission unto their Lordships, which was presently read *in hac Verba*.

May it please your Lordships,

I Shall humbly crave at your Lordships Hands a benign Interpretation of that, which I shall now write; for Words, that come from wasted Spirits, and an oppressed Mind, are more safe in being deposited in a noble Construction, than in being circled with any reserved Caution.

This being moved, and as I hope obtained in the Nature of a Protection for all that I shall say, I shall now make into the rest of that, wherewith I shall at this time trouble your Lordships, a very strange entrance: for in the midst of a state of as great Affliction, as I think a mortal Man can endure, (Honour being above Life) I shall begin with the professing of Gladness in some things.

The first is, that hereafter the Greatness of a Judge or Magistrate shall be no Sanctuary or Protection of Guiltiness, which (in few words) is the beginning of a Golden World.

The next is, that after this Example, it is like that Judges will fly from any thing that is in the likeness of Corruption (tho it were at a great distance) as from a Serpent; which tendeth to the purging of the Courts of Justice, and the reducing them to their true Honour and Splendor. And in these two Points, God is my Witness, that, tho it be my Fortune to be the Anvil whereupon these good Effects are beaten and wrought, I take no small Comfort.

But to pass from the Motions of my Heart, whereof God is only Judge, to the Merits of my Cause, whereof your Lordships are Judges under God, and his Lieutenant; I do understand there hath been heretofore expected from me some Justification, and therefore I have chosen one only Justification instead of all other, one of the Justifications of Job: for after the clear Submission and Confession, which I shall now make unto your Lordships, I hope I may say and

justify with Job in these words, *
I have not hid my Sin, as did Adam, * Job c. 31.
nor concealed my Faults in my Bosom; v. 33.
this is the only Justification, which I will use:
It resteth therefore, that without Fig-leaves I do ingenuously confess and acknowledge, that having understood the particulars of the Charge, not formally from the House, but enough to inform my Conscience and Memory, I find matter sufficient and full both to move me to desert the Defence, and to move your Lordships to condemn and censure me.

Neither will I trouble your Lordships by singling those Particulars, which I think may easiest be answer'd, *Quid te exempta juvat spinis de pluribus una?* neither will I prompt your Lordships to observe upon the Proofs, where they come not home, or the Scruples touching the Credit of the Witnesses; neither will I represent to your Lordships how far a Defence might in divers things extenuate the Offence in respect of the time or manner of the Gift, or the like Circumstances; but only leave those things to spring out of your own noble Thoughts and Observations of the Evidence and Examinations themselves, and charitably to wind about the particulars of the Charge here and there, as God shall put you in mind, and so submit my self wholly to your Pity and Grace.

And now that I have spoken to your Lordships as Judges, I shall say a few words to you as Peers and Prelates, humbly commending my Cause to your noble Minds and magnanimous Affections.

Your Lordships are no simple Judges, but parliamentary Judges, you have a farther extent of Arbitrary Power, than other Judges; and if your Lordships be not tied by the ordinary Course of Courts or Precedents in Points of Strictness and Severity, much less are you in Points of Mercy and Mitigation.

And yet if any thing which I shall move, might be contrary to your honourable and worthy End to introduce a Reformation, I should not seek it; but herein I beseech you give me leave to tell your Lordships a Story. Titus Manlius took his Son's Life for giving Battle against the Prohibition of his General: not many Years after the like severity was pursued by Papirius Cursor the Dictator against Quintus Maximus; who, being upon the Point to be sentenced, by the Intercession of some principal Persons of the Senate, was spared; whereupon Livy makes this grave and gracious Observation, *Neque minus firmata est Disciplina militaris periculo Quinti Maximi, quam miserabili supplicio Titi Manlii.* The Discipline of War was no less established by the questioning of Quintus Maximus, than by the punishing of Titus Manlius. And the same Reason is of the Reformation of Justice; for the questioning Men of eminent Place hath the same Terror, tho not the same Rigour, with the Punishment.

But my Case stayeth not there; for my humble desire is, that his Majesty would take the Seal into his Hands, which is a great downfall, and may serve I hope in it self for an expiation of my Faults.

Therefore if Mercy, and Mitigation be in your Powers, and do no way cross your noble Ends, why should I not hope of your Lordships Favours and Commiseration? Your Lordships will

‘ will be pleased to behold your chief Pattern, the
 ‘ King our Sovereign, of most incomparable Cle-
 ‘ mency, and whose Heart is inscrutable for Wis-
 ‘ dom and Goodness: Your Lordships will remem-
 ‘ ber that there sat not these 200 Years before a
 ‘ Prince in your House, and never such a Prince,
 ‘ whose Presence deserves to be made memo-
 ‘ rable by Records and Acts mixt of Mercy and
 ‘ Justice. Your selves, either Nobles (and Com-
 ‘ passion ever beats in the Veins of noble Blood)
 ‘ or reverend Prelates, who are the Servants of
 ‘ him that would not break the bruised Reed,
 ‘ nor quench the smoking Flax; you all sit upon
 ‘ an high Stage, and therefore cannot but be more
 ‘ sensible of the Changes of the World, and of
 ‘ the Fall of any of High Place.

‘ Neither will your Lordships forget, that there
 ‘ are *vitia temporis* as well as *vitia hominis*; and
 ‘ that the beginning of Reformations hath the
 ‘ contrary Power of the *Pool of Bethesda*, for that
 ‘ had strength to cure only him, that is first cast
 ‘ in, and this hath strength to hurt him only, that
 ‘ is first cast in: And for my part I wish it may
 ‘ stay there, and go no further.

‘ Lastly, I assure my self your Lordships have a
 ‘ noble feeling of me, as a Member of your own
 ‘ Body; and one thing there was, that in this very
 ‘ Session had some taste of your loving Affec-
 ‘ tions, which I hope was not a Lightning before
 ‘ Death, but rather a Spark of that Grace, which
 ‘ now in conclusion will more appear.

‘ And therefore my humble Suit unto your
 ‘ Lordships is, that my penitent Submission may
 ‘ be my Sentence, and the Loss of the Seal my
 ‘ Punishment, and that your Lordships will spare
 ‘ my farther Sentence: But recommend me to his
 ‘ Majesty’s Grace and Pardon for all that is past.
 ‘ God’s Holy Spirit be among you.

Your Lordships humble Servant

April 22.
1621.

and Supplicant,

Fran. St. Albans, *Canc.*

The Lords having consider’d of this Submission,
 and heard the Collections of Corruptions charged
 upon the said Lord Chancellor, and the Proofs
 thereof read, they sent a Copy of the same with-
 out the Proofs unto the Lord Chancellor by Mr.
 Baron Denbam, and Mr. * Attorney
 General, with this Message from
 their Lordships, *viz.* That the
 Lord Chancellor’s Confession is not fully set down
 by his Lordship in the said Submission, for three
 Causes.

1. *First*, His Lordship confesseth not any par-
 ticular Bribe or Corruption.
2. Nor sheweth how his Lordship heard the
 Charge thereof.
3. The Confession, such as it is, is afterwards
 extenuated in the same Submission. And therefore
 the Lords have sent him a particular of the Charge,
 and do expect his Answer to the same with all con-
 venient Expedition.

Unto which Message the Lord Chancellor an-
 swered, that he would return the Lords an An-
 swer with speed.

VOL. V.

And on the 25th of *April*, the Lords consi-
 dered of the Lord Chancellor’s said Answer sent
 unto their Message yesterday, and sent a second
 Message unto his Lordship to this Effect by the
 said Mr. Baron Denbam, and Mr. Attorney Gene-
 ral, *viz.* The Lords having received a doubtful
 Answer unto the Message their Lordships sent him
 yesterday, therefore they now send to him again
 to know of his Lordship directly, and presently,
 whether his Lordship will make his Confession, or
 stand upon his Defence.

Answer returned by the said Messengers, *viz.*
 The Lord Chancellor will make no manner of De-
 fence to the Charge, but meaneth to acknowledge
 Corruption, and to make a particular Confession to
 every Point, and after that an humble Submission;
 but humbly craves Liberty, that where the Charge
 is more full than he finds the Truth of the Fact,
 he may make Declaration of the Truth in such
 Particulars, the Charge being brief, and contain-
 ing not all Circumstances.

The Lords sent the same Messengers back
 again to the Lord Chancellor, to let him know,
 that their Lordships have granted him time until
 Monday next the 30th of *April*, by Ten in the
 Morning, to send such Confession and Submission
 as his Lordship intends to make.

On which *Monday* the Lord Chancellor sent
 the same accordingly, which follows in *hæc Verba*,
viz.

*To the Right Honourable the Lords Spi-
 ritual and Temporal, in the High Court of
 Parliament assembled,*

*The humble Confession and Submission of me the
 Lord Chancellor.*

UPON advis’d Consideration of the Charge,
 descending into my own Conscience, and
 calling my Memory to account so far as I am
 able, I do plainly and ingenuously confess, that
 I am guilty of Corruption, and do renounce all
 Defence, and put my self upon the Grace and
 Mercy of your Lordships.

The Particulars I confess and declare to be as
 followeth.

To the *first* Article of the Charge, *viz.* In the
 Cause between Sir Rowland Egerton and Edward
 Egerton, the Lord Chancellor receiv’d 300 l. on
 the part of Sir Rowland Egerton, before he had
 decreed the Cause.

I do confess and declare, that upon a Reference
 from his Majesty of all Suits and Controversies
 between Sir Rowland Egerton and Edward Egerton,
 both Parties submitted themselves to my Award
 by Recognizances reciprocal in 10000 Marks
 a-piece. Thereupon, after divers Hearings, I
 made my Award, with the Advice and Consent of
 my Lord Hobart. The Award was perfected and
 published to the Parties, which was in *February*.
 Then some Days after, the 300 Pounds, mentioned
 in the Charge, were delivered unto me. After-
 wards Mr. Edward Egerton flew off from the
 Award. Then in *Midsummer* Term following a
 Suit was begun in Chancery by Sir Rowland,
 to have the Award confirmed: And upon that Suit
 was the Decree made, mentioned in the Article.

G

The

The *second* Article of the Charge, *viz.* In the same Cause he received from *Edward Egerton* 400 *l.*

I confess and declare, that soon after my first coming to the Seal, being a Time when I was presented by many, the 400 *l.* mentioned in the said Charge, was delivered unto me in a Purse, and as I now call to mind, from Mr. *Edward Egerton*; but, as far as I can remember, it was express'd by them that brought it, to be for Favours past, and not in respect of Favours to come.

The *third* Article of the Charge, *viz.* In the Cause between *Hody* and *Hody*, he received a dozen of Buttons of the value of 50 *l.* about a Fortnight after the Cause was ended; I confess and declare, that as it is laid in the Charge about a Fortnight after the Cause was ended, it being a Suit for a great Inheritance, there were gold Buttons, about the value of 50 *l.* as is mentioned in the Charge, presented unto me, as I remember, by Sir *Thomas Perrot*, and the Party himself.

To the *fourth* Article of the Charge, *viz.* In a Cause between the Lady *Wharton* and the Co-heirs of Sir *Francis Willoughby*, he received of the Lady *Wharton* three hundred and ten Pounds.

I confess and declare, that I did receive of the Lady *Wharton*, at two several times, as I remember, in Gold 200 *l.* and 100 Pieces, and this was certainly *Pendente Lite*: But yet I have a vehement Suspicion, that there was some shuffling between Mr. *Shute* and the Register, in entring some Orders, which afterwards I did distaste.

To the *fifth* Article of the Charge, *viz.* In Sir *Thomas Monk's* Cause, he received from Sir *Thomas Monk*, by the Hands of Sir *Henry Holmes*, 110 *l.* but this was three quarters of a Year after the Suit was ended.

I confess it to be true that I received 100 Pieces, but it was long after the Suit ended, as is contained in the Charge.

To the *sixth* Article of the Charge, *viz.* In the Cause between Sir *John Trevor* and *Ascue*, he received on the part of Sir *John Trevor* 100 *l.*

I confess and declare, that I received at *New-Year's-Tide* 100 *l.* from Sir *John Trevor*; and because it came as a *New-Year's* Gift, I neglected to inquire, whether the Cause was ended, or depending: but since I find, that tho the Cause was then dismissed to a Trial at Law, yet the Equity was reserved, so as it was in that kind *Pendente Lite*.

To the *seventh* Article of the Charge, *viz.* In the Cause between *Holman* and *Young*, he received of *Young* 100 *l.* after the Decree made for him.

I confess and declare, that as I remember, a good while after the Cause ended, I received 100 *l.* either by Mr. *Toby Mathew* or from *Young* himself: but whereas I have understood, that there was some Money given by *Holman* to my Servant *Hatcher*, to that Certainty I was never made privy.

To the *eighth* Article of the Charge, In the Cause between *Fisber* and *Wrenham*, the Lord Chancellor, after the Decree passed, received a Suit of Hangings worth one hundred and three-score Pounds and better, which *Fisber* gave him by advice of Mr. *Shute*.

I confess and declare, that some time after the Decree passed, I being at that time upon remove

to *York-house*, I did receive a Suit of Hangings of the value, I think, mentioned in the Charge by Mr. *Shute*, as from Sir *Edward Fisber*, towards the furnishing of my House, as some others, that were no ways Suitors, did present me with the like about that time.

To the *ninth* Article of the Charge, In the Cause between *Kenneday* and *Vanlore*, he received a rich Cabinet from *Kenneday*, apprais'd at 800 *l.*

I confess and declare, that such a Cabinet was brought to my House, tho nothing near half the value; and that I said to him that brought it, that I came to view it, and not to receive it, and gave commandment that it should be carried back, and was offended when I heard it was not: and about a Year and an half after, as I remember, Sir *John Kenneday* having all that time refused to take it away, as I am told by my Servants, I was petitioned by one *Pinkney*, that it might be delivered to him, for that he stood engaged for the Money that Sir *John Kenneday* paid for it; and thereupon Sir *John Kenneday* wrote a Letter to my Servant *Sherborne*, with his own Hand, desiring I would not do him that disgrace as to return that Gift back, much less to put it into a wrong hand: And so it remains yet ready to be returned to whom your Lordships shall appoint.

To the *tenth* Article of the Charge, *viz.* He borrowed of *Vanlore* 1000 *l.* upon his own Bond at one time, and the like Sum at another time upon his Lordship's own Bill, subscribed by Mr. *Hunt* his Man.

I confess and declare, that I borrowed the Money in the Article set down, and that this is a true Debt; and I remember well, that I wrote a Letter from *Kew* about a twelve-month since to a Friend about the King, wherein I desired, that whereas I owed *Peter Vanlore* 2000 *l.* his Majesty would be pleased to grant me so much out of his Fine set upon me in the Star-Chamber.

To the *eleventh* Article of the Charge, *viz.* He received of *Richard Scott* 200 *l.* after his Cause was decreed, but upon a precedent Promise; all which was transacted by Mr. *Shute*.

I confess and declare, that some Fortnight after, as I remember that the Decree passed, I received 200 *l.* as from Mr. *Scott* by Mr. *Shute*, as upon some precedent Promise or Transaction by Mr. *Shute*: Certain I am I knew of none.

To the *twelfth* Article of the Charge, *viz.* He received in the same Cause on the part of Sir *John Lentall* 100 *l.*

I confess and declare, that some Month after, as I remember, that the Decree passed, I received 100 *l.* by my Servant *Sherborne*, as from Sir *John Lentall*, who was not the adverse Party to *Scott*, but a third Person relieved by the same Decree in the Suit of one *Power*.

To the *thirteenth* Article of the Charge, *viz.* He receiv'd of Mr. *Worth* 100 *l.* in respect of the Cause between him and Sir *Arthur Manwaring*.

I confess and declare, that this Cause being a Cause for Inheritance of good value, was ended by my Arbitrement and consent of Parties, and so a Decree passed of course; and some Month after the Cause was ended, the 100 *l.* mentioned in the said Article, was deliver'd to me by my Servant *Hunt*.

To the *fourteenth* Article of the Charge, *viz.* He received of Sir *Ralph Hansbye*, having a Cause depending before him, 500 *l.*

I confess and declare, that there were two Decrees, one, as I remember, for the Inheritance, and the other for the Goods and Chattels, but all upon one Bill: and some good time after the first Decree, and before the second, the said 500 *l.* was deliver'd unto me by Mr. *Toby Mathew*; so as I cannot deny but it was upon the matter *Pendente Lite*.

To the *fifteenth* Article of the Charge, *viz.* *William Compton* being to have an Extent for a Debt of 1200 *l.* the Lord Chancellor staid it, and wrote his Letter; upon which part of the Debt was paid presently, and part at a future Day. The Lord Chancellor hereupon sends to borrow 500 *l.* and because *Compton* was to pay 400 *l.* to one *Huxley*, his Lordship requires *Huxley* to forbear six Months, and hereupon obtains the Money from *Compton*. The Money being unpaid, Suit grows between *Huxley* and *Compton* in Chancery, where his Lordship decrees *Compton* to pay *Huxley* the Debt, with Damage and Costs, when it was in his own Hands.

I do declare, that in my Conscience the stay of the Extent was just, being an Extremity against a Nobleman, by whom *Compton* could be no loser. The Money was plainly borrowed of *Compton* upon Bond with Interest, and the Message to *Huxley* was only to intreat him to give *Compton* a longer Day, and in no sort to make me Debtor or responsible to *Huxley*; and therefore, tho I was not ready to pay *Compton* his Money, as I would have been glad to have done, save only 100 *l.* which is paid, I could not deny Justice to *Huxley* in as ample manner as if nothing had been between *Compton* and me: But if *Compton* hath been damnified in my respect, I am to consider it to *Compton*.

To the *sixteenth* Article of the Charge, *viz.* In the Cause between Sir *William Bronker* and *Awbrey*, the Lord Chancellor receiv'd from *Awbrey* 100 *l.*

I do confess and declare, that the Money was given and received; but the manner of it I leave to the Witnesses.

To the *seventeenth* Article of the Charge, *viz.* In the Lord *Mountague's* Cause he received from the Lord *Mountague* 6 or 700 *l.* and more was to be paid at the ending of the Cause.

I confess and declare, there was Money given, and as I remember, to Mr. *Bevis Thelwall*, to the Sum mentioned in the Article, after the Cause was decreed; but I cannot say it was ended, for there have been many Orders since caused by Sir *Francis Inglefield's* Contempts: and I do remember, that when *Thelwall* brought the Money, he said, that my Lord would be yet farther thankful if he could once get his quiet. To which Speech I gave little regard.

To the *eighteenth* Article of the Charge, *viz.* In the Cause of Mr. *Dunch*, he received from Mr. *Dunch* 200 *l.*

I confess and declare, that it was delivered by Mr. *Thelwall* to *Hatcher*, my Servant, for me, as I think some time after the Decree; but I cannot precisely inform my self of the time.

To the *nineteenth* Article of the Charge, *viz.* In the Cause between *Reynell* and *Peacocke*, he received from *Reynell* 200 *l.* and a Diamond-Ring worth 5 or 600 *l.*

Vo L. V.

I confess and declare, that at my first coming to the Seal, when I was at *Whitchhall*, my Servant *Hunt* deliver'd me 200 *l.* from Sir *George Reynell*, my near Ally, to be bestowed upon Furniture of my House; adding farther, that he had received divers former Favours from me: And this was, as I verily think, before any Suit began. The King was receiv'd certainly *Pendente Lite*: and tho it were at *New-Year's-Tide*, it was too great a value for a *New-Year's Gift*, tho, as I take it, nothing near the value mentioned in the Article.

To the *twentieth* Article of the Charge, *viz.* That he took of *Peacocke* 100 *l.* without Interest, Security, or time of Payment.

I confess and declare, that I received of Mr. *Peacocke* 100 *l.* at *Dorset-house*, at my first coming to the Seal, as a Present; at which time no Suit was begun: and at the Summer after I sent my then Servant *Lister* to Mr. *Rolfe*, my good Friend and Neighbour, at *St. Albans*, to use his means with Mr. *Peacocke* (who was accounted a mony'd Man) for the borrowing of 500 *l.* and after by my Servant *Hatcher*, for borrowing of 500 more; which Mr. *Rolfe* procured, and told me at both times it should be without Interest, Script, or Note, and that I should take my own time for payment of it.

To the *twenty-first* Article of the Charge, *viz.* In the Cause between *Smithwick* and *Welsh*, he received from *Smithwick* 200 *l.* which was re-paid.

I confess and declare, that my Servant *Hunt* did, upon his Account, being my Receiver of the Fines upon original Writs, charge himself with 200 *l.* formerly received of *Smithwick*, which after that I had understood the nature of it, I ordered him to re-pay, and to defalk it out of his Accompts.

To the *twenty-second* Article of the Charge, *viz.* In the Cause of Sir *Henry Ruswell*, he received Money from *Ruswell*, but it is not certain how much.

I confess and declare, that I received Money from my Servant *Hunt*, as from Mr. *Ruswell*, in a Purse: And whereas the Sum in the Article is indefinite, I confess it to be 3 or 400 *l.* and it was about a Month after the Cause was decreed; in which Decree I was assisted by two of the Judges.

To the *twenty-third* Article of the Charge, *viz.* In the Cause of Mr. *Barker*, the Lord Chancellor receiv'd from *Barker* 700 *l.*

I confess and declare, that the Sum mentioned in the Article was received from Mr. *Barker* some time after the Decree pass'd.

To the *24th*, *25th*, and *26th* Articles of the Charge, *viz.* the *24th*. There being a Reference from his Majesty to his Lordship of a Business between the *Grocers* and the *Apothecaries*, the Lord Chancellor receiv'd of the *Grocers* 200 *l.* The *25th* Article. In the same Cause he receiv'd of the *Apothecaries*, that stood with the *Grocers*, a Taster of Gold, worth between 4 and 500 *l.* and a Present of Ambergrease. And the *26th* Article; He receiv'd of a new Company of *Apothecaries*, that stood against the *Grocers*, 100 *l.*

To these I confess and declare, That the several Sums from the three Parties were received: and for that it was no judicial Business, but a Concord of Composition between the Parties, and that as I thought all had received good, and they were all three common Purse, I thought it the less

matter to receive that which they voluntarily presented; for if I had taken it in the nature of a corrupt Bribe, I knew it could not be concealed, because it must needs be put to account to the three several Companies.

To the *twenty-seventh* Article of the Charge, *viz.* He took of the *French* Merchants 1000 *l.* to constrain the *Vintners* of *London* to take from them 1500 Tuns of Wine: To accomplish which he used very indirect means, by colour of his Office and Authority, without Bill or Suit depending, terrifying the *Vintners* by Threats, and by Imprisonment of their Persons, to buy Wines, whereof they had no need nor use, at higher Rates than they were vendible.

I do confess and declare, that Sir *Thomas Smith* did deal with me in behalf of the *French* Company, informing me that the *Vintners*, by combination, would not take off their Wines at any reasonable Prices; that it would destroy their Trade, and stay their Voyage for that Year; and that it was a fair Business, and concerned the State: and he doubted not but I should receive thanks from the King, and Honour by it; and that they would gratify me with a thousand Pounds for my travail in it. Whereupon I treated between them by way of persuasion, and to prevent any compulsory Suit, propounding such a Price as the *Vintners* might be gainers 6 *l.* in a Tun, as it was then maintained unto me. And after the Merchants petitioning to the King, and his Majesty recommending this Business unto me as a Business that concerns his Customs and the Navy, I dealt more earnestly and peremptorily in it, and, as I think, restrained in the Messengers hand for a day or two some that were the most stiff; and afterwards the Merchants presented me with 1000 *l.* out of their common Purse; and acknowledging themselves, that I had kept them from a kind of Ruin, and still maintaining to me that the *Vintners*, if they were not insatiably minded, had a very competent Gain. These are the Merits of the Cause, as it then appear'd to me.

To the *twenty-eighth* Article of the Charge, *viz.* The Lord Chancellor hath given way to great Exactions by his Servants, both in respect of private Seals, and otherwise for sealing of Injunctions.

I confess it was a great Fault of neglect in me, that I look'd no better to my Servants.

This Declaration I have made to your Lordships with a sincere Mind, humbly craving, that if there should be any Mistake, your Lordships would impute it to want of memory, and not to any desire of mine to obscure Truth, or palliate any thing; for I do now again confess, that in the Points charged upon me, tho they should be taken as my self have declared them, there is a great deal of Corruption and Neglect, for which I am heartily sorry, and submit my self to the Judgment, Grace, and Mercy of the Court.

For extenuation, I will use none concerning the Matters themselves; only it may please your Lordships, out of your Nobleness, to cast your Eyes of compassion upon my Person and Estate: I was never noted for an avaritious Man, and the Apostle saith, *that Covetousness is the Root of all Evil.* I hope also that your Lordships do the rather find me in the State of Grace, for that in all these Particulars there are few or none that are

not almost two Years old; whereas those, that have an habit of Corruption, do commonly wax worse. So that it hath pleased God to prepare me by precedent degrees of Amendment to my present Penitency: And for my Estate, it is so mean and poor, as my care is now chiefly to satisfy my Debts.

And so fearing I have troubled your Lordships too long, I shall conclude with an humble Suit unto you, That if your Lordships proceed to sentence, your Sentence may not be heavy to my ruin, but gracious and mix'd with Mercy: and not only so, but that you would be noble Intercessors for me to his Majesty likewise, for his Grace and Favour.

Your Lordship's humble

Servant and Suppliant,

Franc. St. Albans, Canc.

The Lords having heard this Confession and Submission read, these Lords under-named, *viz.* the Earl of *Pembroke* Lord Chamberlain, the Earl of *Arundel*, the Earl of *Southampton*, the Bishop of *Durham*, the Bishop of *Winchester*, the Bishop of *Coventry* and *Litchfield*; the Lord *Wentworth*, the Lord *Cromwell*, the Lord *Sheffield*, the Lord *North*, the Lord *Chandois*, the Lord *Hunsdon*, were sent to him the said Lord Chancellor, and shewed him the said Confession, and told him, that the Lords do conceive it to be an ingenuous and full Confession; and demanded of him, whether it be his own Hand that is subscribed to the same, and whether he will stand to it or not. Unto which the said Lord Chancellor answer'd, *My Lords, it is my Act, my Hand, my Heart; I beseech your Lordships to be merciful to a broken Reed.* The which Answer being reported to the House, it was agreed by the House to move his Majesty to sequester the Seal: and the Lords intreated the Prince's Highness that he would be pleas'd to move the King; whereunto his Highness condescended. And the same Lords which went to take the Acknowledgment of the Lord Chancellor's Hand, were appointed to attend the Prince to the King, with some other Lords added. And his Majesty did not only sequester the Seal, but awarded a new Commission unto the Lord Chief Justice *, to execute the Place of the Chancellor, or Lord-Keeper.

* Sir Robert
Hutton.

This was on the 1st of *May*: And on *Wednesday*, the 2d of *May*, the said Commission being read, their Lordships agreed to proceed to sentence the Lord Chancellor to-morrow Morning. Wherefore the *Gentleman-Usher*, and *Serjeant at Arms*, Attendants on the upper House, were commanded to go and summon him, the said Lord Chancellor, to appear in Person before their Lordships to-morrow Morning by nine of the Clock. And the said *Serjeant at Arms* was commanded to take his Mace with him, and to shew it unto his Lordship at the said Summons: But they found him sick in bed; and being summoned, he answer'd, that he was sick, and protested that he feign'd not this for any Excuse, for if he had been well he would willingly have come.

The

The Lords resolved to proceed notwithstanding against the said Lord Chancellor. And therefore on *Thursday*, the 3d of *May*, their Lordships sent their Message to the Commons to this purpose, viz. 'That the Lords are ready to give Judgment against the Lord Viscount *St. Albans*, Lord Chancellor, if they, with their Speaker, will come to demand it.' And the Commons being come, the Speaker came to the Bar; and, making three low Obeisances, said:

'The Knights, Citizens, and Burgeesses of the Commons House of Parliament, having made Complaints unto your Lordships of many exorbitant Offences of Bribery and Corruption, committed by the Lord Chancellor, understand that your Lordships are ready to give Judgment upon him for the same; Wherefore I, their Speaker, in their Name, do humbly demand, and pray Judgment against him the Lord Chancellor, as the nature of his Offence and Demerits do require.'

The Lord Chief Justice answered:

'Mr. Speaker, Upon complaint of the Commons against the Viscount *St. Albans*, Lord Chancellor, this High Court hath thereby, and by his own Confession, found him guilty of the Crimes and Corruptions complained of by the Commons, and of sundry other Crimes and Corruptions of like nature.

'And therefore this High Court having first summoned him to attend, and having his excuse of not attending, by reason of Infirmary and Sickness, which he protested was not feigned, or else he would most willingly have attended, doth nevertheless think fit to proceed to Judgment: And therefore this High Court doth adjudge;

"That the Lord Viscount *St. Albans*, Lord Chancellor of *England*, shall undergo Fine and Ransom of 40000 Pounds.

"That he shall be imprisoned in the *Tower* during the King's pleasure.

"That he shall for ever be incapable of any Office, Place, or Employment, in the State or Commonwealth.

"That he shall never sit in Parliament, nor come within the Verge of the Court."

This is the Judgment and Resolution of this High Court.

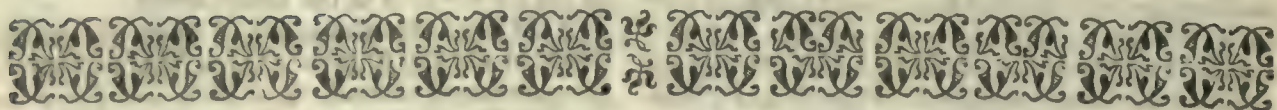
Thus he lost the Privilege of his Peerage, and his Seal; and it was for some time doubtful, whether he should be allowed to retain his Titles of Honour, which was all he did, having only a poor empty Being left, which lasted not long with him, his Honour dying before him. Tho he was afterwards set at Liberty, and had a Pension from the King, he was in great want to the very last, living obscurely in his Chambers at *Grays-Inn*, where his lonely and desolate Condition so wrought upon his melancholy Temper, that he pined away; and after all his height of Abundance was reduced to so low an Ebb, as to be denied Beer to quench his Thirst: For having a sickly Stomach, and not liking the Beer of the House, he sent now and then to Sir *Fulk Grevil* Lord *Brook*, who liv'd in the Neighbourhood, for a Bottle of his Beer; and, after some grumbling, the Butler had Orders to deny him.

He died on the 9th of *April*, 1626. being *Easter-day*, early in the Morning, in the 66th Year of his Age, at the Earl of *Arundel's* House in *High-gate*, near *London*, to which Place he had casually repair'd about a Week before. The Distemper of which he died was a gentle Fever, accidentally accompanied with a violent Cold; whereby the Defluxion of Rheum was so great upon his Breast, that he was quite suffocated.

He was buried in *St. Michael's* Church at *St. Albans*, being the Place directed for his Burial by his last Will, both because his Mother had been buried there before, and because it was the only Church then remaining within the Precincts of old *Verulam*; where he hath a Monument erected for him of white Marble, by Sir *Thomas Meautys*, formerly his Lordship's Secretary, afterwards Clerk of the King's Privy-Council, with an Inscription compos'd by the famous Sir *Henry Wotton*.



Proceed-



Proceedings in the Star-Chamber against HENRY SHERFIELD Esq; Recorder of Salisbury, for breaking a painted Glafs-Window in the Church of St. Edmonds in the said City; the 6th of February 1632. 8 Car. I.

The Information was thus opened :



R. Attorney hath exhibited an Information, in the Behalf of his Majesty, against Henry Sherfield Esq; an antient Bencher of *Lincolns-Inn*; for taking upon him, of his own Authority, to deface a Parish Church in the City of *New Sarum*, in the County of *Wilts*, and that in opposition to the Church Government, establish'd by the Laws amongst us *.

His Majesty's Attorney, in the said Information, setteth forth, that his Majesty is in his Kingdom, next under Christ, the supreme Head: that all Churches are sacred, and both founded and maintained by Regal and Sovereign Power; that no Subject can meddle with them, in doing any thing for their Ornament or Structure, without Licence of the Bishops in their several Dioceffes, or the Ordinary for the Time being, who derive their Authority from the Sovereign Power.

That the Party Delinquent was an Inhabitant of the Parish of *St. Edmonds*, in the City of *New Sarum*.

That in the same Church was an antient and fair Window, containing a Description of the Creation: That in *January*, quinto *Caroli*, the Defendant, and some factious Persons, intending to deface it, there met and agreed so to do.

The Bishop of *Sarum* commanded the contrary, and accordingly made a publick Act thereof.

But in *October* following, he the said Defendant got the Keys of the Church, upon pretence to walk there; and then lock'd the Door, and contrary to the Bishop's Appointment, he beat down the said Window, and utterly defaced it; and when he had thus done, he did boast and glory in that he had so done, and reported that himself was a Defacer of Idolatry.

And for punishing of this great Crime is this Information exhibited, by his Majesty's Attorney in this honourable Court.

Mr. Herne. The Defendant humbly offers to the Consideration of this honourable Court, that he is aged, and has grey Hairs upon him.

That among all the Crosses of this Life hitherto, he doth not account this the least.

That he is this Day not only suspected, but accused as an Enemy to his Majesty and his religious Government; and the Thing that he is especially accused and charged with, is, that of breaking the Glafs Window, whereunto himself giveth this Answer:

That in the Time of King *Hen. III.* this Church of *St. Edmonds* in *Sarum* was built, and that there was a College of Priests there; for there was an House adjoining, called the College to this Day.

That by the Act, in the Time of *Hen. VIII.* this College came to the Crown, and there remained until King *James* granted it to *Gouge* and *Lloyd*, who afterwards granted the same to *Bartholomew Tookey*, and others, to the Use of the Parish of *St. Edmonds*, together with the Advowson and free disposition of the Vicaridge there, which they have by Grant from his said late Majesty King *James*.

And tho he did conceive the said Church to be a Lay-Fee, yet he offereth this, that what he hath done, was not to usurp Authority over the Bishop of *Sarum*, nor in Opposition to his Majesty's Government: But the Parishioners, and such as are Vestry-men of the said Parish, have Time out of mind assembled, and met upon Occasions, in a little Room called the *Vestry*, in or near to the Church of *St. Edmonds*; and there they have used, Time out of mind, to make Orders, whereby new Windows have been made, divers Seats in the Church alter'd and new made, and many other Things done for Ornament, and otherwise, in the same; and this without any Order from the Bishop of *Sarum*, or any other Ordinary, for the Time being.

For this Window that is charged to contain the History of the Creation, he answereth,

That it is no true Relation, or Story of the Creation, in that true Manner as it is set down in the Book of *Moses*; but there are made and committed by the Workmen divers Falsities and Absurdities in the painting of the same Window, as that he hath put the Form of a little old Man in a blue and red Coat, for *God the Father*, and hath made seven such Pictures; whereas *God* is but One in Deity: And in his Order of placing the several Days Works of *God* in the Creation, he hath placed them preposterously, the fourth before the third; and that to be done on the fifth, which was done on the sixth Day; and in one Place he hath represented *God the Father* creating the Sun and Moon, with a Pair of Compasses in his Hand, as if he had done it according to some Geometrical Rules.

That this was not one of the greatest and fairest Windows in the said Church, it contained only four Lights; for the Cost at first in setting it up could not be more than forty Shillings: and that

which

which is broken is very little Damage to the Window, and may be repaired for a very little Cost.

He conceiveth, for his defacing of this profane Representation of God the Father, it is not so heinous a Crime as deserves the Sentence of this Honourable Court; and for his Defence he saith, That he hath for many Years past (*he setteth down for thirty Years past*) been settl'd and resolv'd in his Judgment, and that upon good and sound Authorities, (as he conceiveth) that it is utterly unlawful to make any such Representations of God the Father; and by such Authorities as were set out and declared in the Time of Queen *Elizabeth*, and otherwise, for the taking down and abolishing superstitious Images and Pictures, especially in the Churches.

He was thereupon the rather emboldened to desire, and endeavour the taking away of the said Window; and because it had been a Cause of Idolatry plainly to some ignorant People. He saith he was placed in the Church in such a Seat, as that the said Window was always in his Eye, during his Abode in the Church; and not out of opposition to the King's Majesty, but by special Order and Agreement of the *Vestry*, about *January* 1629. (wherein it was ordered that Mr. *Sherfield* might, if he thought fit, take down the said Window, and set up new Glafs for the same) he thereupon did with his Staff pick out some of the Glafs in that part of the Window only which represented the Deity; but for the doing the same thro' Combination with others, and by Force, he denieth the same: and that he should do it contrary, and against the Command of the said Bishop of *Sarum*, and his said Act, and Letter supposed to be sent, this he also denieth, and saith, that he had no Notice thereof in any part.

And to all the rest of the Misdemeanours and Offences charged in the Information, he pleadeth *not Guilty*, and submitteth himself to the Judgment of this Honourable Court.

For the King.

* *Sir Richard Shilton* * *Sol. Gen.* For that divers Things seem to be set forth in the Defendant's Answer, which have not been opened; we that are of Council for the King, desire that the Answer may be read; and the rather, because he hath thereby confessed more than we have proved, or indeed could prove against him.

Whereupon the Answer was read in Effect as followeth:

The Answer of Henry Sherfield of Lincolns-Inn, in the County of Middlesex, Esq; to the Information of Sir Robert Heath, Kt. his Majesty's Attorney-General.

All Advantages of exception to the Uncertainties and Insufficiencies of the said Information to this Defendant, now and at all Times saved.

This Defendant saith, That K. H. 3. founded in *New Sarum* the College of *St. Edmonds*, and the Church thereunto belonging.

That there belonged unto the said College and Church, a Provost and 13 Priests, which had Maintenance there allowed them. That in the Time of K. H. 8. by the Act of Dissolution, the said College and Church, with the Revenue thereof, came to the Crown, and so remained till *septimo Jacobi*, who granted the same to *Gouge* and *Lloyd*, who alienated it to *Baylie*, who conveyed the whole Premises to *Bartholomew Tookey*, one

of the Defendants named, who, in 13 *Jacobi*, for many good Uses, conveyed the same to the Use of the Parishioners of the same Church.

That this Defendant is one of them, so that the Right of the said Church is in the said Parishioners, who are seized thereof, as of their Lay-Fee; and the said Church is exempt from the Jurisdiction of the Bishop of *Sarum*; and that they, as lawful Owners, had lawful Power without the Bishop to take down or set up any Window, and to do any other Thing in Repairing or Adorning the said Church, and for Reformation of such Things as are amiss in the same.

And that he, this Defendant, and the rest of the Parishioners being Vestry-men, have met, and have used to meet for a long while, and their Predecessors, Time out of mind, in the Vestry-house, and there have made Orders for the taking down, and setting up again, Parts of the Church. They have taken down Glafs Windows, they have removed Altars, Roodlofts have been pulled down, Seats pulled down and alter'd, the Pulpit taken down and set in another Place; and these and many other Things without any special License of the King's Majesty that now is, or of his Father King *James*, or of *John* Lord Bishop of *Sarum*, or of his Predecessors.

That at a Meeting of the said Vestry-men of the said Parish, this Defendant being one of them, in or about *January*, 1629. it was ordered, that this Defendant might, if he pleased, take down the said Glafs Window, being in the South-side of the said Church, so as at his own Cost and Charges he would repair the same with new plain Glafs. And this Defendant being to come to *London*, desired it should be done before his Return; and that the Glazier might not mistake the Window, he pulled down with his Staff two or three of the small Quarrels of Glafs, and so left it to the Church-Wardens to be done.

That he is accused to be an Opposer of his Majesty's Government, and of the Reverend Bishops; and this by the Procurement of those that are ignorant of the Thing, which this Defendant accounteth a very great Affliction.

He saith, That this Window, and the Painting therein, was not a true Representation of the *Creation*; for that it contained divers Forms of little old Men in blue and red Coats, and naked in the Heads, Feet and Hands, for the Picture of God the Father; and in one Place he is set forth with a pair of Compasses in his Hands, laying them upon the Sun and Moon; and the Painter hath set him forth creating of the Birds on the third Day, and hath placed the Picture of Beasts, and Man and Woman, the Man a naked Man, and the Woman naked in some Part, as much as from the Knees upwards, rising out of the Man; and the seventh Day he therein hath represented the like Image of God, sitting down, taking his Rest: whereas this Defendant conceiveth this to be false, for there is but one God, and this representeth seven Gods; and the Sun and Moon were not made on the third Day, but on the fourth Day; nor the Trees and Herbs on the fourth Day, but on the third Day; nor the Fowls on the third Day, but on the fifth; and Man was not created on the fifth, but on the sixth Day; nor did the Lord God so create Woman, as rising out of Man, but he took a Rib of the Man, when he was in a deep Sleep, and thereof made he the Woman, in all which the Workman was mistaken:

ken : In regard of which Falsifications, this Defendant deemeth, that this was not a true Representation of the Creation, tho it be so pretended, but rather an Abuse of the true and lively Word of God, which to pull down, as aforesaid, cannot be any Offence in him, this Defendant, as he conceiveth, at least in that Manner as in the Information it is pretended. But in as much as he is accused of Infidelity and Impiety to Almighty God, and to be disaffected to the King, therefore this Defendant humbly craveth leave to declare his Opinion in the Thing itself.

And he saith, that he believeth it altogether unlawful to make the Representation of the true God in any Church, or Wall, or Window ; and this he hopeth to make appear by the Scripture, by Orthodox Writers, Councils, and Decrees of Emperors, and by a certain Book of the now Bishop of *Sarum* (Dr. *John Davenant*) written on one of St. *Paul's* Epistles, in the 97th and 98th Pages ; King *James's* Book, intitled his *Premunition to all Christian Kings and Princes* ; the Book of *Homilies*, set forth by Authority, and therein the Homily against Idolatry in particular : That this being so false a Representation, and so profane a setting down of the Image of God the Father seven Times, he, this Defendant, being a Parishioner, and troubled therewith in Conscience by the space of twenty Years, for that he could not come into the Church, but he must see it, sitting right opposite to it, he was much grieved thereat, and wished a long while that the same were removed, and yet in respect of himself laboured still to disaffect his Thoughts ; but seeing the Dishonour done to God thereby by some ignorant Persons, (as this Defendant was informed by the Pastor of the said Parish) and fearing that others might offend in Idolatry, he (by Order of the Vestry aforesaid) did take down some little Quarrels of the Window ; and it was done by him only, without any Disturbance, and he did it only in such Places of the Glasse as the Representation of the Deity so falsified was : He did it not to arrogate to himself Authority, but as bound to do what he did to preserve a good Conscience ; it was not done riotously, nor by Combination with any others. And he saith, That he never deserved, nor will deserve such a bitter Charge, as thro' the Malice of his Enemies, is laid upon him by the said Information. And he saith, that he, and other of the Defendants, were Justices of the Peace, and not altogether private Persons, and they were Parishioners, and entrusted, as aforesaid ; and the taking down of the Window seem'd to be warranted by the Statute of *Edw. 6.* and by the late *Queen's* Injunctions, set forth in Print in the first Year of her Reign, whereby it was commanded that all idolatrous and superstitious Pictures, Roodlofts, Altars, and other Relicks of Idolatry, especially in Churches, should be defaced and abolished, but the Wall preserved, and this to be done by the Church-Wardens ; and these Injunctions being by Act of Parliament, they are still in force, as he conceiveth. And in the 13th of *Elizabeth*, in the Convocation held by the Archbishops, amongst other Canons, this for taking down and defacing idolatrous Pictures and Images was one, and made an Article, that the Church-Wardens shall inquire whether it be done accordingly : And the same order'd by the Convocation, in the 1st of King *James*. He saith, That he doth not countenance any Contemners of

the Church, nor ever did : That the painted Window aforesaid was one of the meanest Windows in the said Church, containing but four Lights, whereof all the Glasse at first was worth but 40 s. and all that was taken down by this Defendant, was not worth more than 18 d.

And this Defendant denieth that the Bishop of *Sarum* sent to him to forbid the taking of it down ; and denieth that he had any Notice by way of Act, Letter, or Monition to the contrary, or that any such came to his Hands. But this Defendant saith, that he often attended the Lord Bishop, as well upon this Defendant's own Business, as on the Bishop's Occasions : And yet his Lordship never used any Speech thereof to him at all. And therefore this Charge, that it was done by this Defendant against the Bishop's Directions, is not true, as will appear by Proof. But this Defendant doth aver, what he hath done is lawfully done ; and to all other the Offences, &c. he pleadeth *Not Guilty*.

Sol. Gen. Here is a Confession of the Fact, and a Justification ; and therefore we made no Examinations or Interrogatories ; for as I said before, so I make bold to say again, that he hath confessed more than we could prove against him.

The Question is, Whether a Parishioner may of himself undertake to pull down and set up what he conceiveth to be idolatrous, and so take upon him to be a Reformer ?

In this Gentleman's Answer, you see how curious he hath been in confuting the Painter that is dead a hundred Years ago. (Nay, it hath been there these three hundred Years, said the Archbishop of York.) From the 5th of January, 1629. till October following, he could find no Opportunity to execute the Vestry's Order ; and yet he saith, shortly after the Order, he did with his Staff take down some of the Quarrels of the Window, &c. First, for the Manner of his coming into the Church, we shall read a Witness or two for that.

Depositions of Witnesses on the King's Part read.

Bowen the Sexton's Wife saith, That Mr. *Sherfield* came unto her (her Husband not being at home) and said, Woman, bring the Keys of the Church-door, and let me into the Church ; whereupon she presently brought the Key, and opened one of the little Doors of the Church, and Mr. *Sherfield* went in, and made the Door fast unto him, and staid there alone by himself.

That when he went into the Church, he said, Now Woman go about your Business, while I walk in the Church.

That thereupon she went into her House, and after she had tarried a little in her House, her Child (that was abroad gathering of Sticks) came in, and brought her two or three Pieces of the Glasse Window, and said it was done by a Man all in black. Thereupon she went to a private Door and looked into the Church, and she saw Mr. *Sherfield* standing upon a Seat some four Foot above the Ground, and so he stood breaking the Window with a black Staff with a Pike in the End of it.

That the Window was broken in eleven several Places. And after she went by the same Window, and saw it broken ; but being on the outside, she did not then see it, yet she heard one groan, which she conceived was Mr. *Sherfield* fallen from the Seat whereon he stood, to the Ground. And she

she the rather believeth it was Mr. *Sherfield*, because he afterwards sent for a Horse, and rode home.

That afterwards the Window was broken by another, and a Pitch-fork left in it; and divers other Windows were also broken, but by whom this Deponent knoweth not.

That therefore a Watch was set, and continued for a Fortnight, to see who should attempt to break any of the Windows of the said Church.

Elizabeth Bowen, *the Sexton's Daughter*, saith, That Mr. *Sherfield* came to this Deponent's Mother, about three or four of the Clock in the Afternoon, a little after *Michaelmas*, and commanded her Mother to open the Church Door for him, and she did open it: when he was in the Church he said, Get you about your Business; and when her little Brother brought in part of the Glass of the Window, saying, Somebody was within breaking some of the Windows of the Church, she then run out of her Father's House and went unto the Church, and saw him beating of the Ladder, and heard him talk to himself, and thereupon said to her Mother, That she thought Mr. *Sherfield* was mad.

That thereupon Mr. *Sherfield* came out of the Church, and went into the Clerk's House; and after he had been there a little Space, he went again into the said Church, and bolted the Door after him on the inside, but she peeped in at the Door, and saw him break the Window with his black Staff, which had a Pike in the end of it.

That the Staff broke, and he fell down into the Seat, and lay there a quarter of an Hour groaning; but what Hurt he had, she knoweth not.

That he afterwards kept his House for a Month.

That the Window was broke afterwards, and one *John Palmer* seen there about four of the Clock in the Morning.

Dr. Webb of Steeple-Ashton saith, That Mr. *Sherfield* coming thither to keep a Court-Leet, he afterwards went with this Deponent into the Church of *Steeple-Ashton* to view it, and he asked this Deponent why they should bestow so much Cost in their Windows; and he declared his Dislike thereof, giving these Reasons, to wit, That it made the Windows darker; and it was an occasion of Idolatry: and he conferred with this Deponent about the Window now in question, which he said he would have taken down; but the Bishop's Chancellor opposed him, and said, He knew no Cause why he should, for that it was a Lay-Fee.

John Lymminge of the City of New Sarum saith, That he hath been thirty Years a Parishioner, and two Years ago he was Church-warden of the Parish of *St. Edmond's* in the City of *New Sarum*; that then the Order was made, when he was Church-warden.

That he was present in the Vestry at the making thereof.

That Mr. *Sherfield* moved the Matter to the rest that were present, and they all consented thereunto, saving two, who said, They desired to have the Lord Bishop's Leave for doing it. To whom Mr. *Sherfield* said, Do not you trouble your selves, I will give my Lord Bishop Satisfaction.

That the Bishop afterwards sent for this Deponent, being then Church-warden, as afore said;

and he went to his Lordship, who told this Deponent, He had heard of such an Order or Agreement to have been made at the Vestry, and ask'd this Deponent if it were so? This Deponent answer'd, That it was so: that thereupon the Lord Bishop said, Let it not be done, and gave Directions and Commandment to this Deponent, not to give Notice of this Inhibition therein to the rest of the Vestrymen.

Francis Roberts, Servant to the Bishop's Register, saith, That an Agreement was brought to the Bishop under Mr. *Sherfield's* Hand, and the Hands of divers others, by Mr. *Sherfield*; and the Effect of the Order was (as he taketh it) for the taking down of the Window, in the South Porch of the Church of *St. Edmond's* in the City of *New Sarum*.

That the Lord Bishop caused this Deponent to take a Copy thereof, which he did; and thereupon the Church-wardens were sent for, and were forbidden by the Bishop to put the same in Execution, and made a publick Act thereof, which this Deponent wrote.

It was urged by those of the King's Council, that the Answer was not in this rightly opened, and was therefore one of the Reasons why they desired the Answer it self to be read. In the Answer he justifieth the Act as well done; but the Council that opened the same, did not shew it so to be.

Mr. Herne. In opening the Answer, we declined it, as but an Opinion of the Defendant, and from this a Man may recede: It was not the Point in Issue, therefore we were advised not to stand upon it; and we do acknowledge the Church to be a parochial Church, and subject to the Bishop of *Sarum*.

Whereupon Sir *John Finch* desired that *John Lymminge's* Deposition might be read again, and it was read to this Purpose,

That Mr. *Sherfield* said he would satisfy the Bishop, urging that this was after the Bishop's Inhibition; but this did not appear to the Court.

Sir *John Finch* concluded the Evidence on the King's Part: the Question is not what is fit to be in a Church; The Matter is, that he hath taken upon him to determine what is fit. He is an antient Reader, and well read in the Law; but our Law saith, (and this every one knoweth, that hath suck'd the least Sweetness from the Books of the Law) That the Church must be governed by the reverend Bishops of the Church. That it was a parochial Church he knew well, for that himself was a Parishioner: and tho his Council decline this, yet his Defence is, that it is a Lay-Fee, and that he might well do as he did, to pull down the Window. He is well acquainted with the Bishop, and yet would never desire his Leave in taking it down; but he goeth to the Vestry for Power to do it, and yet there it is his own Motion; and when some question'd their own Power to do it, he beareth them in hand he will satisfy the Bishop. When he cometh to *Steeple-Ashton* to *Dr. Webb*, there he saith it is a Lay-Fee; for he being a Justice of Peace, that seemeth to add another Wing to bear him up: But the Matter's not in question, it appertaineth to the ecclesiastical Jurisdiction. For the Bishop's Inhibition, that Mr. *Sherfield*, being a Vestry-man, should not have Notice of this, is very improbable. If it had been done in execution of the Vestry's Agreement,

ment, why then was it done so privately, and not some of the Vestry called to be with him?

But to have the Doors shut, to do it with such Privacy and so many Colours, as reading in a Book in the Church, walking and viewing of the Clerk's House; this could not be but that he feared something, and that this was the Inhibition.

Note, This was a great Defect in the Proof of the King's Part, that the Relator could not prove that Mr. *Sherfield* had Notice of the Bishop's Inhibition: nay, he had not the Act of the Bishop, which was so easy to be had, to shew in Court, for which the Bishop of *London* was much displeased, and so was the Lord-Keeper.

To remedy this (if it might be) the * Bishop of *London* desired that Dr. *Lynn* the Bishop of *Sarum's* Chancellor, who was the Relator in this Cause, might be heard what he could say to this Point. And he was permitted to speak, yet could not directly say that Mr. *Sherfield* had any Notice of the Bishop's Inhibition; yet he mention'd a Letter that was sent to him to give him Notice of the Bishop's Commands to the contrary, but it could not be proved that ever any such Letter came to his Hands.

* Dr. William Laud.

For the Defendant.

Mr. Herbert. That the Information contained seven several Charges against the Defendant; for five of which, that is to say,

1. That he being factiously disposed, and disaffected to his Majesty's Government, on his own Authority took upon him to deface the Parish Church of *St. Edmond's* in *New Sarum*.

2. That he is an Opposer of the Authority of the reverend Bishops and their Government.

3. That he is an Encourager and Maintainer of all such as are ill affected Persons to their Government, and Contemnners of their Authority.

4. That the defacing of the Window in question was done by Combination and Confederacy between him and ten others, Defendants.

5. That this was done riotously and routously with Force and Arms. For all these I appeal to this honourable Court, what colour of Proof hath been made; only it hath been proved that the Defendant himself took down a little of the Glass of that Window. And there hath been some offer of Proof made, that it was done against the Lord Bishop of *Sarum's* Inhibition. And whereas the said Dr. *Lynn*, the said Bishop's Chancellor, hath endeavoured to prove some Things out of Course for this last Charge, we shall desire and beseech your Lordships to consider that he is the Prosecutor of the Cause against the Defendant. For the Manner of the Prosecution, it hath been very violent, injurious, and favouring of Malice. He was the Man that went to these Witnesses and forty other Persons, to raise up and frame a Charge upon the Defendant. He exhibits a foul Bill, or causeth the same to be exhibited against the Defendant, and ten others. And then falleth off from all those Ten, and desireth that Two of the Defendants might be Witnesses for him; and when he had thus done, never used them. And this, my Lord, hath been the Manner of Prosecution.

For the taking away of the Glass-Window, it is true, we confess we did take down part of the Glass; but for the second Thing, it doth not appear that he had Notice of the Bishop's Inhibition.

And whereas Sir *John Finch* hath insisted upon some Probabilities for Proof hereof; we hope this Cause shall not be sentenced according to Probabilities. Now tho the Charge of those five before-mention'd be not proved, nor any Interrogatory administered to prove them, yet we shall desire Leave to offer our Proofs to the contrary to your Lordships Considerations.

And first, as to the Charge that we are ill affected to the Church-Government, and an Encourager of those that be like-minded, and this for private Ends, and out of a private Spirit:

We answer, That Mr. *Sherfield* the Defendant hath on the contrary, in all his Actions, been conformable to the Canons and Constitutions Ecclesiastical, the Rites and Ceremonies of the Church of *England*.

That he hath been so far from encouraging such factious Persons, that he hath been very active in his Place to punish Separatists. And that he did not this (in removing this little Quantity of Glass) of his own Head or private Spirit; but it is true, he conceived it to be Idolatrous, and so was it thought by the Pastor of the Church, and by all the Men of the Vestry thought fit to be removed. What we did therefore, was no way out of a singular or private Spirit, nor our own Authority, but by Order from the Vestry; not in opposition to the Church-Government, or Governors; but as in respect to the Nature of the Thing. Besides, all the Canons, Constitutions, and Commands for taking away such superstitious and idolatrous Relicks, we shall prove, in Fact, there has been much Idolatry committed therewith. We say, that of a long Time there have been Meetings in the Vestry by some antient Men of the Parish, and this by Power from, and under the Ecclesiastical Governors; and this they have used to do, they have ordered many such Things, and they agreed this Window should be taken down by Mr. *Sherfield*, if he thought fit, and to set up new Glass. We go not about to entitle the Vestry to any Jurisdiction; we say they are respondent to the Bishop, and he may punish them if they abuse their Power: but tho they have not legally a Jurisdiction, yet *de facto* they do meet, and do such Things, tho it be not justifiable; yet this is the Question before your Lordships, Whether those of his Majesty's learned Council can make it a Crime, *Yea*, or *No*? The Curate and Churchwardens assented, as is required by the Statute.

The Queen's Injunctions, 1 *Eliz.* give Power to the Commissioners and others to take away Things of this Nature, especially in Churches, preserving the Walls, &c. So in the Articles set out in 13 *Eliz.* to inquire whether they were removed, *Yea* or *No*. Afterwards there was the like in the First of King *James*; and the Canons contain one Particular of the like Power given to the Churchwardens to inquire of such Matters, &c.

Depositions of Witnesses on the Defendant's Part read.

John Joye of the City of *New Sarum* Gent. saith, That he hath known the Defendant above twenty Years, and hath ever since observed him to be conformable to the Church of *England*; and that the Defendant, when he is in health and at home, is present at divine Service and Sermons, and that during all the Time of this Deponent knowing of him, giving good Example by his religious and pious Carriage unto others; and that this Depo-

nent hath known this Defendant divers Times to have received the Sacrament of the Lord's Supper kneeling.

That this Deponent is a Parishioner within the Parish of *St. Edmond's* in *Sarum*, and a Vestryman.

That the Vestrymen of the said Parish have met, and used to meet as often as they thought fit, and used to make Orders for repairing and adorning the said Parish Church, and have hitherto many times ordered the taking down of Seats in the Church, and the setting up of new, taking down of Windows, Walls, and Pieces of the same Church. And this Deponent remembereth, that about twenty Years since, a new Pew was erected in the middle of the Church for the Minister to read Prayers in; and fourteen Years since a new Pulpit was set up, and part of the Minister's Seat was again alter'd; there was also a new Loft made for ringing of the Bells, and thirty Seats were taken down and new made, and a Glass Window in the Tower was quite taken away: and all this was done without any special Order from the Bishop of *Sarum*, for the Time being, or any other Ordinary, and never any Doubt or Question was made thereof.

That upon the 16th Day of *January* 1629. at a Meeting in the said Vestry, by the Vestrymen, it was order'd, that the Window in question should be taken down, and the Reason why, as this Deponent remembreth, was for the Darkeness caused by it, and for that it was Superstitious; and that five of the said Vestrymen were Justices of the Peace within the said City of *New Sarum*.

Mr. *Herne* noted, that the Defendant's Witnesses are Justices of the Peace, and such as have been Mayors of the City, and are Aldermen there; but the others Witnesses are poor People, and silly Women led by Mr. Chancellor.

This Witness, and many others, testified the Defendant to have been conformable during all the Time of their knowing him, and observant of the Rites and Ceremonies of the Church of *England*.

Peter Thatcher, Clerk, Vicar of the Parish Church of *St. Edmonds* in *New Sarum*, saith, That he hath known the Defendant, *Henry Sherfield*, by the Space of eight Years last past; that when he is well, and in good Health, he cometh to Church, and there stayeth all the Time of divine Service and Sermon, and hath received the Sacrament of the Lord's Supper kneeling.

That there was an Order made in the Vestry, where this Deponent was present; for the taking down of the Window in question by Mr. *Sherfield*.

That he hath seen the said Window since it was broken; that the Story intended thereby to be set forth, may well enough be discerned; and this, upon his certain knowledge, for he took special Notice thereof, upon *Saturday* last, before his Examination; that there are no Letters in the Window aforesaid, describing the Representation of the Creation.

That it may be amended for a very small matter.

That it is not so good Work as some other Windows of the Church.

That he hath heretofore seen an Accompt, made in the Time of *Henry VII.* of Charges in setting up certain Windows in the said Church, which are

all of painted Glass; and there was set down a Particular of 94 Foot of Glass, set up at 3 *d.* a Foot, and this Window in question containeth 72 Foot of Glass or thereabouts.

Note, That in the Time while this Deposition was reading, Mr. *Sherfield* caused a Map of the said Window to be presented to the Lords, representing the said Window, and all the several Breakings of the same set forth in Colours like the Window it self, which was inspected by the Lords.

The Bishop of *London* at this Time took some Exception to the Testimony of the last Deponent, *Peter Thatcher*, for that he saith, he knoweth he cometh to Church, and stayeth there all the Time of divine Service; whereas he knoweth that this *Thatcher* himself hath not read all the divine Service in a whole Year together; he hath not done it heretofore, whatsoever of late he hath done for By-Respect.

Then proceeded the Deposition of the said Peter Thatcher,

That the Picture of the old Man in blue and red, is taken to be the Picture of God the Father, the Creator of Heaven and Earth; and that he is taken to be there represented creating the Birds and Beasts, the Sun and Moon, and speaking to *Adam* and *Eve*, &c.

That, as this Deponent taketh it, there are many Mistakes, Falsities and Absurdities contained in the said Window.

That he saw *Emma Browne* bowing to the Window aforesaid, on which Occasion (this Deponent coming in the mean while) he asked what was the Cause she so bowed. To which she answered, I do it to my Lord God. Why, said this Deponent, where is he? Said the said *Emma Browne*, In the Window, is he not? This Deponent thinketh he told this Defendant of the same, but doth not remember the Time when.

Michael Mackerell, of the City of *New Sarum*, Gent. saith, That he hath known Mr. *Sherfield*, the Defendant, by the Space of twenty Years and more, during all which Time he hath been conformable to the Church of *England*, and duly repairer to the Church and Sacrament, &c. That this Deponent knoweth he hath called divers in question for their Inconformity, and divers have been accused for Anabaptists and Separatists before him, and other Justices of the Peace in the same City, and some of them were imprisoned, some bound to their good Behaviour, and some otherwise punished by his Means; and the Deponent set down the Names of those who were called in question for Inconformity in particular.

James Palmer of the City of *New Sarum*, Senior, aged about 80 Years, saith, That in the said Parish of *St. Edmonds*, for fifty years past, he hath known divers of the Parishioners to have met from time to time in the Vestry of the said Church, which is part of the same Church, or adjoineth thereunto; and they have order'd many things for Reparation of the said Church, without the Bishop of *Sarum*, or any of his Predecessors; and divers of the said Parish are, and have been called, and have been and are Vestry-men of the said Church, and they have done divers things in the Church without the Bishop's Leave, as namely, the Place of reading the Service was altered from out of the Choir, and appointed and order'd by them to be read in the

Body of the Church, without License from the Bishop; and therefore the Parishioners did not ask leave in this Case, of the Bishop, to remove the said Window.

The Bishop of London. Often Vestries take upon them that Authority which pertaineth not unto them, and usually transgress their Bounds; they were made by the Bishops heretofore, where they are granted and suffer'd, and in many Cases, by the Common Law, we cannot do without them. The Truth is, that the Archdeacon in every Diocess was wont to be *magnus Oculus Episcopi*, to view and inform the Bishop of the Things fit to be reformed. But you will say, Shall not those Men repair, nor do any thing in the Church without Leave? Yes, they may, but not doubtful things; therefore for such things they should ask License of the Bishop at their Perils.

The Lord Keeper. So for mending of a Wall, or repairing things not well done in the Church, Vestry-men may do it; but when they do ill, they are to be punish'd.

February 8.

THIS Day the Defendant's Council proceeded in reading their Witnesses for their Defence.

William Antopp of the City of New Sarum, Gentleman, saith, That heretofore, about nine or ten Years since, he took Notice of one *William Trumpetter*, who came as a Stranger into the Town; and this Deponent after understood his Name was *Aldersey*.

That this Deponent hath observ'd the said *William* putting off his Hat to the said Window; and that the said *William Trumpetter's* Master, called *Beech*, did kneel down and pray before the Crucifix in one of the Windows.

This Deponent had Conference with the said *William Trumpetter*, and with his said Master, the said *Beech*; and in their Talk they much commended Pictures in Church Windows, and praised *Belarmine's* Writings; wherefore this Deponent did conceive them both to be Romish Recusants: And this Deponent saw the said *Trumpetter* kneeling and praying towards the said Window; and the said *Beech* kneeling before the Crucifix, beating his Breast, which this Deponent did conceive was Idolatry.

Here the Defendapt's Council offered to speak some thing to discharge the Defendant of that Point, as to the doing of the said Act contrary to the Lord Bishop of Sarum's Inhibition.

Whereunto Mr. Attorney said, That this was not worthy to be insisted on, because they had come short in Proof against him: But as for Mr. Chancellor's enquiring into the said Offence done, we conceive it was rightly done, and proper for him to do it; for that this Fact is of a mixt Cognizance, Ecclesiastical and Temporal; and therefore, he being an Ecclesiastical Officer, it was not a Fault, but a commendable thing in him strictly to enquire of the thing as he did, and it was his Duty so to do. And for the preparing and pre-examining of the Witnesses, we say, in this Case by him it was lawfully done, and they were justly prepared.

The Defendant's Council proceeded, and read divers Statutes and Proclamations, and other Records and Authorities in justification of the De-

fendant's Fact, as concerning the Nature of the thing.

And first was read the particular Injunction in the Point, set out 1 *Eliz.* the 23d Article or Injunction; Church-wardens are to see the Churches kept clean, and all Loathsomness by Dust, or otherwise, removed: That they have in the Churches the holy Bible and Homilies, late set out in print against Rebellion, and other outrageous Crimes.

That there be in every Church a fair joining Table, and a convenient Pulpit, &c.

Also they shall see that all Shrines, Coverings, and Candlesticks, Pictures, Pilgrimages, Relicks of famed Miracles, Rolls of Wax, and superstitious Things be taken away and defaced, preserving nevertheless the Walls of the Stone Buildings of the Windows.

* Archbishop of York. The Church-wardens executed this by Direction of the Queen's Visitors, not upon their own Authority. * Neale.

Then was read the Article touching this Matter, set forth in the Book of Articles, in the 13th Year of the late Queen. The Title of which Book is, *Articles agreed upon by Matthew Archbishop of Canterbury, and the rest of the reverend Bishops*, 3 Aprilis 1571.

The Article it self runneth thus:

Item. Whether all Shrines, Coverings, Rolls of Wax, &c. and Pictures of false and feigned Miracles, be removed and abolished.

Bishop of London. I do not think that the Story of the Creation was a Picture of false Miracles.

The Canon of 13 *Eliz.* was, That the Church-wardens should enquire and make Presentment of such things to the Bishop or Ordinary; but it gave no Power to them, being but Lay-men, to do what they would in Reformation.

Archbishop of York. The Injunctions were in 1 *Eliz.* when the Church was very much out of Order; and this was done by special Commissioners, and not by the Church-wardens Power.

Then was read the Canon, made 13 *Eliz.* the 18th Canon, That the Church-wardens should see the Church kept clean, the holy Bible to be in the Churches, and the holy Homilies lately set forth against Rebellion, a fair joining Table for the Celebration of the Communion; and all Roodlofts, wooden Croffes, Pictures of false and feigned Miracles, and all other Relicks of Superstition destroyed and demolished; the Walls of the Churches to be new whited, and Sentences of holy Scripture to be written upon them in great Letters, and a Bason to be in the Church wherein Baptism is to be administred.

There was the like made in 1 of King James, and 2 *Jacobi* 1603. Canon 85, That the Windows of the Church be well glazed, the Pavements even and decently kept: The like Care to be had for the Church-walls and Church-yards, that they be shut in with Pales, Walls and Rails, as hath been accustomed. And the Officers are to see that the Peace be well kept, and that the Book of Homilies be in the Church, which speaketh against Idolatry and Superstition, &c.

Mr. Herbert. The Matter before your Lordships in Judgment, is the Removal of some few Parcels of Glas out of a Church-Window. Now, upon Things thus opened, whether this be a Crime punishable in this Court, we humbly leave to your Lordships to judge. But if it shall be conceived to be an Ornament to the Church, and so a Fault

in any to remove it without the Bishop's Leave; we say it is true, we did it, but not upon our own private Head, the Vestry agreed upon it.

And whereas it hath been objected and charged, that the Defendant did this to encroach upon the Church-Government, we hope it doth not so now appear to your Lordships; but that he is a good constant observer of the Church of *England*. And for the taking down of this Glass, we have shewed what we did simply, and not so much what our own Opinion was, but as it was conceived Idolatrous by others.

If this be a Fault, it is then because it seemeth to derogate from the Honour and Authority of the Church, and done in opposition to the Bishop's Jurisdiction; or else it ariseth out of our Answer, in that we justify the doing thereof, as in our Lay-Fee. But we have shewed he did not this to make a Power in the Vestry against the Power of the Bishop; no, this was an Act of Duty to the Bishop, and punishable by him if it were not well done: so we do not divide the Power from the Bishop, but the Question is upon the exercise of this Power, whether the Vestry-men, when they have done well, are to be reprehended; or whensoever they do any thing about the Church, whether they must still go to the Bishop for Leave?

But tho this be not an Offence in the nature of it, yet it is said, that to us it is an Offence, because of our Justification; which is not only *de facto*, that it is done, but that it is rightly done by the Vestry as their Act in their Lay-Fee, which is exempt from the Bishop's Jurisdiction.

To this we answer, That this was only the Opinion of the Defendant, it was not the Issue; but his Disposition is not to stand out in a thing, which afterwards appeareth unto him to be otherwise; he did conceive it was a Lay-Fee, and was their Impropriation: And tho he said it was exempt from the Power of supreme Authority, the Archbishop or the King's Majesty, yet he did it as the Act of the Church-wardens, which is subject to the Bishop.

For the Act it self, the taking away of some little quantity of Glass, we have shewed you the Usage of the Vestry, what they have done in other Cases; and if every Alteration in a Church should be prosecuted as a Crime in this Court, I suppose the Court would be over much filled with Prosecutions of this Nature. Thus much for the Matter of the Fact; then for the Manner of doing it, It is pretended, that it was done against the Bishop's Inhibition.

The Defendant hath denied this Point upon his Oath, and sheweth Probability to the contrary: My Lord Bishop had long and often Conferences with him, but never spake to him of this thing.

Next, for that Circumstance, that by this Example of his breaking the Window, some others have done the like; but in the Books we find only that some Body did break the Windows again after this, but who it was, is not set down. Two or three times a Year for Glass Windows to be broken by accident, is a common thing. We find also that after this a Pitch-fork was found hanging in the Window; we say that this was discover'd only upon Proof, and was not in the Pleading: But the Men that examined this, said that it was a mad Man indeed that came that way, and threw his Pitch-fork there, and this might have been proved. And shortly after many more Glass Win-

dows were broken, but where, or in what Church, it doth not appear as I conceive. And, whereas it hath been said by a silly Maid, that she thought Mr. *Sherfield* was mad; and it hath been said, he went about like a mad man: We say, that if his faithful Care and Industry in that City, for the Good thereof, if his Advice in all the Kingdom so well known be respected, he is not to be accounted a mad Man: He did not come in a mad and braving manner, but secretly, and this is proved by the Mother and Daughter; we say the more privately it was done, the less offensive it was: which we submit to your Lordships, and the whole Cause together with it. The Charge against the Defendant is, that he did dishonour to the Church; but we say, that the Act was to do Honour to God.

Bishop of *London*. Was not this done contrary to the Bishop's Inhibition? Let me ask this Question of the Defendant's Council, Why did Mr. *Sherfield* promise to satisfy the Bishop? did he give this Satisfaction before he did the Fact? This I must needs declare to your Lordships, that my Lord Bishop of *Sarum* hath written to me, and by his Letters it appeareth sufficiently how this Matter was carried, and what passed about it: if it please my Lord Keeper, it may be read.

But this being out of Course, and a thing to which the Defendant could make no Answer, was not approved of. There hath been no Fault in the Bishop of *Sarum*; but the Business on the Prosecutor's Part hath been as ill follow'd as ever I saw; and on the other side, by the Defendant's Council, as well defended; so much I must say for them.

Sir *Richard Shilton*. This Offence is clearly against the Bishop's Authority; and the greater by his Defence set forth in his Answer; and by what the Defendant hath shewed, it appeareth he did this by his own Authority.

The Order or Agreement of the Vestry is no more but this, You may, if you please, do such a thing; Mr. *Sherfield* may, if he please, take down the Glass Window; that is to be understood at his peril, they would not stand to it. This, especially in a Man of his Example, is not to be passed over in these Times. I undertake there are some Spirits now, that if they had been alive in *Solomon's* Time, would have gone nigh to have done Violence to the Cherubims; God knoweth what would have become of them!

Mr. *Herne*. As to my Lord of *London's* Objection, that it seemeth it was done after the Inhibition, Mr. *Sherfield*, upon his Oath, denieth that he had Notice of it. Mr. Chancellor himself saith, he had not Notice till after the Fact: He was often with the Bishop, and he never used any Words about it to him.

Bishop of *London*. He undertook to satisfy the Bishop (and the Bishop you are to know, is not bound to give Notice to every Man of his publick Act;) but your Proofs are, that the Vestry have done these and these things, without the Bishop; they prove matter of Fact, but what was done heretofore, maketh not much for an evil Custom.

Attor. Gen. We will not talk of William Noy. the Authority of the Vestry against the Bishop's Authority, they were at first made and suffer'd thro' Negligence of the Prelates themselves. The Vestry consists of the Minister and Curate, and some Lay-men, I do not say Lay-Elders; they here agree for the taking of this Window down, but the Question lieth not upon their Power,

er, it lieth upon the Fact itself, confessed by the Defendant himself; and, I say, if he had not confessed and proved more against himself than the Relator himself hath done, he might (I think) have gone without the Censure of this Court. It is proved by the Defendant's Witnesses; and that he did it, is confessed; but he alledgeth in his Excuse, that for Twenty Years he observed this Window, and he took Offence at it; he sat in a Seat in the Church, and he could not choose but gaze on it; he could not rest with a good Conscience, but the Window must be taken down: but in all these twenty years he never complained to the Ordinary; but after twenty years he proposeth it to the Vestry; there were present the Churchwardens, the Vestry-men, and Mr. *Thatcher* the Minister; some were so wise as to question whether the Bishop's Consent were not to be had unto it; to this the Defendant saith he will satisfy the Bishop, but never offereth to do it: Afterwards it is agreed Mr. *Sherfield* may take it down, provided he make it up again with new plain Glasse. The Bishop hearing of this, sendeth for one of the Churchwardens, and makes a publick Act to prohibit the taking of the Window down, and suspends the Power of the Vestry, if they had any; of this the Bishop is not bound to give Notice: the Defendant must do it afterwards at his Peril, and he told others that the Chancellor opposed it.

For the Manner of it, when he cometh from *London*, he went in secret Manner, it was between four and five of the Clock, when at that time of the Year it was between Day and Night, growing to Darkness: and he went by himself, he took no Glazier with him, nor any other to witness his Act, no not so much as any one of the Vestry-men, upon whose Authority he said he did it; and thus in private and secret manner he committed this Exploit. It is said by the Witnesses on his Part, that some did, by occasion of it, commit Idolatry, but Mr. *Sherfield* knew not of it, (for any thing that appeareth;) besides, he did not follow the Vestry's Order in doing it, for he broke it down, he did not take it down; he taketh Offence at the painted Errors, but he hath broken it, and never mended it again: but he breaketh that Part only which offended him, the Head and the Feet: if this had been done in the Execution of a publick Act, he would surely have had some Witnesses of it; but he had none, he bolted himself into the Church, that none might see him, he was not willing to be seen; so it was clandestinely done: if it had been done by him upon the Order, he would have consulted with the Glazier; wherefore certainly he executed his own Humour, and not the Vestry's Order.

It hath been farther said (to excuse the Defendant) that he may and must do it; but of how dangerous Consequence this *may and must be*, is, I shall endeavour briefly to shew unto your Lordships. He takes notice, first, that the Church is a Lay-Fee, and being in the Parishioners, and himself a Parishioner, that he may therefore do it: But from this they have already started, and they may and must do it; for they well know it is a Parochial Church, and endowed with a Vicaridge, which if they should have denied, we have the Record it self ready here in Court to prove it.

But yet they say, there hath been a Vestry even from the first Foundation; and they have done, and used to do divers such things; they have made

Seats, pulled down Seats, remov'd the place for reading the Service, out of the Choir into the Body of the Church, taken down Walls of the Church, and the like, without the Bishop's Leave or License, and therefore may take down this Window.

My Lords, there is a great deal of Difference between Repairing and Reforming: Reformation ought to be made always by the supreme Power, not by private Men; but when private Persons, or a Vestry will take upon them Reformation, I make bold to say, it is the Highway to pull all out of order with their Reformation. Something was said, as if the Reason why the Window should be taken down, was, because the Painting darken'd the Church: But if this had been all, I should not have spoken much against it. But it was done for Reformation, his Conscience could not bear it. If it should be lawful for private Men to do thus much, what will they do next?

Nay, some hold our Church is idolatrous and unclean; because Common Prayers are said in them, and Masses have heretofore been said in them; and therefore these Reformers would at the next Bout take away our Churches also; this must be next. As to the kneeling down to the Windows by some; it may be some will do so to a Saint, or one of the Prophets of the Old Testament when they see their Pictures in a Church or Chapel, (as in *Lincoln's-Inn* Chapel) which if they do, then Mr. *Sherfield* must pull such Windows down, or some body else to whose Conscience it is a trouble. Again, because it is a Cause of Idolatry in others, therefore must Mr. *Sherfield* pull it down; but it is such Idolatry as must be concealed from the Ordinary. Suppose another Man come, and say it is no Cause of Idolatry, and therefore it shall stand still: Thus they differ first, and then they fight for it; next they have Partakers on both sides, and so an Insurrection may come of it, which has many times taken its Beginnings from less Occasions than this: And tho (God be thanked) in this Case it was not so, yet it might have been, and may be so (if such things should be allowed) in other Instances of like Nature hereafter. But he may and must do it, because of the late Queen's Injunctions and Articles, &c.

The Injunctions and Articles are but to authorize the Ordinary to enquire of such things, fit to be reformed in Churches by the Churchwardens, and other Officers; and they are to present it to them, and so they are to be reformed by the Power of the Ordinary in every Diocese and Jurisdiction: and the Meaning was, that all Relicks of Idolatry and Superstition should be taken away; but every Memorial, or Story of a Saint and Prophet is not a Relick of Idolatry or Superstition. Any Monument of Superstition, or of feigned or false Miracles, may be taken down; but Monuments, or Pictures for Memorials of Saints or Prophets, are not Idolatrous or Superstitious. If they should be so, because some Men conceive them so, and then they may pull them down of their own Heads, why then many might (and I doubt not but some fiery Spirits would) take upon them the Boldness to pull down all Cathedral Churches, because they are made in Form of a Cross, which some of the precise Sort cannot abide: And so, because Churches stand for the most part East and West, they would pull them down, because (forsooth) they hold it Superstition. But Reformation is, and always hath been a Work of publick Authority,

thority, and some Men have been punish'd in this Court, heretofore, for offending in this Kind.

In the Queen's Time, many went abroad (of their own Heads) to break down Crosses, Images and Pictures of all sorts, in the 44th Eliz. At Banbury they pulled down the Cross there. And in the 12th of King James some were brought here in this Court, *Ore tenus*, and sentenced for the like. And by the Sentence you shall see what Name is given to those Men, who pulled down Crosses; I shall read but these two Records, and say no more.

The Records were read by Mr. Robert Page, the Recorder's Attorney.

By the Queen, a Proclamation against pulling down of Images and Pictures: Whereas many violent Persons have of late of their own Authority gone about to deface the Walls and Glass Windows of Churches, and in their Violence have pulled down Tombs and Monuments of Noblemen, and Gentlemen deceased, to their Dishonour, and to the Breach of our Peace: Therefore a strict Commandment is given that all Men forbear to break the Pictures set upon Tombs or Graves, and not to break the Pictures or Pourtraitures of the Noblemen, or others in Churches, Church-Walls, Windows, &c. nor any Images whatsoever, without the Advice of the Ordinary, or the Advice of the Queen's Majesty, or her Council, &c. Given 44th Eliz.

The other Record is this:

In Camera Stellata Anno Regni Jac. duodecimo.

Whereas William Dale, John Eden, Hugh Jones and Richard Jackson, and other refractory Puritans and Brownists, did deface divers Crosses in Highways, in the Night-time: For this the Judgment of this Court is upon their Confession in open Court, that the said John Dale, John Eden, Hugh Jones and Richard Jackson, shall be bound to the good Behaviour, and acknowledge their Offence at the Assizes, and every one of them pay 100 Marks Fine to the King's Use.

Your Lordships see now that the Defendant might not do it as he did, nor was he bound to do it at all; we therefore leave it now to your Lordships to censure.

The Sentence.

*Lord Cottington.

*Chancellor of the Exchequer. This Cause (may it please your Lordships) is of great Weight, and well deserves the Consideration of this Court: It is brought by his Majesty's Attorney-General against this Defendant, Henry Sberfield, and some others; but the rest are not proceeded against. His Offence (as it hath been proved by Witnesses, and confessed by himself) is the wilful breaking of a Glass Window in a Church in Salisbury, which Window antiently stood there; and this he endeavours to justify. That these, and such like, are the Acts of Puritans and Brownists, it appeareth upon Record. His Answer, I conceive, to be against him, tho he now quits that Part of his Justification, and it sheweth his Spirit. It is said he is a wise Man, and an old Man, learned in the Laws, and that grey Hairs are upon him; but it had been a better Argument of Extenuation, to have said he was a weak Man, a poor Man, or a mad Man. He took Scandal, and it was an Offence to his Conscience; but this was a tender and scandal-receiving Conscience; he must have the Window removed.

This, and such like Matters may go very far, and great Mischiefs may arise by it, as there have of late Years both here in this Kingdom and in France. He did not only do this, but he boasted of it when he had done, as if he had reformed Superstition: One Day's Work, in the representing the Creation, is set before another; and the Picture of the little old Man in blue, must be the Picture of God the Father. But this is as light as to affirm, that Idolatry may be committed to any Thing, which for Ornament the Painter hath made. But for the making of Pews in the Church, Pulpits, &c. this is but Reparation, from this they come to Reformation. Six of the Vestry, at least, conceive they have Power to pull down this Window, they agree it shall be taken down, and Mr. Sberfield may do it if he please, &c. This was in Jan. 1629, 5to Caroli; but it was not done till October following, and then it is not taken down, but broken down. I verily believe (tho it appears not in Proof, and therefore as a *Non liquet* I pass it by) that he knew of the Bishop's Inhibition. But, say they, why then should not the Bishop speak to him of it? He saith it is a Lay-Fee; and said, that before the Fact Mr. Chancellor opposed him. The violent Manner of his doing it, is both proved and confessed. It is said he is a Justice of Peace, I hope your Lordships will take Order he be Justice no longer. It is proved he received the Communion kneeling; why did they not prove likewise that Mr. Sberfield was baptized? Who doubts that Mr. Sberfield was baptized? There was a strict Inquisition to prove the Fact; it was well done so to inquire, you see the ill Example of it, others followed it. They say it was a Madman who did it; this was not proved: but it was more like he was mad himself; it was indeed the Act of a Madman, and fit for none but Madmen to imitate.

For his Answer, I take it to be full of Singularity and Pride; and notwithstanding any thing contained therein, or in the Proof, I hold this his Action a great Offence, an Offence of great Scandal and Presumption as to him that knows the Law. If he or others had been minded, upon good Advice, or in good Way to have presented this or the like Thing fit to be reformed, to the proper Ordinary, or to the King's Majesty, being the Supreme Head, he and they should have done well, and have had a great many Thanks for so doing; but tho it were fit to be removed, it was not in his or the Vestry's Power to do it. I take it, it differs not from that Case adjudged here in this Court the last Day, when a great many poor Men, who had a Right to Common, but in claiming it made a Riot, were justly punish'd. So here, tho this Window were scandalous, yet a private Man, nor many private Men cannot take it down: For what (as Mr. Attorney said) if one half of the Town would have it stand, and the other half would have it down, what must follow but Insurrection? so that here is in this a great deal of Disobedience, and that done in the Singularity of his Spirit in Contempt of the Church; he hath thereby touched upon the Regal Power, and encroached upon the Hierarchy of the Bishops, who have their Authority from the King. I come now to my Sentence; *I will have him to be no more Recorder of this City, that he be bound to the good Behaviour, That he make a publick Acknowledgment*

ment

ment of his Fault in that Church where this Fault was done, and in the Cathedral Church. And that he may pay 1000 l. Fine to the King's Majesty.

* Sir Robert Heath. * Lord Chief Justice of the Common-Pleas.

In this Cause, brought by Information by myself, when I was his Majesty's Attorney-General, against Mr. Sherfield and others; the Relator hath only proceeded against this one Defendant. Upon all that hath been said on both sides, these Things come to my Consideration, the Fact, and the Circumstances of Aggravation: For the first of these, I shall agree it to be an Offence; but I shall not agree in the manner of Punishment, set by my Lord that spake last. I dare not give Encouragement for any private Man to do any publick Thing in Church or Commonwealth of his own Authority, it is a very pernicious and dangerous Thing; but yet I shall not sentence him for some Things, which in the first Place I shall make mention of.

1. That he should do it by Confederacy and Conspiracy with others, and that riotously: It is true, it is thus charged in the Bill; but this is not proved, nor any other than Mr. Sherfield himself prosecuted. I must confess, I was informed that the Cause was much fouler than it is, and many others were suspected to have an Hand in it; and this was the Reason of the Charge in the Information.

2. It may be he took just Scandal at this superstitious Window; and had he only moved it at the Vestry, this alone had not been so great a Fault, if he had done according as the Vestry ordered.

3. That he did it contrary to the Command and Direction of the Bishop; but this I dare not say is so fully proved, as on it to ground my Sentence, tho I verily think (as to my own private Satisfaction) he could not but know of the Bishop's Inhibition. However, seeing it is not proved, (tho if it had been carefully followed, I doubt not but it might have been made appear sufficiently; for the Bishop of Salisbury himself, and many others, might have been examined in it) I pass it over as a Thing not manifest.

4. That this was done out of the Spirit of Contradiction, and in opposition of the Church-Government: I condemn his Rashness and Heat of Spirit in doing it without the Bishop; but I cannot perceive that it was done to oppose the Bishop, or Ecclesiastical Government. If this had been proved, or did appear in his Actions, I should have accounted it the greatest Matter against him; as for his inward Thoughts, I dare judge no Man's Conscience.

5. That he did this in a profane Manner, and that it was a Breach of Piety towards God. I must confess I think not so, but rather that the Offence was fit to be removed; he was grieved, and his Conscience offended at it; and I verily think, if the Bishop had been told of it in a decent Manner, he would have reformed it.

6. That it was done riotously; but it is clear there was no Riot in the Manner of doing this Thing: And so I hold this no aggravating Circumstance, he did but satisfy his ill-grounded Conscience.

7. That when he had thus done, he boasted of it; this appeareth not, no Man seeth this proved; Nay, in his Answer, opened by his Council on his Oath, he saith he accounteth it a great Cross to him, and is very sorry for it.

As to his Place and Authority, his Wisdom and Gravity, and his Profession, these excuse him not, but rather increase his Fault.

As to the colourable Pretences by him used in acting this Business, I do not take these, or his secret going about it, to aggravate his Fault; I think Vestries have too great Power, and often take upon them to do Things beyond their Power; and yet I know nothing to the contrary but the Reverend Bishops may abridge that Power when they will. As to this Action of his, I find that he did it not *contra voluntatem Episcopi, sed præter*; that he was the first Mover of the Matter to the Vestry: This is not a Fault in him, I think, but well done of him; and yet when the Vestry had done this, and the Defendant executed their Order or Agreement, I do not see, but the Bishop, if they had done ill, might have punished them. Give me leave, I beseech your Lordships, to speak thus much: A Judge must not speak his own Imaginations, but according to Proof; he is bound ever to give Sentence *secundum probata, not probabilia*. That he undertook to satisfy the Bishop, this I think is proved by one single Witness; but yet this Action of the Defendant, I conceive to be an Error in the Defendant. The Vestry (he should have known) are but private Men, and have no Jurisdiction to reform, whatsoever they have done in Matters of Repair heretofore. But if this, or such like Things should be permitted in the Church-Government, to be done upon private Authority, why should not the like Men do the like in the Commonwealth? and then we should be at an evil Pass.

We read in the Book of the Judges of Israel, when there was no King in Israel, private Men did what was good in their own Eyes, and many erroneous Things and Slaughters fell out thereupon.

There was Cause (I am satisfied) that this Window should be removed. It was made for the Picture of God the Father, and so it was generally conceived to be: but tho it was idolatrous, and their bowing to the same was conceived to be Idolatry, they should therefore have told the Bishop of it; which seeing neither Mr. Sherfield nor the Vestry did do, he is not in this to be excused. I shall therefore agree to sentence him for this Fault; but I shall forbear to put him from his Place of Recorder in the said City: It is not an Offence in him as Recorder, nor as Justice of Peace. I hold every Man that is sentenc'd should (as near as may be) be sentenc'd *eo modo quo offendit*, and therefore I think not fit that he be put from either of his Places; for else we should for this one Offence censure him as worthy to be cut off from his Places, and so good for nothing. And I shall forbear to bind him to the good Behaviour, for he is a Gentleman of Reputation in the Country where he dwelleth; and I have observed, that a Gentleman is not bound to the good Behaviour, but for very foul and enormous Offences. But I would have him to make Acknowledgment of his Fault unto my Lord Bishop of Salisbury, and before such as he shall call unto him: And I would have him give some Satisfaction, and this in the very kind that he hath offended, at the Discretion of the Bishop. For the Fine of 1000 l. set by my Lord, that spake last before me, I hold it to be too much for an Error, being there appeareth no Contempt: I shall therefore think, and so set 500 Marks to be enough.

Lord

* Sir Thomas
Richardson.

* Lord Chief Justice of the King's Bench. My Lords, Mr. Attorney-General is Plaintiff against Henry Sherfield Esq. We are not to take notice of any more Defendants, because they are not proceeded against; for this Cause, my Lords, I hold it comes fitly and properly before your Lordships here. This is rightly *crimen Stellionatum*. There be many Covers in it; for it is of mix'd Cognizance, and therefore fit for this Court, which I ever held to be the greatest Court, except the Parliament.

In delivering of my Mind, I shall crave Pardon, if I speak any thing which shall be mistaken. For the Fact, (as it appeareth unto me upon the Proofs) it was the breaking of a certain Window of painted Glass, not one of the greatest in the Church; it was a private Window, and it was privately done by him with his black Staff.

His Motive to do it was this, There was Offence in this Window, and he conceived that it was Idolatry, or the Cause of Idolatry. The Offence was, that God the Father should be pictured there in the Form of an old Man in blue and red. I have no Reason to think Mr. Sherfield took this to be made for God the Father; for he never was, nor never can be pictured; who knoweth him so well? Moses himself saw but his back Parts. But give me leave, my Lords, as for Idolatry. This worshipping of Idols is the greatest Sin of all others; it is a spiritual Idolatry; it is to give God's Honour unto Creatures: For the Homilies of the Church, I think they are very excellent Things, (and so they are without doubt;) and there is an excellent Homily against Idolatry: so that Mr. Sherfield, and others, taking offence at the Pictures in this Window, (altho I see not why it should be taken for God the Father) they might, to avoid Occasions of evil Desire, endeavour to remove the same. But then I hold he should have gone to the proper Judge that hath Power. And here I find fault with him, that in the twenty Years of his continued Offence thereat, he would never resort to the Bishop to complain thereof: This was certainly *scandalum acceptum, & non datum*. He should have gone to the Bishop; but for his Colour to do the same, by the Order of the Vestry, I think it a meer Colour. Two withstood this Motion, eight or six consented to the taking of it down. I marvel any Question at all was made of it; for I know Mr. Sherfield is as well beloved of the Citizens as any Man can be; and, I presume, he might command an Order in the Vestry: but, I say, the Vestry hath nothing to do to reform, it wholly belongeth to the Bishop. And the Power of the Church-Wardens, by the Canons and Constitutions, is but to inquire and present; but the Bishop, the supreme Ordinary in his Diocese, and the Arch-deacon, who is *magnus Oculus Episcopi*, are the proper Agents in a Work of Reformation; what Mischiefs would else ensue? There was a special Commission in Henry VIIIth's Time. I know who were Commissioners, and have seen the Commission: They did strange Things; but I have seen again as strange Stories of Things befallen those Houses.

In 3 Edw. VI. Cap. 10. It was enacted, that Reformation in the Churches should be made by Archbishops and their Commissaries.

VOL. V.

This was repealed by Queen Mary, but set on foot again 1 Jac. and these Times must follow the Wisdom of an Act of Parliament. Again, of what dangerous Consequence is this Act of Mr. Sherfield's? If these Men should be permitted to be Reformers, they would reform some Things that need no Reformation. I have seen, in some Churches in my Circuit, some Stories of the New Testament, some in Windows, some in Needlework and woven Work; God forbid these should be taken away.

The manner of his doing of it I like not. He did not take it down, but break it down in the Head and Feet, which offended him: This should have been the Act of publick Authority; he presumeth to do it in the Church, a sacred Place, and ever privileged: Therefore it was an Offence to use any Violence in it, tho but to the Windows, and therefore to be punished. I think Churches too little regarded; I hold it very ill that he did it so in private. He might rather have taken a Glazier with him. Yet I hold clearly, he doth not disaffect the Government. To my knowledge, he hath done good in that City since I went that Circuit; so that there is neither Beggar nor Drunkard to be seen there. For Ecclesiastical Government, he is outwardly conformable: I have been long acquainted with him; he sitteth by me sometimes at Church; he bringeth a Bible to Church with him (I have seen it) with the Apocrypha and Common-Prayer Book in it, not of the new Cut.

That he should do it against my Lord Bishop's special Direction to the contrary, I do not think so. There is but one that proves his Undertaking to satisfy the Bishop. And for the Inhibition, he had no Notice of it, for ought is proved; nay, he expressly denieth it upon his Oath, wherefore I do not believe he had Notice.

To speak somewhat of the Offence that sticketh upon him, the breaking of the Window; I assure myself, if Mr. Sherfield had gone and acquainted the Bishop with this Order, when it was made, this Cause had been prevented; but done as it was, it was disorderly done, and without Warrant. This therefore is an Offence done by the Defendant; and it is an Offence, in arrogating to himself Power and Authority not belonging to him, and his Zeal and good Intention shall not excuse him: Zeal must not transport a Man out of his Calling, nor beyond his Bounds; if it doth, it ceaseth to be Zeal, it is Rashness and Boldness, it is (my Lords) Presumption. I proceed to my Sentence, wherein I must crave Liberty (and in all Things whenever I speak in this Place) to use my own Conscience; and I shall ever hold this Rule, to judge and inflict Punishment, *secundum quantitatem delicti*.

For this Defendant, I think him transported with a little indiscreet Zeal; and he would not seek Remedy for his Grievance of his Ordinary, that he might have had Leave to do this Deed, but rather do it of his own Head, and this by colour of the Vestry's Order, nothing to the Purpose. And this, my Lords, is rather an Error, in not doing what he ought to have done, than any great Offence in doing what he ought not.

My Lords, this I remember always, that every Punishment here must be *ad reformationem, non ad ruinam*: therefore I shall not agree to discharge him of his Recordership, nor of his Place of Justice

stice of Peace in that City. For binding him to the good Behaviour, I humbly crave pardon to dissent from that; he is a grave Bench, and a learned Man, and a Gentleman well governed hitherto, howsoever his indiscreet Zeal transported him into this Error. This is the first Offence that ever you heard of him. *I shall agree for his Submission and Confession of his Fault to my Lord Bishop of Salisbury, to be made before his Lordship, and such as he shall call unto him: But, my Lords, for his Fine to the King, 1000 l. is too much, and 500 Marks is too little; I shall therefore go between both, and set 500 l. and Imprisonment, according to the Course of the Court.*

Secretary Windebanke. *I agree in Sentence with Mr. Chancellor of the Exchequer 1000 l. Fine, Acknowledgment in both Churches; to be put out of his Place, and imprisoned.*

Secretary Cooke. His Majesty's Attorney-General Plaintiff, and Mr. Sherfield, an antient Gentleman, is Defendant. In my Sentence I shall endeavour to keep a good Rule, which is this, not to make Faults where they are not, nor to make them greater than in themselves they are.

The Information hath charged seven several Crimes upon the Defendant; but of all these, nothing but one, touching the Defacing of such Ornaments, sticketh upon him: But is this so much? This Picture was made for the Picture of God the Father: So I thought also, I confess, whosoever was mistaken; for Images in Churches, there hath been heretofore much Trouble about them. The first Trouble that I have read of, was in or about the second Nicene Council; and we read, that Imagery, or Image-worship, grew up after it had slyly crept in, in this manner.

First they were made for Stories, to teach that to the Eye which the Word doth to the Ear. Then they began to gain some shew of Reverence at their approach unto them; but not to the Images, the Reverence was done to God. Afterwards they came, as we read, (out of the Windows and Walls) into the Church, and at last upon the Altars; and then to be worshipped and offered unto. Howbeit, this was but a relative Worship, as they would excuse it; nay, as St. Gregory de Valentia saith, they did in his Time give Co-worship to the Images with God: But our Church doth not allow any Adoration to be given to any Image or Picture whatsoever, nor the Image of God the Father to be in the Church.

This is the Matter of his Accusation: So that as unto the Matter, the taking away of such a Picture is no Offence; but in the Manner of doing it, is the greatness of the Offence.

Reformation in a private Man, is Deformation, it is not to be permitted: I shall ever be as ready to punish such as any. But that he did this of his own Head, without Leave of the Church-wardens, and against the Bishop's Inhibition, it doth not appear to me as it standeth before us. I conceive he had some Opinion that the Vestry, or his own Authority, might allow him in that which he did, and warrant him in it; but he should then have done it according to the Authority.

I think he did this out of a little more Zeal than he thought to be in others; and I find that he did it without acquainting the Bishop therewith: but it is fully proved that he is conformable, and therefore it doth not appear to be in Opposition of the Reverend Bishops.

I incline to my Lord the Judge's Opinion that spoke last, that it was done out of Zeal; and he himself answereth, it was done out of Tenderness of Conscience: yet I say, that private Men are not to make Batteries against Glass Windows in Churches at their Pleasure, upon pretence of Reformation. Notwithstanding, I conceive the Danger of Example to encourage others to break down such Windows, will not be so great, as the Occasion of Triumph to ill-affected Persons would be, if this Court should too severely punish an Error in pulling that down which the Church disalloweth. *Therefore an Acknowledgment to the Bishop of Salisbury, in the Presence of such others as he shall appoint, that he hath not done well in not asking his Leave, would do well; and I hold it fit it should so be: And that he be admonished to conform himself to the Government; but I acquit him (for my Part) of his Fine, and all other Punishment.*

Sir Thomas Farmin. The Cause before your Lordships, is upon Mr. Attorney General's Information against this Gentleman, Mr. Sherfield; and it is for doing of a Thing, which, if it had been done with answerable Circumstances, had been no Fault in him, *sed bonum est ex integris causis*: So that the not doing of this Thing in a right Manner, maketh it an Evil; but not so great an Evil, in my Opinion, as by our Sentence to ruin him. But it is a great Error for Men to be zealous in their private Spirits, and to put themselves forward upon publick Actions belonging to the Supreme Government. I hold that the practical Solecism, by overt Actions, is the greatest Opposition against Authority. These are to be vigilantly met withal; but for this Gentleman, some Things here spoken make me pity his Case: Besides his doing the Fact in such manner as he confesseth, there is not any one Thing else brought home upon him by two Witnesses.

To speak my Sentence shortly; As I shall not say any thing to encourage those hot-spirited Men, so I shall still bear and remember that excellent and just Saying, mentioned by one of my Lords the Judges, that we are to judge *secundum probata*, not *probabilia*; and therefore *I agree with the same Lord in all the Sentence.*

Sir Henry Vane. As to the Cause, before this Court, at this Time, it is (my Lords) a Crime in the Defendant; none differeth from this, that he hath done that which becometh not his Wisdom and Experience. I have learned long since, that Ignorance doth not excuse an Offence, either in Church or Commonwealth: And I hold that this Offence of Conscience is not to excuse him; for he went not to the Bishop to complain of it, all these 20 Years that he was troubled at it. I heard some commend his Manner of doing it; I am not of that Mind, he could not but know, that if he had an Order he must pursue it. I must confess, I do admire that he (being a Lawyer) should be ignorant of the Proclamation to the contrary: But he is a learned Man, a Recorder, a Bench, and a Parliament Man; I have known him give grave and wise Counsel in that Place: All these aggravate his Offence, and make it Wilfulness in him. But for his Conformity, and yet doing a Thing contrary to his Profession of Conformity, I ground my Sentence the heavier upon him, *he shall pay (I think fit) 1000 l. he shall make acknowledgment of his Offence in the Cathedral Church of Sarum before the Bishop, Prebendaries, and Canons, but not be put out of his Recordership.*

Sir Thomas Edmonds. I agree with my Lord Heath for 500 Marks Fine, Acknowledgment before the Bishop of Sarum only, and such as he shall please to call unto him.

Bishop of London. If there be *defensio facti*, or *confessio facti*, or else two Witnesses, I think any one of these three will be a sufficient Proof to convict a Man of an Offence; and I have observed there are all these together, in this Cause against Mr. Sherfield. He confesseth that he broke the Windows, and setteth forth his Justification in his Answer to Mr. Attorney's Information; and this was done by him with his Pike Staff, as is testified by two Witnesses, such as they were; yet they were Eye-witnesses, which is the strongest Testimony. I am persuaded, as I am a private Man, that at least he heard of the Bishop's Inhibition; I do not say, but *ignorantia facti* may excuse a Man in such a Case, at least *a tanto*, tho not *a toto* perchance; but *ignorantia juris* never doth excuse: yet, because it is not directly proved that he had Notice of the Act of Inhibition, made by my Lord Bishop, I shall forbear to give my Sentence touching this Particular, the rather because he hath cleared himself of it by his Oath; and yet I have met with as strange Equivocation in some of late as almost hath been heard of, I have not read the like; but seeing there is not plain Proof, I must not judge him other than an honest Man.

Mr. Herbert hath defended this as well as ever any did a Cause to my Knowledge. As for Vestries, which were made and suffered first by Negligence doubtless, yet being of continuance, we cannot so easily restrain the Power which they use. I have had Experience of what I speak herein, in a Parish Church within my Diocese, St. Lawrence by Name, there is a Vestry: It fell out once that they could not agree upon some Election, I interposed as Ordinary; I had no sooner done this, but I was inhibited by the Archbishop of Canterbury; afterwards, by his Grace's means, it was referred to me to end, which I endeavoured; but then a Prohibition at the Common Law was sent me: so that it is not an easy Matter to restrain a Custom.

But it is not in the Power of a Vestry to remove or displace any thing in the Church that is doubtful; and tho they made an Order, in this Case, for the taking down of the Window, yet it was Mr. Sherfield's Fault to go so disorderly to work; his violent and riotous breaking into the Church, and upon a consecrated Thing, is criminal in him.

Whereas divers Things touching his Conformity have been proved, I am confident upon good Information, had the Cause been followed as well as defended, (but it was ill followed by them that prosecuted, and unworthy their Places) many more things might have been proved against him; and that it would have appeared, he had done more Harm underhand in his Place, than Good otherwise. But for his Trouble of Conscience, which should impel to this Action; it troubled not much, for he kept it in, and nourished it till it grew, as you see, to a great Head, so that at last it hath brought him hither, even to the Sentence of this Court.

My Conscience being laid at Stake, I am not of Opinion, that Images and Pictures were not in the Church till the Time of Gregory the Great: Nor am I of Opinion that the first Trouble about them was at the Second Council of Nice. St. Gregory, who was 600 Years after Christ, in his 9th

Book and 9th Epistle, written to faith of Images, *vetustas admittit*, &c. But 200 Years before this, we find that Gregory, surnamed the Divine, otherwise called Gregory Nazianzen, when the Emperor laid Siege to the City of which he was Bishop, in his Oration to the said Emperor, to move him to pity, faith, That the Citizens, above all their Losses, spoiling of the City Walls, ruining of their Houses and Temples, took to heart the pulling down their Statues; *Et hoc acerbum*, faith he. Nay, we find them in the Church 200 Years after Christ, they were upon the Chalice, and that is ever upon the Altar.

In Tertullian's Time (who was one of the antientest Fathers) there was painted upon the Chalice the Picture of the Shepherd bringing home the lost Sheep upon his Shoulders; and this was objected against Tertullian himself, who in his latter Time fell into the Opinion and Error of the Monitans, who are against second Marriage and Repentance after Baptism, affirming that no Repentance is left to him that sinneth after Baptism; against which Error, the Church used this Symbol of the Shepherd bringing home the lost Sheep.

Again, in the Time of that antient Father Irenaeus, who is held to be the Scholar of St. John, they had the Picture of Jesus Christ; and they had it from the Gnosticks, who had Adorations with it, and Sacrifices: and therefore the holy Father condemned that Picture, because (faith he) the Gnosticks did that to this Picture which the Heathens did to their Idol Gods. But it hath been a distasteful Thing to remove Pictures and Images. We read, that the Bishop of Cyrene broke the Pictures in the Churches, which his People took so ill, that they rose against him, and were hardly appeased.

And of late Times we have had Experience of the like Mischiefs in France and the Low-Countries about this Matter. And we know what Rebelions were raised in the beginning of the Reformation here in this Kingdom and in Germany: when Carlostadius and his Company went about to pull down, and deface the Images in the Churches, what a Stir was there? If Luther himself had not come back and appeased the Multitude by his timely Advice, that the Work of Reformation was to be left to the supreme Magistrates, (which was well done of him, and a Thing wherein he shewed his Wisdom) much more Mischief would have ensued. I do not say these Things to any such Purposes, as that Images should have any Part of Divine Adoration.

When these were brought into the Churches, as one Side fell to worshipping them, so the other Side fell to breaking and defacing them, which bred many Broils; and amongst the rest, one very sharp Contention by reason of the prevailing of Worshipers of Images, was stirred in the Time of Constantine the Great; for I read the Empress gave her Voice against her Son Constantine to put him off from the Empire, because of his defacing of the Images, which they had in their Churches. But for that gross Council of Nice, (pardon me this gross Term, but they deserve it in my Opinion) they decree, the same Honour was to be done to the Image as to the Life, whether it were the Picture of Man, or of God, or of Christ. And then another Decree in that Council was, that a Man must rather endure Penury than do Violence to a Picture: and their absurd Distinction of *Latria* and *Doulia*, &c. Yet this I say, there is a great deal

of Difference between an Image and an Idol. But then, if Men give Worship to them as to the other, it is unlawful.

As for the Injunctions in the Queen's Time; this was done by publick Authority, and done in every Place by the proper Judge.

And, touching the Matter in question, I do not think it lawful to make the Picture of God the Father: but 'tis lawful to make the Picture of Christ, and Christ is called the express Image of his Father; I don't mean to say that the Picture of Christ, as God the Son, may be made; for the Deity cannot be pourtrayed or pictured, tho the Humanity may. I do not think but the Representation of God the Father (as in the Prophet *Daniel* he is called the Antient of Days) hath been allowed (tho erroneously) to be made, like an antient old Man: And this the *Lutheran* Party hold too; but whether it be idolatrous or superstitious or no, this I hold not to be the Question. And I shall crave Liberty not to declare* mine Opinion at this time, whether it ought to be remov'd: But the Defendant, Mr. *Sherfield*, did this in Contempt, at least in Neglect of the Church's Authority, and the Authority of the King's Majesty; for the Church derive their Authority from the King, as well as the Civility. I shall therefore sentence him for breaking this Window, whether it were fit or no to be in the Church; if it had been white Glass it would have been the same thing to me; it was a violent and raging Act, and it is now a Business of great Weight and ill Consequence, and therefore fit for the timely Censure of this Court. And I say farther, if it had been the Idol of *Jupiter*, and they had professed Divine Worship to it, it had not been lawful for Mr. *Sherfield*, or any private Man to deface it; and this I shall prove and maintain by Scripture.

The Idol of *Jupiter* was but as the golden Calf which *Aaron* made, before which the People of *Israel* committed Idolatry; yet we see Judgment was executed by the supreme Magistrate by Command from God, and the Tribe of *Levi* was commanded to kill the Idolaters.

Then again, there was a Brazen Serpent appointed to be set up by the Lord himself; and afterwards it became an Idol, and the People committed Idolatry with it; yet none of all *Israel* presumed to break it down, but *Hezekiah* the King did it. Also the Calves of *Jeroboam*, set up at *Dan* and *Bethel*, were plain Idols, yet they continued a long Time, and were not pulled down till *Josiah* the King did it, and this he doth by his supreme Power; and the King did this by the Priests of the first and second Order. Both these appear in their Stories in the 4th Book of *Kings*, the 18th and 23d Chapters.

As for the Second Commandment, *Thou shalt not make any graven Image*, or Picture, to thy self: No, take heed, worship it not howsoever it be; if thou dost make an Image, yet thou shalt not worship it. But there is no Command or Example for breaking of Images (when they are made) without publick Authority. You shall see this plainly in that Altar set up by the *Reubenites* and *Gadites* at *Jordan*; this was conceived by some of the People to be an idolatrous Thing, at least an Intention in them to set up another Manner of

Worship, and *Jerusalem* was the Place of Worship only: there was an Embassage sent unto them, and *Phineas* and other Princes were imploy'd in it; they did not presently fall upon them and break down the Altar, tho they had special and strict Command to overthrow and break down all Idolatrous and Heathen Altars, Groves, Places of Idolatry and Images; but this they were not to do presently, they were to tarry till the Land was theirs, in their own Power, as you may see in the 7th and 12th Chapters of *Deut.* But you will say these were for the *Jews*, but not for us in the Times of the Gospel. In St. *Augustin's* Time the People committed Idolatry with their Images, and many there were that would have pulled down the Images (the Causes of this Idolatry.) St. *Augustin* adviseth, No, first preach them out of Mens Hearts, and he called upon the Ministers so to do; but you shall not pull them down (saith he) till the supreme Power doth it, or Power were given them. Thus, if it were *Jupiter's* Picture, Mr. *Sherfield* or any others are not to pull it down till Power be given them. And *Gerardus* the *Lutheran* is of the same Opinion.

The Homily against Idolatry (so much magnify'd) plainly shews it to belong to the supreme Magistrate, and has reference to such Pictures as are upon Walls; but Stories upon Glass-Windows were not here meant. And as for my Lord Bishop of *Salisbury*, his † Book of his worthy Lectures at *Cambridge*, upon the 4th Chapter of the Epistle to the *Colossians*, upon these Words, *Walk wisely towards them that are without*, What saith he? Why the very same that St. *Austin* did before, that a private Man hath neither *vocationem* nor *potestatem* to do it; thus if he had read a little farther, he should have found Direction to have walked wisely. And indeed, those that are out of the Church must be dealt wisely withal. When you see these Things, you cannot, as the *Israelites* did not, deface them, for they belong only to the supreme Power. And you shall see St. *Paul's* Practice in the 17th Chapter of the *Acts* of the Apostles; he saw they had set up an Altar to the unknown God, yet he went not to pull it down, but to teach them that God which they knew not, even as St. *Austin* afterwards advised.

So I come to this which is the Work of the Day; this is a violent, riotous and profane entering into the Church by him, to break this Window down with his Pike-Staff: and as the Matter standeth proved to me, it seemeth there are these Circumstances of Aggravation of his Fault.

1. The First Circumstance of Aggravation is, That when he went about the taking down of this Window, he went not unto the Bishop, but chose another way.

2. He was Twenty Years offended at it; and in all this Time we think some good Spirit might have suggested unto him better Advice, if he would have followed it.

3. By his Office and Authority, his Fault is the greater and more scandalous.

4. By his Age, being grown grey, he should have learned Wisdom.

5. That when he went to do this, he went in private, which some have said to be well done,

* But he show'd his Opinion, when upon his Promotion to the See of Canterbury, he caus'd the same kind of Pictures to be set up in his Chapels at Lambeth and Croydon. Rush. Col. Vol. 2. p. 273.

† Davenant on the Colossians, cap. 4, 5. p. 389.

but I am not of that Opinion : true, if it had been a Work of Necessity in him to take it down, he might have done it, but then he must follow his Order, and he should then have taken a Glazier with him to have taken it down, and not break it down with his Staff.

6. His Offence is the greater by his Office of Justice of Peace ; certainly herein he was not *Conservator pacis*, for besides the Force and Violence, there might have been much Discord and Blood-shed about it, as was well observed by Mr. Attorney.

7. By the doing of this Act contrary to his Conformity, there have been the like Insolences done in the same Church, for which I think there is a Cause against some of them depending in the *High Commission Court* ; there was the Tomb of a dead Bishop there, his Bones taken up, his Scull made a Mazer in an Apothecary's Shop, (as I am inform'd) his Dust thrown about, and all to bury a Tanner's Wife.

8. In regard of his Tenderneſs of Conscience, which he alledged for himself : My Reason is, for that, if he were of a tender Conscience indeed ; yet in this thing I shall sentence him, for not going to the Bishop to reveal it to him ; if it were but a shew of Tenderneſs, then surely there was the more Wilfulness in his Offence, and this can be no Excuse.

9. His Fault is aggravated from his Profession. It is an honourable Profession ; and as it is a great Offence in a Divine to infringe the Law of the Kingdom wherein he is born and bred up, so is it also a great Offence, if those of the Profession of the Law vilify the poor Laws of the Church. Thus much let me say to Mr. *Sherfield*, and such of his Profession as slight the Ecclesiastical Laws and Persons, that there was a time when Churchmen were as great in this Kingdom as you are now ; and let me be bold to prophesy, there will be a Time when you will be as low as the Church is now, if you go on thus to condemn the Church.

To proceed, he went into the Church. It pleased God to give him a fall upon the Place, and if it had not been God's Mercy, he had broken his Back upon the Edge of the Pew ; yet all this while these Things have not wrought him to any Confession that he hath done amiss ; nay, he saith, he was persecuted for God's Cause (as I am informed) but I think he persecuted the poor Sexton of the Church, they put him in Prison, and there kept him, and would have kept him, if my Lord Bishop had not sent Bail ; and if it had not been for the Bishop, they would have turned him out of his Place. And then, just upon the Fact committed, cometh a new Lecturer to Town, and he pitcheth upon the Text, *Pſalm cxix. ver. 121. I have executed Judgment and Justice ; leave me not to mine Oppressors.* I have been the willing to render this Account at this Time, because some are ready to slander us, as Maintainers of Popish Superstition, and I know not what. *As for my Sentence, I agree with my Lord Cottington.*

Lord *Wentworth*. This is an Offence (my Lords) committed by a Man of Learning and Judgment ; the Persons of Men and Times may aggravate Offences. Men now in these Days make themselves wiser than their Teachers ; whereas it is said, he did this out of Conscience

and Zeal, and with an intent to honour God, he is out of his Element. *Uzzah* touched the Ark with a good Intention ; but because he did this without warrant, he was secretly punished : It is not for a Divine to meddle with *Littleton's Tenures*, nor a Lawyer with Divinity, to govern Matters in the Church. The Vestry had no Power to reform, nor authorize Mr. *Sherfield* to do this Thing ; and I hold it a very great Boldness in him, to justify his Fact under these Pretences ; for Things which Vestries undertake to do of themselves, if it be well done, it is well ; if it be not, let them look to it. But for their frequent and ordinary transcending their Power, it is high time that the Bishops be directed by the King's Majesty, to regulate all such Things, and to reduce all these Vestrymen into Order and Obedience. I shall not forbear to punish an Offence of this dangerous Consequence upon that Ground, for fear of giving an Occasion of Triumph to some. I think his Impunity will be rather an Encouragement, to Men of other Minds, to set their Hands to the like, of which there is great Danger. I shall not therefore in my Sentence go any thing less than any of my Lords here before me have done ; *That he be not any longer Recorder of that City ; that he be bound to the good Behaviour ; I see no Reason but a Gentleman may be bound to the good Behaviour : For his publick Acknowledgment, I think it necessary to be made in both the Churches ; and that he pay 1000 l. Fine to his Majesty's Use.*

Sir *Robert Naunton*, Master of the Court of Wards and Liveries, gave not his Sentence, because he was not in Court the last Day, at the beginning of the Hearing.

Lord *Newburgh*, Chancellor of the Duchy of Lancaster, forbore to give his Sentence for the same Reason.

Viscount *Falkland* agreed in his Sentence with my Lord Cottington, for 1000 l. Fine unto the King, &c.

Viscount *Wimbleton* agreed in his Sentence with my Lord Heath, for acknowledgment of his Fault to the Bishop, and such as he should think fit to call to him ; and to pay a Fine of 500 Marks to the King's Majesty.

Earl of *Holland*. He was not present at the Beginning of the Hearing of the Cause, and therefore did forbear to give his Sentence.

Earl of *Devonshire*. He agreed with my Lord Cottington for 1000 l. &c.

Earl of *Dorset*. I conceive, my Lords, that the Prosecutor of this Cause is much to be blamed, and did the Court legally take Notice of a Prosecutor, where the King is a Party, I should give my Vote to fine such a Man : He hath here made a great Noise of terrible Things, (seven in Number) but hath not endeavoured to prove many of them. I shall speak somewhat of the Matter in question that sticketh upon him, and not meddle with what hath not been proved. And first is to be considered what was done ; a Window in a Church was broken, because of the Image of God the Father which was in it, in those Places of the Head and Feet of the Representation of the Deity : this, if it had been done by the proper Judge, had been well done. If all unlawful Pictures and Images were utterly taken out of the Churches, I think it were a good Work ; for at the best they are but Vanities and Teachers of Lyes. For the Antient

tient of Days in *Daniel* (I take it) this doth not give warrant to frame a Picture of God like an old Man; but it sheweth the Eternity of God, that he was before all Times and Days. And it cannot be taken to be the Pourtraiture of any other; for this being made to represent the Creation, it must needs be intended for the Picture of God the Father; for what Man did help God about the Creation? This therefore is unlawful; no Man ever saw God, nor did he ever appear in any Likeness to Man. But we picture Christ, because he took upon him Man's Nature, and was Man as well as God; and the Holy Ghost appeared in the Similitude of a Dove: But I wish there were no Image of the Father, neither in the Church, nor out of the Church.

Secondly, I note the Mind wherewith it was done, and it was out of a little too much Zeal, his Conscience was tender. This, if it had been guided well, would have been worthy of Praise. I do not speak this to make as if Men may take upon them to meddle in what belongeth not unto them; yet there is difference between a Fault done of Zeal, and the same thing done out of Malice.

Next let us consider the Authority whereby he did it; and herein especially Mr. *Sherfield* had no Power. The Vestry had no Power, neither could they give any to another; it was therefore an Error in him to conceive, that because they used to meet and do Things for Repair and Ornament in the Church, that therefore they might do this, being a Piece of Reformation; I say it was his Error to do it without the Bishop of the Place. I would not be mistaken, as if I speak or did any thing against the Authority of the Reverend Prelates; for I take it, whensoever that Authority goeth down or decayeth, the Monarchy dieth with it, I think they are inseparably join'd together. But this was an Opinion of his, that it was their Lay-Fee; and if he repent him of his Opinion, recant it, and depart from his Justification, (tho his Answer be otherwise) I shall not take upon me to destroy a Man for such an Offence.

Then in what Manner did he it? Privately and without Noise; and this I hold to be a Diminution of his Fault, for secret Evils are not so bad as when they are openly done; the same Evils done in Chambers, are not so bad as if they were done in the Market-Place.

And it cannot aggravate his Fault, that he is conformable: I say, in my Opinion it was very necessary for him to prove himself a Conformitant; and being charged in the Information to be otherwise minded, he did well and wisely to clear himself by Proof.

I come to my Sentence.

I shall not sentence him for Three or Four Papists, nor shall I forbear to Sentence him for Three or Four Schismatics; the Reason why I shall not sentence him, is to avoid the Tumults of the rude ignorant People in the Countries where this Gentleman dwelleth, where he hath been a good Governour, as hath been testified, and is well known, and no doubt hath punished Drunkenness and other Disorders; and then such Persons shall rejoice and triumph against him, and say, This you have for your severe Government: this I think would be no good Reward for his Care. The Reason why I shall sentence him, is because he hath erred in his Manner of doing

this Thing, in going on his own Head without the Ordinary, to a Work of this Nature; and this I shall hold to be an Offence in this Defendant, or a Misdemeanour, but not a Crime. I would not have him to lose his Place therefore, nor to be bound to the good Behaviour; *I would notwithstanding have him make such Acknowledgment to the Bishop of Sarum, and in such Manner as he shall think fit; but I do not set any Fine upon him.*

Earl of *Pembroke* and *Montgomery*, Lord Chamberlain, he gave no Sentence at all.

Earl of *Arundel*, Lord Marshal. I find Fault with this Gentleman for keeping close his Offence of Conscience, which he saith he had at this Window, by the Space of twenty Years together; he should in all this Time have revealed his Mind to the Bishop, who had been able to direct him; but upon the Matter, he goeth on his own Authority to break down this Window. This being long kept in his Heart, breaketh out to deface the Image of God in a Man. Besides he leaveth the Ordinary, who hath Power, and goeth to the Vestry who hath none; and in his fanatical Humour he proceedeth, and breaketh the Order of the Vestry. God gave him a Warning; he fell upon the Seat, and hath had Time enough to think of it since, and in all this Time he never came to acknowledge his Offence. *I agree therefore with my Lord Cottington.*

Earl of *Manchester*, Lord Privy Seal. In this Cause, my Lords, I shall propound two Things to be considered, The Fact it self, and the Circumstance of it: For the Fact, the breaking of the Window because of Idolatry, If this had been in a Man's Lay-Fee, then he had been bound to have pulled it down; but being in a parochial Church, it is to be done by the Ordinary, or by his Appointment. This therefore being done by Mr. *Sherfield*, upon some Opinion that he had in the Power of the Vestry, it was an Error in him, but pardonable. It doth not appear that this was done contrary to the Inhibition of the Bishop, *Non notum est Judici, quod non notum est Judicialiter*, he had not therefore Notice of it: for my Lord of *London's* aggravating Circumstances, it is true, if the Thing were done, as it is charged in the Information, then those would be all against him; but we see there were Causes it should be taken down; it is proved some did adore it. How long soever Pictures and Images have been in the Churches, I hold it a very offensive Thing to make such a Picture, or Representation of God. I will mention but one Author, which was before all them who were named, the Prophet *Isaiab*, *What Likeness or Similitude will you make of me, saith the Lord?* Yes; but Idolatry is in the *Worshipping* of the Image. Take a wise Man's Counsel, The painted Picture inticeth the Ignorant to Idolatry. I profess it would offend my Conscience to see it, I am of such a pure Conscience. But there are three other Things for which I shall censure him.

1. His pretending the Order of the Vestry.
2. That he would neglect Authority, which is near unto Contempt.
3. His Passion in doing it himself, and not by others.

This Cause and Sentence hath many Judges, even so many as hear it are Judges of it. All may take notice, that our Votes are to maintain Order and Government, yet not to uphold Superstition.

I will

I will be short, I will Sentence the Defendant, but not Fine him; to make Acknowledgment to the Bishop, not to disreorder him: the Fact deserves not a Fine.

Archbishop of York *. May it please your Lordships, this Gentleman, Mr.

* Dr. Neale. *Sherfield*, is informed against by his Majesty's Attorney-General, for entering with Force into the Church of St. *Edmond's*, in the City of *Salisbury*, and there undertaking, without the Ordinary of the Place, to be a Reformer of Idolatry, in breaking a Glass-Window in the same Church, which he did of his own Authority. In his Answer upon the Matter, he setteth forth a Justification.

First he saith it was the Lay-Fee of the Parishioners; but this will not help him, for it is a Parochial Church.

Next he had Warrant for what he did, as he pleadeth, That he did it by Order of the Vestry: I wonder what is the Vestry, and what Power and Authority they have? It is a Place where antiently the Ornaments of the Church were kept; since those Things were gone, there were Meetings by Parishioners to agree on Matters of Repair and Assessments, and Rates for the Church and the Poor; and they did meet sometimes in the Church, and sometimes in the Vestry, no Man of the Parish was excluded. Afterwards, to avoid Tumults and multiplicity of Voices, some Bishops had appointed, by special Instruments under their episcopal Seals, that such and such, to a set Number, should be Vestry-men, and be so call'd, and shall order Matters for the Repair of the Church, for Bread and Wine for the Communion, and such like Things, as the Charges about the Bells, &c. And here I shall make bold to remember a Story to your Lordships of what passed between my Lord *Burleigh*, my self, and Dr. *Bancroft*, the then Bishop of *London*, when I was Vicar of *Chestbunt*. I was then a young Man, and I had an Opinion that there was somewhat in a Vestry; and had a Purpose which I acquainted my Lord and honourable Patron withal, to have some Authority deputed us in our Vestry, by the Bishop of *London* our Ordinary; I had my Lord *Burleigh's* Letter of Commendations, and special Request to the Bishop for the same. His Lordship's Answer which he gave me was thus: *If you have occasion to repair the Church or the Bells, to make Rates for the Poor, and such like Things, this you may do; but if you think otherwise, or aim at any other Power, it shall not be allowed you, and you smell of the Presbytery; therefore, I pray you, commend me to my Lord Burleigh, and tell his Lordship I will not incur a Premunire, for I have somewhat to lose.*

I conclude: The Vestry hath no Power to make Reformation, nor can the Defendant derive any Power from them: Therefore, as for the Matter of Offence, the Picture of God the Father, no Man ever took upon him to paint the Essence of the Deity. But the Question is, whether it be lawful to express God the Father by any Representation? I think it not unlawful in it self. The Eternity of *Alpha* and *Omega* doth appear in Christ, and Christ is the Image of his Father. As for those divine Homilies of the Church, set forth in King *Edward's* Days, and that in special against Idolatry, we know the Times did not bear them; nor are they to be taken or understood, as not to allow any manner of Pictures or Images (tho it

may seem so) of Christ upon the Cross; but it is like the forbearing of Food for a Time, as St. *Paul* saith he would, for fear of giving Offence or Scandal unto others, who are weak; I say that for the Crucifix, there may be very good Use made of it. As for the Purpose, he that shall look upon a Crucifix not to adore it, or give any divine Worship thereunto, he must needs think with himself, how can I but grieve and mourn for these Sins of mine, which could not be expiated but by my Saviour's Blood upon the Cross? And then I cannot but think of the great Love of our Lord Jesus Christ to Mankind, that vouchsafed to die for my Sins. And then, it serves to increase my Confidence in him, by considering that he has given himself for me, and promised that I shall not want any thing that is good for me; and that he will not deny me my Prayers in any thing which I ask agreeable to his Will; so that this must needs work a deep Impression on my Heart. I thus think; but when it cometh to be Superstitious, or that some make it a Cause of Idolatry, I must confess, I would then rather want the Thing, and all the good Uses of it, than incur the danger of propagating Idolatry. That reverend *Jewel*, Bishop of *Salisbury*, in his Time had a Commission, and he took down all idolatrous Windows in the Churches, and set in Place thereof clear Glasse, but he left alone this Window; and surely, if he had thought it to be idolatrous, he would have reformed it. And we have the Creed of *Athanasius*, which hath these Words, *That Christ is of one Substance with the Father*; therefore the Image of the Son is the Image of the Father, and therefore it cannot be Idolatry simply to make it. But grant that it was a Cause of Idolatry, might Mr. *Sherfield* or the Vestry take it down? He saith in his Answer, that himself and four others of the Vestry are Justices of the Peace, and not altogether private Men. I would ask him this Question, whether, as Justices of the Peace, they are to meddle with Reformation in the Church? It is plain they are not; yet, as a private Man, he hath undertaken to break this Window; whereas the Agreement of the Vestry was to take it down: neither was it meant that he should do it himself, but by the Glazier, and set up new Glasse in the room of it; but he hath not followed this neither. My Brother, that sitteth by me, hath very well and learnedly spoken of the Authority by which these Things ought to be done. I cannot add to what hath been said by him; I shall therefore (because much Time hath been already spent) only insist on one Thing in the Defendant's Answer, and so conclude my Sentence. He saith, the Authority which the late Queen had to reform and set forth those her Injunctions, were given to her by the Parliament. This is not well spoken. The Statute of *1 Eliz.* is but an Act Declaratory, not to be taken as if without it the Queen had no Power to meddle with those Things of the Church; for this Authority was invested in the Crown, and is still without the Parliament. He that said *per me Reges regnant*, giveth this Authority to the King. It is good to meet with growing Evils, we know not how great a Fire may be kindled with a small Spark. I cannot therefore do otherwise, but agree to Fine and Censure him highly, having offended with so many Circumstances of Aggravation, as have been well opened by divers of your Lordships before me; therefore my Sentence is, that

that I concur with my Lord Cottington in all the Parts of his Sentence.

Lord Coventry, Lord Keeper of the Great Seal of England. This Cause, my Lords, I doubt not will produce a good Effect; for this great Audience consisting of Gentlemen from all Parts of the Kingdom, cannot but be satisfied that we think it not fit nor lawful to represent the Deity by Picture, and consequently we condemn *Romish* Superstition; and on the other side, that we are resolutely bent to maintain the Government by the reverend Fathers of the Church, the Bishops. And all this I think fit to be carefully expressed in drawing up the Sentence. This I must premise, that when I speak my Conscience I be not mistaken, I am no Worshipper of graven Images; nor on the other side, am I of that peevish turbulent Humour with others. For the Charges in the Bill, if they had been proved, I should for my part have trebled the Fine set by any of your Lordships. There was never Cause worse prosecuted, yet we are to consider how much standeth proved against the Defendant. The Prosecutor causeth the Information to be exhibited against this Defendant and ten others; but those ten are not so much as pressed to answer. First, to speak to those Things that are not proved, but only charged upon him.

First, He is charged with Inconformity, therefore it was necessary for him to discharge himself of it by his Proof, which he hath done, and no doubt remaineth in me to the contrary; for the Prosecutor, tho apt enough to charge him with this, yet he exhibiteth not a Witness or Interrogatory to prove it.

Secondly, That he did this in Contempt of the Ecclesiastical Power, and contrary to the Lord Bishop's Act of Inhibition; but it is not proved he had any Notice of it before the Act was done, and therefore the Oath of the Party is to be believed: nay, there was no Endeavour to prove it, so far as I see. And I like not so well Mr. Chancellor's moving the Bishop to make an Act to continue this Window, if it were for any other Cause than to preserve the Ecclesiastical Jurisdiction. Mr. Chancellor should have done well to have declared this Dislike and Scandal to the Window to my Lord Bishop of Sarum, and he, no doubt, would have removed it. I do not say the Bishop or Ecclesiastical Judge is bound to give Notice of his judicial Acts in their ordinary Proceedings in Course of the Ecclesiastical Laws, and their own Jurisdictions: But if you will charge a Man upon a Contempt in a criminal Court, as here you must, then prove he hath Notice of the Inhibition: for else it is but *Ignorantia Juris*, which in the ordinary Way will not excuse; and yet if it were *Ignorantia Juris*, I do not see but in so high a Course of Prosecution as in this Court, it might in some Cases diminish a Fault: but this is *Ignorantia facti* in this Case.

Thirdly, That he did profanely demolish this Window, containing a Representation of the Creation. This giveth Occasion to look a little into the Nature of these Pictures; I conceive them to be unlawful and irreligious Pictures of God the Father. Two of the Witnesses say they were Idolatrous, and made to represent God the Father; that it is God the Son's Picture, there is no Proof. I think that Opinion of making the Image of God according to that of *Daniel* (calling God the an-

tient of Days) in the Form of an antient Man, is (as my Lord of London hath said) erroneously grounded; and also to bring God as he appeared unto *Daniel* to be presented in the Creation, which was long before, is somewhat improper.

Fourthly, Then that Mr. Sherfield boasted of it, it is not proved that he did, and it is evident that he doth not boast of it.

Now for what is charged upon him, and sticketh, that under Colour of the Vestry's Order, he did the same, and without the Bishop of Sarum. And for an Answer what Vestries are, I read not of a Vestry in our Book of Common Law; I read much of Church-wardens, and their Doings. If it be a Meeting of the Minister, Church-wardens, and Parishioners, it is a good Meeting, and they may well deal in Matters of Reparation, not Reformation: and this is not derogatory from the Authority of the Bishop, but subordinate to it. But it may be thro' the Neglect of the Prelates, the Vestries do incroach upon their Government; and will be more disorderly, if they be not regulated. My Lord of London did, in the beginning of this Cause, well declare, that the Archdeacon is *magnus Oculus Episcopi*; it were fit for these to do their Duties, and so such Things should not be left to be done unto these Men of the Parish, I mean to these Vestry-men. Now, in the Vestry they make an Order that this Window may be taken down by Mr. Sherfield. I do not say nor believe they have Power to Reform; yet he proveth by way of Prescription for sixty-nine Years they have made Reparations and Meetings. But howsoever he doth not pursue his Order; and this indeed was not Discretion in him. But if he had taken down white Glass, I do not see any Reason why I should sentence him; this being not prosecuted in an Ecclesiastical ordinary Course. The Council on both sides have carried themselves in the Cause extremely well; and for their yielding it to be a parochial Church, it is well done, and no Fault is to be put on the Party for his Protestation; for I cannot think but when he made his Answer, he was of Opinion it was a Lay-Fee, he sweareth it; and being he now confesseth it to be subject to the Bishop, his Fault is a great deal the less, in as much as it now appeareth, he doth not oppose the Ecclesiastical Authority.

I am glad to hear what I have heard this Day from my Lords who have spoken, and from my Lords the Reverend Bishops. I say, it appeareth that nothing hath fallen from them or any here present, to allow the Picturing of the Deity, or the Worshipping of Images.

I am much inclined to that Opinion of Mr. Secretary Cooke, That he be sentenced by way of Reprehension and Admonition; I hold fit that he make his Acknowledgment before my Lord Bishop, and repair this broken Window in decent Manner. I am loth he should be put to any heavy Fine, the rather because he hath not been prosecuted in an Ecclesiastical Course; therefore I give no Fine at all.

The Votes of the said Lords and others of his Majesty's Privy-Council, were thus disposed.

Nine agreed to set 1000 l. Fine upon Mr. Sherfield the Defendant, and he should be put out of his Place of Recorder, be bound to the good Behaviour, and make open Acknowledgment of his Fault in the Church of St. Edmonds, where the Offence was done, and likewise in the Cathedral Church of Sarum, before

fore the Bishop there, and the Deans and Prebends of that Church.

And Nine others (my Lord Keeper's Voice being one) agreed that he should not be disrecorded, that he should make Acknowledgment in private to the Bishop of Sarum of the said Offence, and in such Manner, and before such Persons as the said Bishop of Sarum should think fit. And for the King's Fine, these were again divided; four (whereof my Lord Keeper was one) gave no Fine at all, and five did give their Voices to set a Fine; four of them set 500 Marks, and one of them, viz. my Lord Chief Justice Richardson set 500 l. which Fine of 500 l. was taken for the King, because according to the Rules and Orders of the Court of Star-Chamber, when there is difference of Fines in an odd, the King is to have the middle Fine. Therefore the Sentence of the Court was (and is thus entred:)

' The Defendant being troubled in Conscience, and grieved with the sight of the Pictures which were in a Glass-Window in the Church of St. Edmond in New Sarum, one of the said Pictures,

' to his Understanding, being made to represent God the Father; did procure an Order to be made by the Vestry (whereof himself was a Member) that the Window should be taken down; so as the Defendant did, at his own Charge, glaze it again with white Glass: and by colour of this Order, the Defendant, without acquainting the Bishop, or his Chancellor therewith, got himself into the Church, made the Doors fast to him, and then, with his Staff, brake divers Holes in the said painted Window, wherein was described the Creation of the World; and for this Offence committed, with neglect of episcopal Authority, from whom the Vestry derive their Authority, and by colour of an Order of Vestry, who have no Power to alter or reform any of the Ornaments of the Church, the Defendant was committed to the Fleet, fined 500 l. and ordered to repair to the Lord Bishop of his Diocese, and there make an acknowledgment of his Offence and Contempt, before such Persons as the Bishop would call unto him.'



*Proceedings in the Star-Chamber against Dr. John Bastwick, Mr. Henry Burton, and William Prynne Esq; * for several Libels, the 14th of June 1637. 13 Car. I. Wrote by his Friends.*



Information was exhibited in the Star-Chamber by the Attorney-General, against *John Bastwick* Doctor in Physick †, *Henry Burton* Batchelor of Divinity, and *William Prynne* Barrister at Law, Defendants, for writing and publishing seditious, schismatical and libellous Books against the Hierarchy. They prepared their Answers, but the Counsel being backward for fear of offending the Court, they petition'd they might sign their Answers themselves, which was denied; and the 28th of *April* the Court order'd them to put in their Answers by *Monday* sevensnight under their Counsels hands, or else the matters of the Information to be taken *pro confesso*. Mr. Prynne, May 5. again petition'd them, that having been for above a Week debar'd access to his Counsel, and his Servant who should sollicit for him being detain'd close Prisoner in a Messenger's Hands, and it being difficult to get his Counsel to repair to him during the Term; he having been a Barrister at Law, pray'd he might (according to former Precedents in that Court) have Liberty to put in his Answer by the Day prefix'd, under his own Hand, and not under his Counsels, who refused it out of Fear and Cowardice; for which he alledg'd these Reasons.

1. *Clofe*, Dr. Layton, and others, had been allow'd this, and there is but one Precedent against it; where, upon a special Reason, and in case of a Woman, not of a Man, much less of a Lawyer, it was denied.

2. Upon an *ore tenus* in this Court, in many Cafes at the Council-Table, in Parliament, and in the King's-Bench upon Indictments and Informations (especially in Cafes of Felony or Treason) the Defendants make their Defence without Counsel.

3. Counsel is allow'd not of Necessity but Favour, as a help to the Defendants; but when they find them no help, but that they advise them to their prejudice, why may they not answer without them?

4. Every Answer in the eye of the Law, is the Defendant's not the Counsel's.

5. Shall an innocent Man suffer without Conviction, thro' the want, fear, neglect, ignorance, diversity of Opinions, or Treachery of Counsel?

6. The Law of Nature teacheth every Creature, Man especially, to defend himself, and in the present Case the Defendant's Answer resteth upon Books, matters of Divinity, and other Points, wherein Counsel have little skill: How can they defend him in a Cause they understand not?

7. At the General Day of Judgment, every Man shall be allow'd to make Answer for himself, much more should earthly Judges allow the same, where others will not or dare not.

8. By the judicial Law among the *Jews*, and by the Civil Law among the *Pagan Romans*, every one might answer for themselves: *Naboth*, *Susanna*, *Christ*, and others, tho unjustly condemn'd, yet were not condemn'd as guilty for not answering by Counsel.

9. *St. Paul* when he was slander'd and accus'd by *Ananias* the High-Priest and *Tertullus*, and several times before *Felix*, *Festus*, and King *Agrippa* (three Heathen Magistrates) was suffered to speak for himself without any Counsel assign'd.

The Defendant therefore hopes, he being accus'd in this Court, by the *English* Prelates and High Priests Instigations, of Sedition and other such like Crimes, as *St. Paul* was, shall enjoy the same Privilege and Freedom before *Christian* Judges, as *St. Paul* had among *Pagans*; which his Adversaries will not be against, unless they will be deem'd more unreasonable than *Ananias* himself: especially the Defendant having been a Barrister and Counsellor at Law formerly, and admitted in this Court to put in Answers under his Hand in other Mens Cafes.

Upon reading this and a Petition from Dr. *Bastwick* to the same purpose, alledging his Counsel refus'd to sign his Answer, the Court adher'd to their former Order, that they should by *Monday* put in their Answers under Counsels hands, or else to be taken *pro confesso*. Prynne and Bastwick thereupon left their Answers under their own Hands at the Office, and tender'd another Draught thereof to the Court.

Before this Petition of Mr. Prynne, he and the two other Defendants put in a Cross-Bill under all their Hands, against the Archbishop of *Canterbury* and others of the Prelates, wherein they charg'd them with usurping upon his Majesty's Prerogative Royal, with Innovations, licensing Popish and Arminian Books, &c. and set forth the Substance of their Answers. The Bill being ingross'd and sign'd by them, Mr. Prynne tender'd it to my Lord Keeper, praying it might be accepted without Counsels Hands, who durst not sign it: The Lord Keeper upon reading the Cross-Bill refus'd to admit it, but delivered it to the King's Attorney. The Archbishop nettled thereat, demanded the opinion of the Judges, whether they could not be punish'd as Libellers; who all but one answer'd negatively: for it was tender'd in a Legal way, and the King's Courts

* Clar. Hist. Vol. 1. p. 73, 158.

† Rush. Col. Vol. 2. p. 380.

are open to all Men. The Archbishop then apply'd to the Court of Star-Chamber, and inform'd them, That in some Books and Pamphlets lately publish'd, his Grace and the other Bishops are said to have usurped upon the King's Prerogative, and proceeded in their Courts contrary to Law. He pray'd the Court would require the Judges to give their Opinions therein; and the Court accordingly desir'd their Opinions in the Points following:

1. Whether Process may not issue out of the Ecclesiastical Courts in the Names of the Bishops? The Judges answer'd affirmatively.

2. Whether a Patent under the Great Seal be necessary for keeping Ecclesiastical Courts, and for Citations, Suspensions, Excommunications and other Censures? Whether Citations must be in the King's Name, and under his Seal of Arms? The like for Institutions, Inductions, and Corrections of Ecclesiastical Offences? They answer'd that a Patent under the Great Seal is not necessary in any of these Cases; nor is it necessary that Summons, Citations, or other Process Ecclesiastical, or Institutions, Inductions, or Corrections of Ecclesiastical Offences should be in the King's Name, or with his Stile, or under his Seal, or that their Seals of Office have in them the King's Arms, the Statute of 1 E. 6. Ch. 2. being not now in Force.

3. Whether Bishops, Arch-Deacons, &c. may keep any Visitation, without Commission under the Great Seal? They answer'd they may. Which opinion of the Judges being certified into the Star-Chamber under the hands of eleven of the twelve, the Court, at the Prayer of the Attorney-General, order'd the said Certificate to be recorded there, and in the other Courts at *Westminster*, the High-Commission and other Ecclesiastical Courts; and afterwards the original Certificate to be deliver'd to the Archbishop of *Canterbury*, to be preserv'd among the Records of his Court.

Dr. *Bastwick* having left his Answer at the Office as aforesaid, the Court taking notice that it was five Skins and a half of Parchment close written, and (as was alledg'd) contain'd much scandalous defamatory matter, order'd, That all the matters of the Information, wherewith he was charg'd, should be taken *pro confesso*. Dr. *Bastwick* notwithstanding petition'd again, that his Answer might be accepted under his own Hand, but to no purpose: And Mr. *Prynn* in a second Petition desiring of the Court not to require Impossibilities of him, his Counsels Hands not being at his Command (for thus the most innocent Man may be betray'd and condemn'd, thro' the unfaithfulness, wilfulness, fear, corruption, or default of Counsel) he pray'd them to deal with him as they would be dealt with themselves, were they (which God forbid) in his Condition, and as they would have *Christ* proceed with them at the Day of Judgment. He crav'd only so much favour and justice as *Christ* found before *Pilate*, and *Paul* before *Felix*, *Festus*, and *Agrippa*, or as every Traytor or Felon enjoys in the Court of Justice, to answer for himself, when his Counsel will not, cannot, or dare not; especially in this weighty Cause highly concerning his Majesty's Royal Prerogative, the safety of Religion, and the good of the whole Realm. He pray'd the Cross-Bill and Answers of him and the other Defendants against the Prelates late dangerous Encroachments, Innovations, Practices and Oppressions, may be accepted under the Defendants own Hands; and the Pe-

titioner (upon granting his Petition) should ever pray for their Lordships, &c. The Court hereupon command'd Mr. *Holt*, one of Mr. *Prynn*'s Counsel to repair to him in the *Tower*, and take Instructions for his Answer; and the Lieutenant of the *Tower* was sent for and check'd by the Lords for suffering Mr. *Prynn* to dictate such a Petition; and one *Gardener* who writ it from his Mouth by the Lieutenant's Licence, was the same Evening, by a Warrant from the Archbishop and others, apprehended by a Pursuivant, detain'd about 14 Days, and not releas'd till he had given Bond to appear when call'd.

Mr. *Prynn* upon Mr. *Holt*'s repairing to him, gave him his Fee, and Instructions for drawing his Answer; and the same being agreed on and settled by Mr. *Holt*, and Mr. *Tomlins* his other Counsel, Mr. *Holt*'s Clerk ingross'd it, but *Holt* then refus'd to sign it, saying he had express Order to the contrary, and would not do it for 100 *l*. and in the mean time *Tomlins* went into the Country. Mr. *Prynn* thus deluded, requested the Lord Keeper, the Chief Judge of that Court, to command Mr. *Holt* who had drawn it, to sign it; but the Lord Keeper answer'd, he had no Power to command Counsel to sign an Answer. And the Court May 19. positively order'd that for their Contempt in not putting in their Answers, the matters against *Bastwick* and *Prynn* should be taken *pro confesso*, and the Cause against them should be heard the first sitting of the next Term. As for Mr. *Burton*'s Answer, it was sign'd by Mr. *Holt*; but after it had been near three Weeks in Court, upon Mr. Attorney's suggestion that it was scandalous, the Court referr'd it to the two Chief Justices *Bramston* and *Finch*. The latter revild *Holt* exceedingly, and told him he deserv'd to have his Gown pull'd over his Ears for drawing it: *Holt* reply'd, it was only a Confession or Explanation of the Charge in the Bill, and a recital of Acts of Parliament, and how that could be scandalous or impertinent he could not conceive. But the two Justices certified it to be all scandalous and impertinent, except the usual words in the beginning, *The said Defendant by Protestation not confessing*, &c. and the words in the latter end, containing his Plea of *Not Guilty*, the common averment that he was ready to prove the matters of Answer, his Prayer of a favourable Interpretation, and to be dismissed. So all the body of his Answer, containing about 40 Sheets of Paper, was expung'd, and nothing but the Head and Feet remain'd: And by his Plea of *Not Guilty* to all, he was made to deny what he had confess'd, and justified in his Answer: And the Examiner coming to him afterwards to the Fleet, with Interrogatories grounded on his Answer, he refused to be examin'd unless his Answer might be admitted as it was put in, or he permitted to put in a new one. The Court order'd the Examiner to repair to him a second time with the Interrogatories, but he persisting in his refusal to be examin'd, for that the Answer now in Court was none of his, the Court order'd the matter of the Information and Interrogatories to be taken against him *pro confesso*; and on the 13th of June the Court order'd the Cause against all the three Defendants to be heard the next Day, and that in the mean time they should have Liberty with their Keepers to attend their Counsel. This was look'd upon as short warning by some, who affirm'd, that by the Course of the Court, a *Subpœna ad audiendum judicium* should

should have been serv'd upon them fifteen days at least before the Day of hearing, which was not done. However Mr. *Prynn* made use of his Liberty, and repair'd to Mr. *Tomlins* (then newly return'd) with his Answer newly drawn up and ingross'd as aforesaid, who sign'd it, but Mr. *Holt* said he durst not; then Mr. *Prynn* tender'd it thus sign'd to Mr. *Goad* at the Office, but he utterly refus'd to take it.

Mr. *Burton* in his Answer, set forth the Substance of his Sermon which he preach'd the fifth of November in his Parish Church in *Friday-street*, touching the Innovations brought into the Church.

Dr. *Bastwick* in his Answer term'd the Prelates Invaders of the King's Prerogative, Contemners of the Scriptures, Advancers of Popery, Superstition, Idolatry, Profaneness, Oppression of the King's Subjects, in the impious performance whereof they shew'd neither Wit nor Honesty; Enemies of God and the King, and Servants of the Devil.

Mr. *Prynn*'s Answer was much against the *Hierarchy*, but in more moderate and cautious Expressions.

June 14. The Lords being set in their places in the Star-Chamber, and the three Defendants brought to the Bar, to receive their Sentences, the Lord Chief Justice *Finch* looking earnestly on Mr. *Prynn*, said, I had thought Mr. *Prynn* had no Ears, but methinks he hath Ears; which caus'd many of the Lords to take the stricter View of him, and for their better Satisfaction, the Usher of the Court was commanded to turn up his Hair, and shew his Ears: Upon the sight whereof the Lords were displeas'd they had been formerly no more cut off, and cast out some disgraceful words of him. To which Mr. *Prynn* reply'd, my Lords, there is never a one of your Honours, but would be sorry to have your Ears as mine are.

L. Keeper. In good Faith he is somewhat saucy.

Mr. *Prynn.* I hope your Honours will not be offended, pray God give you Ears to hear.

L. Keeper. The Business of the Day is to proceed on the Prisoners at the Bar.

Mr. *Prynn* then humbly desir'd of the Court to give him leave to make a motion or two, which being granted, he moved.

Mr. *Prynn.* First, That their Honours would be pleas'd to accept of a Cross-Bill against the Prelates, sign'd with their own Hands, being that which stands with the Justice of the Court, which he humbly craves; and so tender'd it.

L. Keeper. As for your Cross-Bill, it is not the Business of the Day; hereafter if the Court shall see just Cause, and that it favours not of libelling, we may accept of it: for my part I have not seen it, but have heard somewhat of it.

Mr. *Prynn.* I hope your Honours will not refuse it, being it is on his Majesty's behalf. We are his Majesty's Subjects, and therefore require the Justice of the Court.

L. Keeper. But this is not the Business of the Day.

Mr. *Prynn.* Why then, my Lords, I have a second Motion, which I humbly pray your Honours to grant; which is, that your Lordships will be pleas'd to dismiss the Prelates here now sitting, from having any voice in the Censure of this Cause (being generally known to be Adver-

saries) as being no way agreeable with Equity or Reason, that they who are our Adversaries, should be our Judges. Therefore we humbly crave they may be expung'd out of the Court.

L. Keeper. In good faith, it is a sweet Motion, is it not? Herein you are become libellous. And if you should thus libel all the Lords and Reverend Judges, as you do the most Reverend Prelates, by this your Plea, you would have none to pass Sentence upon you for your Libelling, because they are Parties.

Mr. *Prynn.* Under Correction, my Lord, this doth not hold, the Case is not alike, for here are only one or two Members of the Court, who are said to be libelled against, and your Lordship your self in your Case against *Norton*, absented your self from the Hearing, because a Party, which is usually done by the Lords in like Cases. But this prevailed nothing.

Then I have a third Motion, which is, that your Lordships will receive my Answer to the Information, sign'd with one Counsel's Hand, which as soon as I could get sign'd, I tender'd at the Office, but it was refus'd.

L. Keeper. Your Answer comes now too late, proceed to the Business of the Day. Read the Information, which was read, being very large, and having these five Books thereto annex'd, Dr. *Bastwick*'s Latin Apology, his Litany, Mr. *Burton*'s Book, intituled, *An Apology of an Appeal to the King's most Excellent Majesty, with two Sermons for God and the King*, preach'd on the 5th of November last: *The News from Ipswich, and the Divine Tragedy, recording God's fearful Judgments against Sabbath-Breakers.* The King's Counsel being five, took each of them a several Book.

Mr. *Attorney* began with Dr. *Bastwick*'s Latin Apology; next unto the Attorney, Serjeant *Whitfield* falls upon Mr. *Burton*'s Book, saying, in good faith, my Lords, there is never a Page in this Book, but deserves a heavier and deeper Censure than this Court can put upon him.

Next follow'd the Archbishop, who in like manner descanted on the News from *Ipswich*, charging it to be full of pernicious Lyes; and especially vindicating the honour of *Matthew Wren*, Bishop of *Norwich*, as being a Learned, Pious, and Reverend Father of the Church.

Next follow'd the King's * Solicitor, who descanted upon the *Divine Tragedy*; to which part of it concerning God's Judgments on Sabbath-Breakers, he said, that they sat in the Seat of God, who judged these Accidents which fell out upon Persons suddenly struck, to be the Judgments of God for Sabbath-breaking. He enlarg'd himself upon that Passage, which reflected upon his Majesty's late Attorney-General, Mr. *William Noy*, who, (he said) was most shamefully abus'd by a slander laid upon him, as if God's Judgment fell upon him, for so eagerly prosecuting Mr. *Prynn* for his *Histriomastix*, which Judgment was this; that he laughing at Mr. *Prynn*, while he was suffering upon the Pillory, was struck with an Issue of Blood in his Privy Parts, which could never be stop'd till the Day of his Death, which follow'd soon after: but the Truth of this, my Lords, you shall find to be as probable as the rest, for we have here three or four Gentlemen of good Credit and Rank, to testify upon Oath that he had that Issue long before. And the Solicitor call'd out for room to be

be made for the Gentlemen to come in, but none such appear'd.

Lastly follow'd Mr. *Herbert*, who descanting upon Dr. *Bastwick's* Litany, concluded jointly with the rest, that it deserved a heavy Censure.

L. Keeper. You hear, Gentlemen, wherewith you are charg'd, and now least you should say you cannot have Liberty to speak for your selves, the Court gives you leave to speak what you can, with these Conditions.

First, That you speak within the bounds of Modesty.

Secondly, That your Speeches be not libellous.

They all three answer'd, they hop'd so to order their Speech, as to be free from any immodest or libellous speaking.

L. Keeper. Then speak in God's Name, and shew Cause why the Court should not proceed in Censure (as taking the Cause *pro confesso*.)

Mr. *Prynn*. I expected some particular Charge to be prov'd against me: Dr. *Bastwick* and Mr. *Burton* are charg'd with particular Books to the Information annex'd, but none of the Books are laid to me; my sole Offence, for which the Information must be taken *pro confesso*, is my not putting in my Answer under Counsel's Hand by a Day prefix'd; whereas I enter'd my Appearance, and took out a Copy of the Information, which being taken out, I endeavour'd to draw up my Answer; but being shut up close Prisoner, I was deserted of all means by which I should have done it: for I was no sooner serv'd with the *Subpœna*, but I was shortly after shut up close Prisoner, prohibited of Pen, Ink and Paper, and so disabled to draw up my Answer, or Instructions for Counsel; my Servant who should solicit for me was in Prison, without being admitted to Bail, my Friends deny'd Access, and my Chamber twice search'd; and after I had drawn some Instructions, and part of my Answer (having then obtain'd Liberty of Pen and Ink) they were taken away by Mr. *Nicolas*, Clerk of the Council; your Lordships refus'd to let me put in my Answer under my own Hand, tho a Counsellor at Law, contrary to former Precedents; your Lordships did at last assign me Counsel, but they neglected to come to me, and when by order of the Court Mr. *Holt* came to me in the *Tower*, I gave him my Fee and Instructions, and afterwards Mr. *Holt* and my other Counsel agreed upon my Answer, caus'd it to be ingross'd, and promis'd to sign it, but Mr. *Holt* refus'd to do it then; afterwards Mr. *Tomlins* sign'd it, and it was carry'd to the Office, but they refus'd it. Here it is, I tender it upon my Oath, which your Lordships cannot deny with the Justice of the Court.

L. Keeper. We can give you a Precedent, that this Court hath proceeded and taken a Cause *pro confesso*, for not putting in an Answer in six Days; you have had a great deal of Favour shew'd you, in affording you longer time, and therefore the Court is free from all Calumny or Aspersions for rejecting your Answer, not sign'd with Counsels Hands.

Mr. *Prynn*. But one word or two, my Lords, I desire your Honours to hear me; I put a Case in Law, If an Award be made that *A* shall together with *B* and *C* enter into a Bond of 100*l.* to *S*, the Award is void, because *A* hath no Power to compel *B* and *C* to enter into such a Bond: my Case is the same, The Court order'd

me to put in my Answer under Counsels Hands; I endeavour'd it, they refus'd to sign it, I had no Power to compel them, and desir'd the Court to order them to sign it; but the Court reply'd they had no Power to force them; how then could I, a close Prisoner, compel them, if the Court could not? By this means the most innocent Person in the World may be made Guilty of what Crimes you please. I appeal to Mr. *Holt*, if I have not us'd all my endeavours to get him to sign my Answer.

Mr. *Holt*. There was so long time spent ere I could do any thing after I was assign'd his Counsel, that it was impossible his Answer could be drawn up in so short a time as was allotted; for after long expectation, seeing he came not to me, I went to him, where I found him shut up close Prisoner, so that I could not have Access to him; whereupon I motioned to the Lieutenant of the *Tower* to have free Liberty of Speech with him concerning his Answer, which being granted me, I found him very willing and desirous to have it drawn up, whereupon I did move in this Court for Pen and Paper, which was granted, the which he no sooner had gotten but he set himself to draw up Instructions, and in a short time sent me 40 Sheets, and soon after I received 40 more; but I found the Answer so long, and of such a nature, that I durst not set my Hand to it, for fear of giving your Honours distaste.

Mr. *Prynn*. My Lords, I did nothing but according to the Directions of my Counsel, only I spake my own words: my Answer was drawn up by his Consent, it was his own Act, and he did approve of it; and if he will be so base a Coward, to do that in private which he dares not acknowledge in publick, I will not have such a Sin lie on my Conscience, let it rest with him. Here is my Answer, which tho it be not sign'd with their hands, yet here I tender it upon my Oath, which you cannot in Justice deny.

L. Keeper. Your Case is good Law, but ill apply'd; the Court desires no such long Answer, but whether you are Guilty or not Guilty.

Mr. *Prynn*. By the Statutes of *Phil.* and *Mar.* and of *Eliz.* in the Case of Libelling the King or Queen, the Party's Confession, or two Witnesses Face to Face are required, else no Conviction, and here is neither; nor is there in all the Information one Clause that doth particularly fall on me, but only in general. There is no Book laid to my Charge, and shall I be condemn'd for a particular Act, when no Accusation of any particular Act can be brought against me? This were most unjust and wicked. Here I tender my Answer to the Information upon my Oath; my Lord, you do impose Impossibilities upon me, I could do no more than I did.

L. Keeper. Well, hold your Peace, your Answer comes too late: What say you Dr. *Bastwick*?

Dr. *Bastw.* My Honourable Lords, methinks you look like an Assembly of Gods, and sit in the place of God: Ye are called the Sons of God; and since I have compared you to Gods, give me leave a little to parallel the one with the other, to see whether the Comparison between God and you doth hold in this noble and righteous Cause. This was the Carriage of Almighty God in the Cause of *Sodom*, before he would pronounce Sentence, or execute Judgment, he would first come down, and see whether the Crime was altogether according to the Cry that was come up. And with whom doth

doth the Lord consult, when he came down? With his Servant *Abraham*, and he gives the reason; for I know (saith he) that *Abraham* will command his Children and Household after him, that they shall keep the way of the Lord to do Justice and Judgment. My good Lords, thus stands the case between your Honours and us this Day: there is a great cry come up into your Ears against us from the King's Attorney; why now be you pleased to descend and see if the Crime be according to the Cry, and consult (with God) (not the Prelates being the Adversary part; who, as it is apparent to all the World, do proudly set themselves against the ways of God, and from whom none can expect Justice or Judgment) but with righteous Men, that will be impartial on either side, before you proceed to Censure, which Censure you cannot pass on us without great Injustice before you hear our Answers read. Here is my Answer, which I here tender upon my Oath: My good Lords, give us leave to speak in our own Defence. We are not conscious to our selves, of any thing we have done that deserves a Censure this Day in this Honourable Court, but that we have ever laboured to maintain the Honour, Dignity, and Prerogative Royal of our Sovereign Lord the King; let my Lord the King live for ever. Had I a thousand Lives, I should think them all too little to spend for the maintenance of his Majesty's Royal Prerogative. My good Lords, can you proceed to Censure before you know my Cause? I dare undertake, that scarce any one of your Lordships have read my Books: and can you then Censure me for what you know not, and before I have made my Defence? O my Noble Lords! is this righteous Judgment? This were against the Law of God and Man, to condemn a Man before you know his Crime: The Governour before whom *St. Paul* was carried (who was a very Heathen) would first hear his Cause before he would pass any Censure upon him; and doth it be seem so Noble and Christian an Assembly to Condemn me before my Answer be perused, and my Cause known? Men, Brethren, and Fathers, into what an Age are we fallen? I desire your Honours to lay aside your Censure for this Day, to inquire into my Cause, and hear my Answer read; which if you refuse to do, I here profess, I will clothe it in *Roman* Buff, and send it abroad unto the View of all the World, to clear mine Innocency, and shew you great Injustice in this Cause.

L. Keeper. But this is not the Business of the Day; why brought you not in your Answer in due time?

Dr. Bastw. My Lord, a long time since I tender'd it to your Honour, I failed not in any one particular: And if my Counsel be so base and cowardly, that they dare not sign it for fear of the Prelates (as I can make it appear) therefore have I no Answer? My Lord, here is my Answer, which tho my Counsel out of a base Spirit dare not set their Hands unto, yet I tender it upon my Oath.

L. Keeper. But, Mr. Doctor, you should have been brief; you tender'd in too large an Answer, which (as I heard) is as libellous as your Books.

Dr. Bastw. No, my Lord, it is not libellous tho large; I have none to answer for me but my self, and being left to my self, I must plead my Conscience in answer to every Circumstance of the Information.

L. Keeper. What say you, Mr. Doctor, are you Guilty, or not Guilty? answer yea, or no: you needed not to have troubled your self so much about so large an Answer.

Dr. Bastw. I know none of your Honours have read my Book; and can you with the Justice of the Court, condemn me before you know what is written in my Books?

L. Keeper. What say you to that was read to you even now?

Dr. Bastw. My Lord, he that read it did so murder the Sense of it, that had I not known what I had written, I could not tell what to have made of it.

L. Keeper. What say you to the other Sentence read to you?

Dr. Bastw. That was none of mine, I will not father that which was none of my own.

L. Dorset. Did not you send that Book, as now it is, to a Nobleman's House, together with a Letter directed to him?

Dr. Bastw. Yea, my Lord, I did so, but withal you may see in my Epistle set before the Book, I did at first disclaim what was not mine. I lent my Book over by a *Dutch* Merchant, who it was that wrote the Addition I do not know, but my Epistle set to my Book, made manifest what was mine, and what was not; and I cannot justly suffer for what was none of mine.

L. Arund. My Lord, you hear by his own Speech the Cause is taken *pro confesso*.

L. Keeper. Yea, you say true, my Lord.

Dr. Bastw. My Noble Lord of *Arundel*, I know you are a Noble Prince in *Israel*, and a great Peer of this Realm; there are some honourable Lords in this Court, that have been forced out as Combatants in a single Duel; it is between the Prelates and us, at this time, as between two that have appointed the Field. The one being a Coward goes to the Magistrate, and by virtue of his Authority disarms the other of his Weapons, and gives him a Bullrush, and then challenges him to fight. If this be not base Cowardice, I know not what belongs to a Soldier. This is the Case between the Prelates and us, they take away our Weapons (our Answers) by virtue of your Authority, by which we should defend our selves, and yet they bid us fight. My Lord, doth not this favour of a base cowardly Spirit? I know, my Lord, there is a Decree gone forth (for my Sentence was passed long since) to cut off our Ears.

L. Keeper. Who shall know our Censure, before the Court pass it? Do you prophesy of your selves?

Dr. Bastw. My Lord, I am able to prove it, and that from the Mouth of the Prelates own Servants, that in *August* last it was decreed, that *Dr. Bastwick* should lose his Ears. O my Noble Lords! is this righteous Judgment? I may say, as the Apostle once said, What whip a *Roman*? I have been a Soldier able to lead an Army into the Field, to fight valiantly for the Honour of their Prince: Now I am a Physician, able to cure Nobles, Kings, Princes and Emperors; and to curtailize a *Roman's* Ears like a Cur, O my honourable Lords! is it not too base an Act for so noble an Assembly, and for so righteous and honourable a Cause? The Cause, my Lords, is great, it concerns the Glory of God, the Honour of our King, whose Prerogative we labour to maintain and to set up in a high manner, in which your Honours Liberties are engaged: And

And doth not such a Cause deserve your Lordships Consideration, before you proceed to Censure? Your Honours may be pleased to consider, that in the last Cause heard and censured in this Court, between Sir *James Bagg* and the Lord *Mobun*, wherein your Lordships took a great deal of Pains, with a great deal of Patience, to hear the Bills on both sides, with all the Answers and Depositions largely laid open before you; which Cause when you had fully heard, some of your Honours now sitting in Court, said, you could not in Conscience proceed to Censure, till you had taken some time to recollect your selves. If in a Cause of that Nature, you could spend so much time, and afterwards recollect your selves before you would pass Censure; how much more should it move your Honours to take some time in a Cause wherein the Glory of God, the Prerogative of his Majesty, your Honours Dignity, and the Subjects Liberty is so largely engaged? My good Lords, it may fall out to be any of your Lordships Cases to stand as Delinquents at this Bar, as we now do. It is not unknown to your Honours, the next Cause that is to succeed ours, is touching a Person that sometimes hath been in greatest Power in this Court: And if the Mutations and Revolutions of Persons and Times be such, then I do most humbly beseech your Honours to look on us, as it may befall your selves. But if all this will not prevail with your Honours, to peruse my Books, and hear my Answer read, which here I tender upon the Word and Oath of a Soldier, a Gentleman, a Scholar, and a Physician, I will clothe them (as I said before) in *Roman Buff*, and disperse them thro'out the Christian World, that future Generations may see the Innocency of this Cause, and your Honours unjust Proceedings in it; all which I will do, tho' it cost me my Life.

L. Keeper. Mr. Doctor, I thought you would be angry.

Dr. Bastwick. No, my Lord, you are mistaken, I am not angry or passionate; all that I do press, is, that you would be pleased to peruse my Answer.

L. Keeper. Well, hold your Peace. Mr. *Burton*, what say you?

Mr. Burton. My good Lords, your Honours (it should seem) do determine to Censure us, and take our Cause *pro confesso*, altho we have laboured to give your Honours Satisfaction in all Things. My Lords, what you have to say against my Book, I confess I did write it, yet did I not any thing out of Intent of Commotion or Sedition: I delivered nothing but what my Text led me to, being chosen to suit with the Day, namely the 5th of *November*; the words were these, &c.

L. Keeper. Mr. *Burton*, I pray stand not naming Texts of Scripture now, we do not send for you to preach, but to answer to those things that are objected against you.

Mr. Burton. My Lord, I have drawn up my Answer to my great Pains and Charges, which Answer was signed with my Counsels Hands, and received into the Court, according to the Rule and Order thereof. And I did not think to have been called this Day to a Censure, but have had a legal proceeding by way of Bill and Answer.

L. Keeper. Your Answer was impertinent.

Mr. Burton. My Answer (after it was entered into the Court) was referr'd to the Judges, but by what means I do not know. Whether it be impertinent, and what Cause your Lordships had to cast it out, I know not; but after it was approved of,

and received, it was cast out as an impertinent Answer.

L. Finch. The Judges did you a good turn to make it impertinent, for it was as libellous as your Book, so that your Answer deserved a Censure alone.

L. Keeper. What say you Mr. *Burton*, are you Guilty, or not?

Mr. Burton. My, Lord, I desire you not only to peruse my Book here and there, but every Passage of it.

L. Keeper. Mr. *Burton*, time is short, are you Guilty, or not Guilty? What say you to that which was read? Doth it become a Minister to deliver himself in such a railing and scandalous way?

Mr. Burton. In my Judgment, and as I can prove it, it was neither railing nor scandalous; I conceive that a Minister hath a larger Liberty than always to go in a mild strain: I being the Pastor of my People, whom I had in charge, and was to instruct, I supposed it was my Duty to inform them of these Innovations that are crept into the Church, as likewise of the Danger and ill Consequence of them: As for my Answer, ye blotted out what ye would, and then the rest which made best for your own Ends, you would have to stand; and now for me to tender only what will serve for your own Turns, and renounce the rest, were to desert my Cause, which before I will do, or desert my Conscience, I will rather desert my Body, and deliver it up to your Lordships to do with it, what you will.

L. Keeper. This is a place where you should crave Mercy and Favour, Mr. *Burton*, and not stand upon such Terms as you do.

Mr. Burton. There wherein I have offended thro' human Frailty, I crave of God and Man Pardon: And I pray God, that in your Sentence, you may so Censure us, that you may not sin against the Lord.

Thus the Prisoners desiring to speak a little more for themselves, were commanded to Silence. And so the Lords proceeded to Censure.

L. Cottington. I condemn these three Men to lose their Ears in the *Palace-yard* at *Westminster*; to be fined five Thousand Pounds a Man to his Majesty; and to perpetual Imprisonment in three remote places of the Kingdom; namely, the Castles of *Carnarvan*, *Cornwall*, and *Lancaster*.

L. Finch. I condemn Mr. *Prynn* to be stigmatiz'd in the Cheeks with two Letters (*S & L*) for a seditious Libeller. To which all the Lords agreed. And so the Lord Keeper concluded the Censure.

Archbishop Laud's Speech.

My Lords,

I shall not need to speak of the infamous Course of libelling in any kind:

Nor of the punishment of it, which in some Cases was capital by the *Imperial Laws*.

As appears:

Nor how patiently some great Men, very great Men indeed, have borne *animo civili* (that's *Suetonius's* word) *laceratam estimationem*, the tearing and rending of their Credit and Reputation, with a gentle, nay, a generous Mind.

But of all *Libels*, they are most odious which pretend *Religion*; as if that of all things did deserve to be defended by a Mouth that is like an open Sepulchre,

*Cod. l. 9.
T. 36.*

*In Jul. c.
71.*

Sepulchre, or by a Pen that is made of a sick and a loathsome Quill.

There were Times when *Persecutions* were great in the Church, even to exceed *Barbarity* it self: Did any *Martyr* or *Confessor*, in those times, libel the *Governours*? Surely no; not one of them to my best remembrance: yet these complain of *Persecution* without all shew of Cause, and in the mean time libel and rail without all Measure. So little of kin are they to those which suffer for Christ, or the least part of *Christian Religion*.

My Lords, It is not every Man's Spirit to hold up against the *Venom* which *Libellers* spit. For St. *Ambrose*, who was a stout and worthy *Prelate*, tells us, not that himself, but that a far greater Man than he, that's King *David*, had found out (so it seems in his Judgment 'twas no Matter of ordinary Ability) *grande inventum*, a great and mighty Invention, how to swallow and put off

those bitter *Contumelies* of the *Tongue*; and those of the *Pen* are no whit less, and spread farther. And it was a great one indeed, and well becomed the

In 1. Apol.
David. c.
6.

Greatness of *David*. But I think it will be far better for me to look upward, and practise it, than to look downward, and discourse upon it.

In the mean time I shall remember what an *Antient* under the name of St. *Jerome* tells me, *Indignum est & præposterum*, 'tis unworthy in it self and preposterous in demeanour, for a Man to be ashamed for doing good, because other Men glory in

Ad Ocean. de
ferend. Opprob.

speaking ill.

And I can say it clearly and truly, as in the presence of God, I have done nothing, as a *Prelate*, to the uttermost of what I am conscious, but with a single Heart, and with a sincere Intention for the good Government and Honour of the Church, and the Maintenance of the orthodox Truth and Religion of Christ professed, established, and maintained in this Church of England.

For my Care of this Church, the reducing of it into Order, the upholding of the external Worship of God in it, and the settling of it to the Rules of its first Reformation, are the Causes (and the sole Causes, whatever are pretended) of all this malicious Storm, which hath loured so black upon Me, and some of my Brethren. And in the mean time, they which are the only, or the chief Innovators of the Christian World, having nothing to say, accuse us of Innovation; they themselves and their Complices, in the mean time, being the greatest Innovators that the Christian World hath almost ever known. I deny not but others have spread more dangerous Errors in the Church of Christ; but no Men, in any Age of it, have been more guilty of Innovation than they, while themselves cry out against it: *Quis tulerit Gracchos*?

And I said well, *Quis tulerit Gracchos*? for 'tis most apparent to any Man that will not wink, that the Intention of these Men, and their Abettors, was, and is, to raise a Sedition; being as great Incendiaries in the State (where they get power) as they have ever been in the Church; *Novatian* himself hardly greater.

Our main Crime is (would they all speak out, as some of them do) that we are *Bishops*; were we not so, some of us might be as passable as other Men.

Burton Apol.
p. 110.

And a great Trouble 'tis to them, that we maintain that our Calling of *Bishops* is *Jure Divino*, by divine Right: of this I have said enough,

and in this Place, in *Leighton's Case*; nor will I repeat. Only this I will say, and abide by it, that the Calling of *Bishops* is *Jure Divino*, by divine Right, tho not all Adjuncts to their Calling. And this I say in as direct Opposition to the Church of Rome, as to the Puritan Humour.

And I say farther: That from the Apostles Times, in all Ages, in all Places, the Church of Christ was governed by *Bishops*; and *Lay-Elders* never heard of till *Calvin's* new-fangled Device at Geneva.

Now this is made by these Men, as if it were contra Regem, against the King, in Right or in Power.

But that's a mere ignorant Shift; for our being *Bishops*, *Jure Divino*, by divine Right, takes nothing from the King's Right or Power over us. For tho our Office be from God and Christ immediately, yet may we not exercise that Power, either of Order or Jurisdiction, but as God hath appointed us, that is, not in his Majesty's, or any Christian King's Kingdoms; but by and under the Power of the King given us so to do.

And were this a good Argument against us, as *Bishops*, it must needs be good against *Priests* and *Ministers* too; for themselves grant that their Calling is *Jure Divino*, by divine Right; and yet I hope they will not say, that to be *Priests* and *Ministers* is against the King, or any his royal Prerogatives.

Next, suppose our Callings, as *Bishops*, could not be made good *Jure Divino*, by divine Right; yet *Jure Ecclesiastico*, by ecclesiastical Right, it cannot be denied. And here in England the *Bishops* are confirmed, both in their Power and Means, by Act of Parliament. So that here we stand in as good Case, as the present Laws of the Realm can make us. And so we must stand, till the Laws shall be repealed by the same Power that made them.

Now then, suppose we had no other String to hold by (I say suppose this, but I grant it not) yet no Man can libel against our Calling (as these Men do) be it in Pulpit, Print, or otherwise, but he libels against the King and the State, by whose Laws we are established. Therefore, all these Libels, so far forth as they are against our Calling, are against the King and the Law, and can have no other Purpose than to stir up Sedition among the People.

If these Men had any other Intention, or if they had any christian or charitable Desire, to reform any thing amiss; why did they not modestly petition his Majesty about it, that in his princely Wisdom he might set all things right, in a just and orderly manner? But this was neither their Intention, nor Way: for one clamours out of his Pulpit, and all of them from the Press, and in a most virulent and unchristian manner set themselves to make a Heat among the People; and so by Mutiny, to effect that, which by Law they cannot; and by most false and unjust Calumnies to defame both our Callings and Persons. But for my part, as I pity their Rage, so I heartily pray God to forgive their Malice.

No Nation hath ever appeared more jealous of Religion, than the People of England have ever been. And their Zeal to God's Glory hath been, and at this Day is a great Honour to them. But this Zeal of theirs, hath not been at all times and in all Persons, alike guided by Knowledge. Now Zeal, as it is of excellent Use where it sees its

Way,

Way, so is it very dangerous Company where it goes on in the dark * : And these Men, knowing the Disposition of the People, have laboured nothing more than to misinform their Knowledge, and misguide their Zeal, and so to fire that into a Sedition, in hope that they, whom they causelessly hate, might miscarry in it.

For the main Scope of these Libels is, to kindle a Jealousy in Mens Minds, that there are some great Plots in hand, dangerous Plots (so says Mr.

Page 5. Burton expressly) to change the Orthodox Religion established in England; and to bring in I know not what Romish Superstition in the room of it. As if the external decent Worship of God could not be upheld in this Kingdom, without bringing in of Popery.

Now by this Art of theirs, give me leave to tell you that the King is most desperately abused and wounded in the Minds of his People; and the Prelates shamefully.

The King most desperately: for there is not a more cunning Trick in the World, to withdraw the Peoples Hearts from their Sovereign, than to persuade them that he is changing true Religion, and about to bring in gross Superstition upon them.

And the Prelates shamefully: for they are charged to seduce, and lay the Plot, and be the Instruments.

For his Majesty first. This I know, and upon this Occasion take it my Duty to speak: there is no Prince in Christendom more sincere in his Religion, nor more constant to it, than the King. And he gave such a Testimony of this at his being in Spain, as I much doubt whether the best of that Faction durst have done half so much as his Majesty did, in the face of that Kingdom. And this, you, my Lord, the Earl of Holland, and other Persons of Honour, were Eye and Ear Witnesses of, having the Happiness to attend him there. And at this Day, as his Majesty (by God's great Blessing both on him and us) knows more, so is he more settled and more confirmed, both in the Truth of the Religion here established, and in Resolution to maintain it.

And for the Prelates. I assure my self, they cannot be so base as to live Prelates in the Church of England, and labour to bring in the Superstitions of the Church of Rome upon themselves and it. And if any should be so foul, I do not only leave him to God's Judgment, but (if these Libellers, or any other, can discover that his base and irreligious Falshood) to Shame also, and severe Punishment from the State: and in any just way, no Man's Hand shall be more, or sooner against him, than mine shall be.

And for my self. To pass by all the scandalous Reproaches which they have most injuriously cast upon me, I shall say this only.

First, I know of no Plot, nor Purpose of altering the Religion established.

Secondly, I have ever been far from attempting any thing that may truly be said to tend that way in the least Degree: And to these two I here offer my Oath.

Thirdly, If the King had a mind to change Religion, (which I know he hath not, and God for-

bid he should ever have) he must seek for other Instruments. For basely as these Men conceive of me, yet, I thank God, I know my Duty well both to God and the King: and I know that all the Duty I owe to the King, is under God. And my great Happiness it is (tho not mine alone, but your Lordships and all his Subjects with me) that we live under a gracious and religious King, that will ever give us leave to serve God first, and him next. But were the Days otherwise, I thank Christ for it, I yet know not how to serve any Man against the Truth of God, and I hope I shall never learn it.

But to return to the Business: What is their Art to make the World believe a change of Religion is endeavoured? What? why, forsooth, they say, there are great Innovations brought in by the Prelates; and such as tend to the advancing of Popery.

Now, that the Vanity and Falshood of this may appear, I shall humbly desire your Lordships to give me leave to recite briefly all the Innovations charged upon us, be they of less or greater moment; and as briefly to answer them. And then you shall clearly see, whether any Cause hath been given of these unfavoury Libels; and withal, whether there be any shew of Cause to fear a change of Religion. And I will take these great pretended Innovations in order as I meet with them.

First, I begin with the News from Ipswich.

Where the first Innovation is, that the last Year's Fast was enjoined to be without Sermons in London, the Suburbs, and other infected Places, contrary to the Orders for other Fast days in former Times: whereas Sermons are the only Means to bumble Men, &c. Page 2.

To this I say, 1st. That an After-age may, without Offence, learn to avoid any visible Inconvenience observed in the former. And there was visible Inconvenience observed in Men's former flocking to Sermons in infected Places.

Secondly, This was no particular Act of the Prelates; but the Business was debated at the Council-Table, being a matter of State, as well as of Religion. And it was concluded for no Sermons in those infected places, upon this Reason; that infected Persons or Families, known in their own Parishes, might not take occasion upon those by-days to run to other Churches, where they were not known, as many use to do, to hear some humorous Men preach; for on the Sundays, when they better kept their own Churches, the Danger is not so great altogether.

Nor, 3dly, is that true, that Sermons are the only means to bumble Men. For tho the preaching of God's Word, where it is performed according to his Ordinance, be a great means of many good effects in the Souls of Men; yet no Sermons are the only means to bumble Men. And some of their Sermons are fitter a great deal for other Operations: Namely, to stir up Sedition, as you may see by Mr. Burton's; for this his printed Libel was a Sermon first, and a Libel too. And 'tis the best part of a Fast to abstain from such Sermons.

* You may see it in the Example of St. Paul himself, whose very Zeal in the darkness of his Understanding, which he then had, made him persecute Christ and his Church, Act. xxii. 3, 4. And he was very dangerous Company then; for he breathed out Threatnings against the Disciples, Act. ix. 1. So true is that of St. Greg. Naz. Orat. 21. Zelus Iracundiam acuit: All Zeal puts an Edge to Anger is self. And that must needs be dangerous in the dark.

2. The second Innovation is, That Wednesday was appointed for the Fast-day, and that this was done with this Intention, by the Example of this Fast without preaching, to suppress all the Wednesday Lectures in London.

To this I answer, 1st. That the appointing of Wednesday for the Fast-day was no Innovation; for it was the Day in the last Fast before this: and I my self remember it so, above forty years since, more than once.

Secondly, If there had been any Innovation in it, the Prelates named not the Day: My Lord Keeper, I must appeal to your Lordship; the Day was first named by your Lordship, as the usual and fittest day: And yet I dare say, and swear too, that your Lordship had no aim to bring in Popery; nor to suppress all, or any the Wednesday-Lectures in London. Besides, these Men live to see the Fast ended, and no one Wednesday-Lecture suppressed.

3. The third Innovation is, that the Prayer for seasonable Weather was purged out of this last Fast-book, which was (say they) one cause of Shipwrecks and tempestuous Weather.

To this I say, first in the general; this Fast-book, and all that have formerly been made, have been both made and published by the command of the King, in whose sole power it is to call a Fast. And the Archbishop and Bishops to whom the ordering of the Book is committed, have power under the King to put in, or leave out, whatsoever they think fit for the present Occasion; as their Predecessors have ever done before them. Provided that nothing be in contrary to the Doctrine or Discipline of the Church of England.

And this may serve in the General for all Alterations, in that or any other Fast-book, or Books of Devotion upon any particular occasions, which may and ought to vary with several times; and we may, and do, and will justify, under his Majesty's Power, all such Alterations made therein.

Secondly, For the Particular. When this last Book was set out the Weather was very seasonable; and it is not the Custom of the Church, nor fit in it self, to pray for seasonable Weather when we have it, but when we want it. When the former Book was set out the Weather was extreme ill, and the Harvest in danger; now the Harvest was in, and the Weather good.

Thirdly, 'Tis most inconsequent to say, that the leaving that Prayer out of the Book of Devotions, caused the Shipwrecks and the Tempests which followed. And as bold as they are with God Almighty, in saying it was the Cause, sure I am, God never told them that was the Cause. And if God never revealed it, they cannot come to know it: yet had the Bishops been Prophets, and foreseen these Accidents, they would certainly have prayed against them.

Fourthly, Had any Minister found it necessary to use this Prayer at any one time during the Fast, he might with ease, and without danger, have supplied that want, by using that Prayer to the same purpose which is in the ordinary Liturgy.

Fifthly, I humbly desire your Lordships to weigh well the Consequence of this great and dangerous Innovation. The Prayer for fair Weather was left out of the Book for the Fast; therefore the Prelates intend to bring in Popery. An excellent Consequence, were there any shew of Reason in it.

4. The fourth Innovation is, That there is one very useful Collect left out, and Clause omitted in another.

Page 3.

To this I answer, first, as before; It was lawful for us to alter what we thought fit.

And secondly, Since that Collect made mention of Preaching, and the Act of State forbid Sermons on the Fast-days in infected places; we thought it fit, in pursuance of that Order, to leave out that Collect.

And thirdly, For the Branch in the other, which is the first Collect, tho God did deliver our Forefathers out of Romish Superstition, yet (God be blessed for it) we were never in. And therefore that Clause being unfittingly expressed, we thought fit to pass it over.

5. The fifth Innovation is, That in the sixth Order for the Fast, there is a Passage left out concerning the Abuse of Fasting in relation to Merit.

Page 3.

To this I answer, That he to whom the ordering of that Book to the Press was committed, did therefore leave it out, because in this Age and Kingdom there is little Opinion of meriting by Fasting.

Nay, on the contrary, the contempt and scorn of all Fasting (save what humorous Men call for of themselves) is so rank, that it would grieve any Christian Man to see the necessary Orders of the Church concerning Fasting, both in Lent, and at other set times, so vilified as they are.

6. The sixth Innovation is, That the Lady Elizabeth and Her princely Children are dashed (that's their Phrase) out of the new Collect, where as they were in the Collect of the former Book.

Page 3.

For this first, The Author of the News knows full well that they are left out of the Collect in the latter Editions of the Common Prayer-book, as well as in the Book for the Fast. And this was done according to the Course of the Church, which ordinarily names none in the Prayer, but the right Line descending. Yet this was not done till the King himself commanded it; as I have to shew under his Majesty's Hand.

Secondly, I beseech your Lordships to consider what must be the Consequence here: The Queen of Bohemia and her Children are left out of the Collect, therefore the Prelates intend to bring in Popery; for that (you know) they say is the end of all these Innovations. Now if this be the end and the Consequence, truly the Libellers have done very dutifully to the King, to poison his People with this Conceit, that the Lady Elizabeth and her Children would keep Popery out of this Kingdom, but the King and his Children will not. And many as good Offices as these have they done the King quite thorow these Libels, and quite thorow his Kingdoms. For my part, I honour the Queen of Bohemia, and her Line, as much as any Man whatsoever, and shall be as ready to serve them; but I know not how to depart from my Allegiance, as I doubt these Men have done.

7. The seventh Innovation is, That these words (who art the Father of thine Elect and of their Seed) are changed in the Preface of that Collect, which is for the Prince and the King's Children. And with a most spiteful Inference, that this

Page 3.

this

this was done by the Prelates to exclude the King's Children out of the number of God's Elect. And they call it an intolerable Impiety, and horrid Treason.

To this I answer, first, That this Alteration was made in my Predecessor's time before I had any Authority to meddle with these things, farther than I was called upon by him.

Secondly, This is not therefore to lay any Asperision upon my Predecessor, for he did in that but his Duty; for his Majesty acknowledges it was done by his special Direction, as having then no Children to pray for.

And thirdly, this Collect could not be very old, for it had no Being in the Common Prayer-book all Queen Elizabeth's time, she having no Issue.

The truth is, it was made at the coming in of King James; and must of necessity be changed over and over again, *pro ratione temporum*, as Times and Persons vary. And this is the intolerable Impiety and horrid Treason they charge upon us.

In this Method the Innovations are set down in the News from Ipswich. But then in Mr. Burton's News from Friday-street (called his Apology) they are in another Order, and more are added. Therefore with your Lordship's leave I will not repeat any of these, but go on to the rest, which Mr. Burton adds.

Burton's Apology, Pag. 2.
8. The eighth Innovation is, That in the Epistle the Sunday before Easter, we have put out In, and made it, At the Name of Jesus every Knee shall bow: which Alteration, he saith, is directly against the Act of Parliament.

Here give me leave to tell you, 'tis At the name of Jesus, in the late learned Translation made in King James's time. About which many learned Men of best note in the Kingdom were employed, besides some Prelates.

But to this I answer: first, 'Tis true, the Common Prayer-book was confirmed by Act of Parliament, and so all things contained in it, at the passing of that Act. But I hope if any thing were false printed then, the Parliament did not intend to pass those Slips for current.

Secondly, I am not of opinion, that if one word be put in for another, so they bear both the same Sense, that there is any great matter done against the Act of Parliament.

Thirdly, this can make no Innovation. For In the Name, and At the Name of Jesus, can make no essential Difference here. And Mr. Pryn (whose darling business it hath long been to cry down the Honour due to the Son of God, at the mentioning of his saving Name Jesus) knows the Grammar Rule well, In a place, or at a place, &c.

Fourthly, if there were any Error in the change of In into At; I do here solemnly protest to you, I know not how It came; for Authority from the Prelates, the Printers had none; and such a Word is easily changed in such a negligent Press as we have in England. Or if any altered it purposely, for ought I know, they did it to gratify the precisers; for therein they followed the Geneva Translation, and printed at Geneva 1557*. where the words are, At the Name of Jesus.

* In Octavo. And that is eighty years ago; and therefore no Innovation made by us.

Fifthly, this I find in the Queen's Injunctions, without either word, In or At. Whensoever the Name of Jesus shall be in any Injunction Lesson, Sermon, or otherwise pronounced in the Church ('tis enjoined) that due Reverence be made of all Persons, young and old, with lowliness of Courty, and uncovering of the Heads of the Menkind, as thereunto doth necessarily belong, and heretofore hath been accustomed. So here is Necessity laid upon it, and Custom for it, and both expressed by Authority in the very beginning of the Reformation; and is therefore no Innovation now.

9. The ninth Innovation is, That two places are changed in the Prayers set forth Page 3. for the fifth of November; and ordered to be read (they say) by Act of Parliament. The first place is changed thus, From, Root out that Babylonish and Antichristian Seat, which say of Jerusalem, &c. Into this form of Words; Root out that Babylonish and Antichristian Seat (of them) which say, &c. The second place went thus in the old: Cut off those Workers of Iniquity, whose Religion is Rebellion. But in the Book printed 1635. 'tis thus altered: Cut off those Workers of Iniquity, who turn Religion into Rebellion, &c.

To this I say First, 'Tis a notorious untruth, that this Book was ordered to be read by Act of Parliament. The Act of Parliament indeed is printed before it; and therein is a Command for Prayers and Thanksgivings every fifth of November, but not one word or syllable for the Form of Prayer. That's left to the Church, therefore here's no Innovation against that Act of Parliament.

Secondly, The Alteration first mentioned, that is, That Seat, or that Seat of them: is of so small consequence, as it is not worth the speaking of. Besides, if there be any thing of moment in it, 'tis answered in the next.

Thirdly, Both for that and the second place, which seems of more moment; and so for the rest not only in that Book, but that other also for his Majesty's Coronation; his Majesty expressly commanded Me to make the Alterations, and see them printed. And here are both the Books with his Majesty's Warrant to each of them. So that herein I conceive I did not offend, unless it were that I gave not these Men notice of it, or asked them leave to obey the King.

Against this there can be but two Objections, should Malice it self go to work. The one is, that I moved his Majesty to command the change. And the other, that now, when I saw my self challeng'd for it, I procured his Majesty's Hand for my security.

To these I answer clearly; First, That I did not move the King, directly, or indirectly, to make this change.

And Secondly, That I had his Majesty's Hand to the Book, not now, but then, and before ever I caused them to be printed, as now they are. And that both these are true, I here again freely offer my self to my Oath.

And yet Thirdly, That you may see his Gracious Majesty used not his Power only in commanding this change, but his wisdom also; I shall adventure to give you my Reasons, such as they are, why this Alteration was most fit, if not necessary.

My first Reason is, In the Litany of Henry VIII.* and also under Edward VI.† there was this Clause; From the Tyranny of the Bishop of Rome, and all

* It was put into the Litany of Henry VIII. his Time, as appears in his Primer, with his Injunction before it.

† And 'tis in both the Service-Books of Edw. VI. both that which was printed, 1549. and in that which was after, An. 1552.

his detestable enormities, from all false Doctrine, &c. Good Lord deliver us. But in the Litany in Queen Elizabeth's time this Clause about the Pope was left out, and it seems of purpose, for avoiding of scandal: And yet the Prelates for that were not accounted Innovators, or Introducers of Popery. Now 'tis a far greater scandal to call their Religion Rebellion, than it is to call their chief Bishop Tyrant.

And this Reason is drawn from scandal, which must ever be avoided as much as it may.

My second Reason is, That the Learned make but three Religions to have been of old in the World, Paganism, Judaism, and Christianity. And now they have added a fourth, which is Turcism, and is an absurd mixture of the other three. Now if this ground of theirs be true (as it is generally received) perhaps it will be of dangerous consequence sadly to avow, that the Popish Religion is Rebellion. That some Opinions of theirs teach Rebellion, that's apparently true, the other would be thought on, to say no more. And this Reason well weighed, is taken from the very foundations of Religion it self.

My third Reason is, Because if you make their Religion to be Rebellion, then you make their Religion and Rebellion to be all one. And that is against the ground both of State, and the Law. For when divers Romish Priests and Jesuits have deservedly suffered Death for Treason, is it not the constant and just profession of the State, that they never put any Man to Death for Religion, but for Rebellion and Treason only? Doth not the State truly affirm, that there was never any Law made against the Life of a Papist, quatenus a Papist only? And is not all this stark false, if their very Religion be Rebellion? For if their Religion be Rebellion, it is not only false, but impossible, that the same Man in the same Act should suffer for his Rebellion, and not for his Religion.

And this King James of ever blessed memory understood passing well, when (in his *pag. 336.* premonition to all Christian Monarchs) he saith, *I do constantly maintain that no Papist either in my time, or in the time of the late Queen, ever died for his Conscience.* Therefore he did not think, their very Religion was Rebellion. Tho this Clause passed thro' inadvertency in his time. And this Reason is grounded both upon the Practice and the Justice of the Law.

Which of these Reasons, or whether any other better, were in his Majesty's Thoughts, when he commanded the alteration of this Clause, I know not. But I took it my Duty to lay it before you, that the King had not only Power, but Reason to command it.

10. The Tenth Innovation is, That the *pag. 3.* Prayer for the Navy is left out of the late book for the Fast.

To this I say, there is great Reason it should. For the King had no declared Enemy then, nor (God be thanked) hath he now. Nor had he then any Navy at Sea; for almost all the Ships were come in, before the Fast-book was set out.

But howsoever, an excellent consequence it is, if you mark it; the Prayer for the Navy was left out of the Book for the Fast, therefore by that, and such like Innovations, the Prelates intend to bring in Popery. Indeed, if that were a piece of the Prelates Plots to bring in Popery from beyond Sea, then they were mightily overseen that they left out the Prayer for the Navy. But else what

reason or consequence is in it, I know not, unless perhaps Mr. Burton intended to befriend Dr. Bastwick, and in the Navy bring hither the Whore of Babylon to be ready for his Christening, as he most profanely scoffs.

Well: I pray God the time come not upon this Kingdom, in which it will be found, that no one thing hath advanced or ushered in Popery so fast, as the gross Absurdities even in the Worship of God, which these Men, and their like, maintain both in Opinion and Practice.

11. The 11th Innovation, is the reading of the second Service at the Communion Table, or the Altar. *Page 105.*

To this first I can truly say, That since my own Memory, this was in use in very many places, as being most proper (for those Prayers are then read which both precede and follow the Communion) and by little and little this ancient Custom was altered, and in those places first where the Emissaries of this Faction came to preach. And now if any in Authority offer to reduce it; this ancient Course of the Church is by and by called an Innovation.

Secondly, With this the Rubricks of the Common Prayer-book agree: for the first Rubrick after the Communion tells us, that upon Holy-days, tho there be no Communion, yet all else that's appointed at the Communion shall be read. *Shall be read?* That's true, but where? Why, the last Rubrick before the Communion tells us, that the Priest, standing at the North side of the holy Table, shall say the Lord's Prayer, with that which follows. So that not only the Communion, but the Prayers which accompany the Communion (which are commonly called the second Service) are to be read at the Communion-Table. Therefore if this be an Innovation, 'tis made by the Rubrick, not by the Prelates; and Mr. Burton's Scoff that this second Service must be served in for Dainties, favours too much of Belly and Profanation. *Page 105.*

12. One thing sticks much in their Stomachs, and they call it an Innovation too. And that is, bowing, or doing Reverence at our first coming into the Church, or at our nearer Approaches to the holy Table, or the Altar, (call it whether you will) in which they will needs have it, that we worship the holy Table, or God knows what. *[Then the second Service, as Dainties, must be said there.] Page 105.*

To this I answer. First, That God forbid we should worship any thing but God himself.

Secondly, That if to worship God when we enter into his House, or approach his Altar, be an Innovation, 'tis a very old one.

For Moses did Reverence at the very Door of the Tabernacle, Hezekiah, Num. 20.6. and all that were present with him, when they had made an end of Offering, bowed and worshipped, David calls the People to it with a Venite, O come let us worship and fall down, and kneel before the Lord our Maker: And in all these places (I pray mark it) 'tis bodily Worship. *2Chron. 29. 29. Psal. 95. 6.*

Nor can they say, that this was Judaical Worship, and now not to be imitated. For long before Judaism began, Bethel, the House of God, was a place of Reverence, Gen. 28. 17, therefore certainly, of, and to God. *&c.*

And

And after *Judaical Worship* ended, *Venite, Adoremus*, as far upwards as there is any Track of a *Liturgy*, was the *Introitus* of the *Priest* all the *Latin Church* over.

And in the daily *Prayers* of the *Church of England*, this was retained at the *Reformation*; and that *Psalm*, in which is *Venite, Adoremus*, is commanded to begin the *Morning Service* every Day. And for ought I know, the *Priest* may as well leave out the *Venite*, as the *Adoremus*; the calling the *People* to their *Duty*, as the *Duty* it self, when they are come.

Therefore even according to the *Service-book* of the *Church of England*, the *Priest* and the *People* both are called upon; for *external* and *bodily Reverence* and *Worship* of *God* in his *Church*. Therefore they which do it, do not *Innovate*. And yet the *Government* is so moderate (*God* grant it be not too loose there while) that no *Man* is constrained, no *Man* questioned, only religiously called upon, *Venite, Adoremus, Come, let us Worship*.

For my own part, I take my self bound to worship with *Body*, as well as in *Soul*, when ever I come where *God* is worshipped. And were this *Kingdom* such as would allow no *boly Table* standing in its proper place (and such places some there are) yet I would worship *God* when I came into his *House*. And were the *Times* such as should beat down *Churches*, and all the curious carved *Work* thereof, with *Axes*, and *Hammers*, (and such *Times* have been)

yet would I worship in what place soever I came to pray, tho there were not so much as a *Stone* laid for *Bethel*. But this is the *Misery*; 'tis *Superstition* now-a-days for any *Man* to come with more *Reverence* into a *Church*, than a *Tinker* and his *Bitch* come into an *Ale-house*; the *Comparison* is too homely, but my just *Indignation* at the *Profaneness* of the *Times*, makes me speak it.

And you, my honourable *Lords* of the *Garter*, in your great *Solemnities*, you do your *Reverence*; and to *Almighty God*, I doubt not, but yet it is *Versus Altare*, towards his *Altar*, as the greatest place of *God's Residence* upon *Earth*. (I say the greatest; yea greater than the *Pulpit*; for there 'tis *Hoc est corpus meum*, This is my *Body*; but in the *Pulpit*, 'tis at most but, *Hoc est Verbum meum*, This is my *Word*. And a greater *Reverence* (no doubt) is due to the *Body*, than to the *Word* of our *Lord*. And so, in relation, answerably to the *Throne*, where his *Body* is usually present, than to the *Seat*, whence his *Word* useth to be proclaimed. And *God* hold it there as his *Word*; for as too many *Men* use the *Matter*, 'tis *Hoc est verbum Diaboli*. This is the word of the *Devil*, in too many places; witness *Sedition*, and the like to it.) And this *Reverence* ye do when ye enter the *Chapel*, and when you approach nearer to offer. And this is no *Innovation*, for you are bound to it by your *Order*, and that's not new.

And *Idolatry* it is not, to worship *God* towards his *boly Table*; for if it had been *Idolatry*, I presume *Queen Elizabeth* and *King James* would not have practised it, no not in those *Solemnities*. And being not *Idolatry*, but true *divine Worship*, you will, I hope, give a poor *Priest* leave to worship *God*, as your selves do: for if it be *God's Worship*, I ought to do it as well as you; and if it be *Idolatry*, you ought not to do it more than I.

I say again, I hope a poor *Priest* may worship *God* with as lowly *Reverence* as you do, since you are bound by your *Order*, and by your *Oath*, ac-

cording to a *Constitution* of *Henry the fifth*, (as appears) to give due Honour and *Reverence*, *Domino Deo, & altari ejus, in modum virorum ecclesiasticorum*; that is, to the *Lord your God*, and to his *Altar* (for there is a *Reverence* due to that too, tho such as comes far short of *divine Worship*) and this in the *Manner*, as *ecclesiastical Persons* both *Worship* and do *reverence*.

The *Story* which led in this *Decree* is this: *King Henry the fifth*, that noble and victorious *Prince*, returning gloriously out of *France*, sat at this *Solemnity*; and finding the *Knights of the Order* scarce bow to *God*, or but slightly, and then bow towards him and his *Seat*, startled at it (being a *Prince* then grown as religious as he was before victorious) and after asking the *Reason*, (for till then the *Knights of the Order* never bowed toward the *King* or his *Seat*) the *Duke of Bedford* answered, It was settled by a *Chapter Act* three Years before. Hereupon, that great *King* replied, No; I'll none of this, till you the *Knights* do it *Satis bene, well enough*, and with due *Performance* to *Almighty God*. And hereupon the fore-named *Act* proceeded, that they should do this *Duty* to *Almighty God*, not slightly, but ad *modum virorum ecclesiasticorum*, as low, as well, as decently as *Clergymen* use to do it.

Now if you will turn this off, and say, it was the *Superstition* of that *Age* so to do; *Bishop Jewel* will come in to help me there. For where *Harding* names divers *Ceremonies*, and particularly bowing themselves, and Adoring at the *Sacrament*, I say, Adoring at the *Sacrament*, not adoring the *Sacrament*; there *Bishop Jewel* (that learned, painful, and reverend *Prelate*) approves all both the *Kneeling* and the *Bowing*, and the *Standing up* at the *Gospel* (which as antient as it is in the *Church*, and a common *Custom*, is yet fondly made another of their *Innovations*.) And further the *Bishop* adds, That they are all commendable *Gestures*, and *Tokens of Devotion*; so long as the *People* understand what they mean; and apply them unto *God*. Now with us the *People* did ever understand them fully, and apply them to *God*, and to none but *God*, till these factious *Spirits*, and their like, to the great *Disservice* of *God* and his *Church*, went about to persuade them that they are *superstitious*, if not *idolatrous Gestures*: as they make every thing else to be, where *God* is not served slovenly:

13. The thirteenth *Innovation* is, The placing of the *boly Table* altarwise, at the upper end of the *Chancel*; that is, the setting of it North and South, and placing a *Rail* before it, to keep it from *Profanation*, which, *Mr. Burton* says, is done to advance and usher in *Popery*.

To this I answer, That 'tis no *Popery* to set a *Rail* to keep *Profanation* from that *boly Table*: nor is it any *Innovation* to place it at the upper end of the *Chancel* as the *Altar* stood. And this appears both by the *Practice* and by the *Command* and *Canon* of the *Church of England*.

First, By the *Practice* of the *Church of England*. For in the *King's Royal Chapels*, and divers *Cathedrals*, the *boly Table* hath ever since the *Reformation* stood at the upper end of the *Choir*, with the large or full side towards the *People*.

And tho it stood in most *Parish Churches* the other way, yet whether there be not more *Reason*, the

In Libro Ni.
gro Windesfor-
riensi. p. 65.

Bp. Jewel's
Reply to Har-
ding's Answer,
Art. 3. Div.
29.

Page 45, 102

the *Parish Churches* should be made conformable to the *Cathedral and Mother Churches*, than the *Cathedrals* to them, I leave to any reasonable Man to judge.

And yet here is nothing done either by *Violence* or *Command*, to take off the *Indifferency* of the standing of the *holy Table* either way, but only by *laying* it fairly before Men, how fit it is there should be *Order and Uniformity*; I say, still reserving the *Indifferency* of the Standing.

But howsoever I would fain know, how any *discreet moderate* Man dares say, that the placing of the *holy Table Altar-wise* (since they will needs call it so) is done either to *advance* or *usher in* *Popery*? For did *Queen Elizabeth* banish *Popery*, and yet did she all along her *Reign*, from first to last leave the *Communion Table* so standing in her own *Chapel Royal*, in *St. Paul's* and *Westminster*, and other Places; and all this of purpose to *advance* or *usher in* that *Popery* which she had driven out?

And since her *Death* have two gracious Kings kept out *Popery* all their *Times*, and yet left the *holy Table* standing as it did in the *Queen's Time*, and all of purpose to *advance* or *usher in* *Popery* which they kept out?

Or what's the Matter? May the *holy Table* stand this way in the *King's Chapel* or *Cathedrals*, or *Bishops Chapels*, and not elsewhere? Surely, if it be decent and fit for *God's Service*, it may stand so (if *Authority* please) in any *Church*. But if it *advance* or *usher in* any *Superstition* and *Popery*, it ought to stand so in none.

Nor hath any *King's Chapel* any *Prerogative* (if that may be called one) above any ordinary *Church* to *disserve* God in by any *superstitious Rites*. Where, give me leave to tell you, that the *King* and his *Chapel* are most *jeeringly*, and with *Scorn* abused, in the last Leaf of *Mr. Burton's* mutinous *Appeal*; for such it is.

Secondly, This appears by the *Canon* or *Rule* of the *Church of England* too; for 'tis plain in the last *Injunction* of the *Queen*, That the *holy Table* ought to stand at the upper end of the *Quire*, *North and South*, or *Altar-wise*. For the Words of the *Queen's Injunctions* are these:

The *holy Table* in every *Church* (mark it I pray, not in the *Royal Chapel* or *Cathedrals* only, but in every *Church*) shall be decently made and set in the Place where the *Altar* stood. Now the *Altar* stood at the upper end of the *Quire*, *North and South*, as appears before by the *Practice* of the *Church*. And there to set it otherwise, is to set it *cross* the Place, not In the Place where the *Altar* stood: and so *Stulti dum vitant vitia*—weak Men, as these *Libellers* are, run into one *Superstition* while they would avoid another; for they run upon the *Superstition* of the *Cross*, while they seek to avoid the *Superstition* of the *Altar*. So you see here's neither *Popery* nor *Innovation* in all the *Practice* of *Queen Elizabeth*, or since.

These Words of the *Injunction* are so plain, as that they can admit of no Shift.

And give me leave to tell you, that a very learned *Prelate* of this *Church*, and one whom, I think, these Men will not accuse, as a Man like to *advance* or *usher in* *Popery*, is of the same Opinion: 'Tis my Lord the *Bishop of Salisbury*.

Some Difference was lately rising about placing the *Communion-Table* in a *Parish Church* of his *Diocese*. The *Bishop* careful to prevent all Dif-

order, sends his *Injunction* under his Hand and Seal to the *Curate* and *Church-Wardens*, to settle that *Business*: In which he hath these two Passages remarkable. I have seen and read the Order.

The first Passage is this: By the *Injunction* of *Queen Elizabeth* (saith he) and by *Can. 82.* under *King James*, the *Communion-Tables* should ordinarily be set and stand with the side to the *East-Wall* of the *Chancel*. Therefore this is no *Innovation*, since there is *Injunction* and *Canon* for it.

The other Passage is this: 'Tis *Ignorance* (saith that learned *Bishop*) to think that the standing of the *holy Table* there relishes of *Popery*. Therefore, if it do not so much as relish of *Popery*, it can neither *advance* it, nor *usher* it in. And therefore this is a most odious *Slander* and *Scandal* cast upon Us.

So here's enough both for the *Practice* and *Rule* of the *Church of England* since the *Reformation*. Now before that Time, both in this and other *Churches* of *Christendom*, in the *East* and *West*, ordinarily the *holy Table* or *Altar* stood so: against this *Mr. Burton* says little.

But the *Lincolnshire Minister* comes in to play the *Puritan* for that. Concerning which *Book* (falling thus in my way) and the nameless *Author* of it, I shall only say these two things.

The one is, That the *Author* prevaricates from the first Word to the last in the *Book*; for he takes on him both for the *Name* and for the *Placing* of the *holy Table*, and the like, to prove that generally and universally, and ordinarily in the whole *Catholic Church*, both *East* and *West*, the *holy Table* did not stand at the upper end of the *Quire* or *Chancel*. And this he must prove, or he doth nothing.

Now when he comes to make his *Proofs*, they are almost all of them particular, few or none general and concludent; for he neither brings *Testimonies* out of the general and received *Rituals* of the *Eastern* and *Western Churches*, nor of *Fathers* and *Histories* of the *Church*, which speak in general Terms of all, but where they speak of particular *Churches* only.

So that suppose the most that can be, that is, suppose his *Quotations* be all truly alledged, and true too in the Sense that the *Minister* takes them (tho in very truth, the Places, most of them, are neither truly alledged, nor sensed) yet they are but *Exceptions* of, and *Exemptions* from the general *Practice*. And you know both in *Law* and *Reason*, *Exceptio firmat Regulam in non exceptis*. So that upon the sudden I am not able to resolve, whether this *Minister* hath done more wrong to himself or his *Readers*, for he hath abused both.

The other is, That in the *Judgment* of very many learned Men, which have perused this *Book*, the *Author* is clearly conceived to want a great deal of that *Learning* to which he pretends; or else to have written this *Book* wholly, and resolvedly against both his *Science* and his *Conscience*.

And for my own Part, I am fully of Opinion, this *Book* was thrust now to the *Press*, both to countenance these *Libellers*, and, as much as in him lay, to fire both *Church* and *State*.

And tho I wonder not at the *Minister*, yet I should wonder at the *Bishop* of the *Diocese* (a Man of *Learning* and *Experience*) that he should give *Testimony* to such a *Business*, and in such Times as these.

And

And once more, before I leave the *holy Table*, *Name*, and *Thing*, give me leave to put you in mind, that there is no danger at all in the *Altar*, *Name*, or *Thing*. For at the *Beginning* of the *Reformation*, tho there were a *Law* for the taking down of the *Altars*, and setting up of *holy Tables* in the room of them; yet in some Places the *Altars* were not suddenly removed. And what says the *Queen* in her *Injunction* to this?

Injunct. ultim. Why she says, *That there seems no Matter of great Moment in this, saving for Uniformity, and the better Imitation of the Law in that behalf.* Therefore for any *Danger* or *Hurt* that was in the *Altars*, *Name*, or *Thing*, they might even then have been left standing, but for *Uniformity*, and the *Imitation of the Law*.

But howsoever, it follows in the same *Injunction*, that when the *Altar* is taken down, the *holy Table* shall be set In, (not cross) the *Place* where the *Altar* stood; which (as is aforesaid) must needs be *Altar-wise*.

14. The *fourteenth* and last *Innovation* comes with a mighty *Charge*, and 'tis taken out of an *Epistle* to the *Temporal Lords* of his Majesty's *Privy Council*. Of which *Epistle* we got one *Sheet*, and so (for ought I yet know) that *Impression* staid: In that *Sheet* is this *Charge*; the *Words* are;

The Prelates, to justify their Proceedings, have forged a new Article of Religion brought from Rome (which gives them full Power to alter the Doctrine and Discipline of our Church at a Blow, as they interpret it) and have foisted it (such is their Language) into the beginning of the twentieth Article of our Church. And this is in the last Edition of the Articles, Anno 1628. in Affront of his Majesty's Declaration before them, &c.

The *Clause* (which they say is forged by us) is this: *The Church* (that is, the *Bishops*, as they expound it) hath *Power* to decree *Rites* and *Ceremonies*, and *Authority* in *Matters of Faith*. (The *Word* is *Controversies of Faith*, by their leave.) This *Clause* (say they) is a *Forgery* fit to be examined, and deeply censured in the *Star-Chamber*. For 'tis not to be found in the *Latin* or *English Articles* of *Edward VI.* or *Queen Elizabeth*, ratified by *Parliament*.

And then in the *Margent* thus, *If to forge a Will or Writing be censurable in the Star-chamber, which is but a Wrong to a private Man, how much more the Forgery of an Article of Religion, to wrong the whole Church, and overturn Religion, which concerns all our Souls?*

This is a heavy *Charge*, my *Lords*, but I thank God the *Answer's* easy.

And truly I grant, that to forge an *Article of Religion* in *Whole* or in *Part*, and then to thrust it upon the *Church*, is a most heinous *Crime*, far worse than the forging of a *Deed*; and is certainly very deeply censurable in this *Court*. And I would have humbly besought you, that a deep *Censure* might have been laid upon it, but that this *Sheet* was found after, and so is not annexed to the *Information*, nor in *Judgment* at this present before you.

But then, My *Lords*, I must tell you, I hope to make it as clear as the *Day*, that this *Forgery* was not, that this *Clause* mentioned was added by the *Prelates* to the *Article*, to gain *Power* to the *Church*, and so to serve our *Turns*. But that that *Clause* in the beginning of the *Article* was by these

Men, or at least by some of their *Faction*, raz'd out, and this to weaken the just *Power* of the *Church* to serve their *Turns*.

They say (to justify their *Charge*) that this *Clause* is not to be found in the *Articles*, *English* or *Latin*, of either *Edw. VI.* or *Queen Elizabeth*.

I Answer, The *Articles* of *Edw. VI.* and those made under *Queen Elizabeth* differ very much. And those of *Edw. VI.* are not now binding. So whether the *Clause* be in or out of them, 'tis not much material.

But for the *Articles* of the *Church of England*, made in the *Queen's Time*, and now in *Force*, that this *Clause* for the *Power* of the *Church* to decree *Ceremonies*, and to have *Authority* in *Controversies of Faith*, should not be found in *English* or *Latin Copies*, till the *Year 1628*. that it was set forth with the *King's Declaration* before it, is to me a *Miracle*; but your *Lordships* shall see the *falsehood* and *boldness* of these Men.

What? Is this affirmative *Clause* in no *Copy*, *English* or *Latin*, till the *Year 1628*? Strange! Why, my *Lords*, I have a *Copy* of the *Articles* in *English*, of the *Year 1612*. and of the *Year 1605*. and of the *Year 1593*. and in *Latin* of the *Year 1563*. which was one of the first printed *Copies*, if not the first of all. For the *Articles* were agreed on but the 29th *Day* of *January*,

Anno 1563. } According to the *English Account*.
 } According to the *Julian Account*.

And in all these, this affirmative *Clause* for the *Churches Power* is in. And is not this strange boldness then to abuse the *World*, and falsely to say 'tis in no *Copy*, when I my self, out of my own *Store*, am able to shew it in so many, and so antiently?

But, My *Lords*, I shall make it plainer yet: For 'tis not fit concerning an *Article of Religion*, and an *Article* of such Consequence for the *Order*, *Truth*, and *Peace* of this *Church*, you should rely upon my *Copies*, be they never so many or never so antient.

Therefore I sent to the *publick Records* in my *Office*; and here under my *Officer's Hand*, who is a *publick Notary*, is returned me the *twentieth Article* with this affirmative *Clause* in it. And there is also the whole *Body* of the *Articles* to be seen.

By this your *Lordships* see how free the *Prelates* are from forging this part of the *Article*. Now let these Men quit themselves and their *Faction*, as they can, for their *Index Expurgatorius* and their foul *Rasure* in leaving out this part of the *Article*. For to leave out of an *Article* is as great a *Crime* as to put in; and a main *Rasure* is as censurable in this *Court* as a *Forgery*.

Why, but then, my *Lords*, what is this *Mystery of Iniquity*?

Truly, I cannot certainly tell, but as far as I can, I'll tell you.

The *Articles* you see were fully and fairly agreed to, and subscribed in the *Year 1563*. But after this, in the *Year 1571*. there were some that refused to subscribe; but why they did so, is not recorded. Whether it were about this *Article* or any other, I know not. But in *Fact* this is manifest, that in that *Year 1571*. the *Articles* were printed both in *Latin* and *English*, and this *Clause* for the *Church* left out of both. And certainly this could not be done, but by the malicious cunning of that opposite *Faction*. And tho I shall spare dead Mens *Names* where I have not certainty; yet if you be pleased to look back and consider who they were that governed *Businesses* in 1571. and rid the *Church* almost at their

their Pleasure, and how potent the Ancestors of these Libellers began then to grow, you will think it no hard matter to have the Articles printed, and this Clause left out.

And yet 'tis plain, That, after the stir about Subscription in the Year 1571. the Articles were settled and subscribed unto at last, as in the Year 1562. with this Clause in them for the Church : For looking farther into the Records which are in mine own Hands, I have found the Book of 1562. subscribed by all the lower House of Convocation, in this very Year of Contradiction, 1571. Dr. John Elmar (who was after Lord Bishop of London) being then Prolocutor : Alexander Nowel Dean of St. Pauls, having been Prolocutor in 1562, and yet living, and present and subscribing in 1571. Therefore, I do here openly in Star-Chamber charge upon that pure Sect this foul Corruption of falsifying the Articles of the Church of England ; let them take it off as they can.

I have now done, and 'tis time I should, with the Innovations charged upon the Prelates, and fit to be answered here.

Some few more there are, but they belong to matter of Doctrine, which shall presently be answered, *Justo Volumine*, at large, to satisfy all well-minded People. But when Mr. Burton's Book, which is the main one, is answered, (I mean his Book, not his Railing) neither Prynne, nor Bastwick, nor any Attendants upon Rabshakeb shall by me or my Care be answered. If this Court find not a way to stop these Libellers Mouths and Pens, for me they shall rail on till they be weary.

Yet one thing more, I beseech you, give me leave to add. 'Tis Master Burton's Charge upon the Prelates, That the Censures formerly laid upon Malefactors, are now put upon God's Ministers for their Virtue and Piety.

A heavy Charge this too. But if he, or any Man else, can shew that any Man hath been punished in the High Commission, or elsewhere, by the Prelates, for Virtue and Piety, there is all the reason in the World we should be severely punished our selves. But the Truth is, the Virtue and Piety for which these Ministers are punished, is for preaching Schism and Sedition, many of their Sermons being as bad as their Libels ; as Burton's Libel was one of his Sermons first. But whether this stuff have any affinity with Virtue and Piety, I submit to any Christian Reader.

And yet Mr. Burton is so confident of his Innocency, even in this Cause wherein he hath so foully carried himself, that he breaks forth into these words, I never so much as once dream-

ed, that Impiety and Impudency it self, in such a Christian State as this is, and under such a gracious Prince, durst ever thus publicly have called me in question, and that upon the open Stage, &c.

You see the boldness of the Man, and in as bad a Cause, as (I think) in this kind ever any Man had.

I shall end all with a Passage out of St. Cyprian, when he, then Bishop of Carthage, was bitterly railed upon by a pack of Schismatics, his Answer was, and 'tis now mine : They have railed both bitterly and falsely upon me, and yet *Non oportet me paria cum illis facere* ; it becomes not me to answer them with the like, either Levities or Revilings, but to speak and write that only which becomes *Sacerdotem Dei*, a Priest of God.

Neither shall I in this give way (tho I have been extremely vilified) to either Grief or Passion to speak, remembering that of the Psalmist, *Psalm 37. 8. Fret not thy self, else shalt thou be moved to do Evil.*

Neither yet by God's Grace shall the Reproaches of such Men as these, make me faint or start aside, either from the right Way in matter of Practice (they are St. Cyprian's words again) or a certain regulâ, from the certain Rule of Faith. *ib. p. 10.*

And since in former Times, some spared not to call the Master of the House Beelzebub, how much more will they be bold with them of his Household, as it is in St. Matthew. And so bold have these Men been ; but St. Mat. the next words of our Saviour are, *10. 25. Fear them not.*

I humbly crave pardon of your Lordships for this my necessary length, and give you all hearty Thanks for your noble Patience, and your just and honourable Censure upon these Men, and your unanimous dislike of them, and defence of the Church.

But because the Business hath some Reflection upon my self, I shall forbear to Censure them, and leave them to God's Mercy, and the King's Justice.

On the 30th of June following the Sentence was executed, when Dr. Bastwick, Mr. Prynne, and Mr. Burton were convey'd to the Pillory in the Palace-yard, Westminster.

DR. Bastwick and Mr. Burton first meeting, they did close one in the other's Arms three times, with as much Expressions of Love as might be, rejoicing that they met at such a place, upon such an occasion, and that God had so highly honoured them, as to call them forth to suffer for his glorious Truth.

Then immediately after, Mr. Prynne came, the Doctor and he saluting each other, as Mr. Burton and he did before. The Doctor then went up first on the Scaffold, and his Wife immediately following came up to him, and saluted each Ear with a Kiss, and then his Mouth. Her Husband desired her not to be in the least manner dismayed at his sufferings : And so for a while they parted, she using these words, Farewel my dearest, be of good comfort, I am nothing dismayed. And then the Doctor began to speak these words.

Dr. Bastwick. There are many that are this Day Spectators of our standing here, as Delinquents, tho not Delinquents, we bless God for it. I am not conscious to my self wherein I have committed the least Trespass (to take this outward shame) either against my God, or my King. And I do the rather speak it, that you that are now Beholders may take notice, how far Innocency will preserve you in such a Day as this is ; for we come here in the strength of our God, who hath mightily supported us, and filled our Hearts with greater Comfort than our Shame or Contempt can be. The first occasion of my Trouble was by the Prelates, for writing a Book against the Pope, and the Pope of Canterbury said I wrote against him, and therefore questioned me : but if the Presses were as open to us as formerly they have been, we would shatter his Kingdom about his Ears : But be ye not deterred by their Power, neither be affrighted at our sufferings ; let none determine to turn from the Ways

of the Lord, but go on, fight courageously against *Gog and Magog*. I know there be many here who have set many days apart for our Behalf, let the (Prelates take notice of it) and they have sent up strong Prayers to Heaven for us, we feel the Strength and Benefit of them at this time; I would have you to take notice of it, we have felt the Strength and Benefit of your Prayers all along this Cause. In a word, so far I am from base Fear, or caring for any thing that they can do, or cast upon me, that had I as much Blood as would swell the *Thames*, I would shed it every Drop in this Cause, therefore be not any of you discouraged, be not daunted at their Power; ever labouring to preserve Innocency, and keep Peace within, go on in the strength of your God, and he will never fail you in such a Day as this: As I said before, so I say again, had I as many Lives as I have Hairs on my Head, or Drops of Blood in my Veins, I would give them all up for this Cause. This Plot of sending us to those remote Places, was first consulted and agitated by the Jesuits, as I can make it plainly appear. O see what Times we are fallen into, that the Lords must fit to act the Jesuits Plots! For our own parts, we owe no Malice to the Persons of any of the Prelates, but would lay our Necks under their Feet to do them good as they are Men, but against the Usurpation of their Power, as they are Bishops, we do profess Enemies till Dooms-day.

Mr. Prynn shaking the Doctor by the Hand, desired him that he might speak a word or two. With all my heart, said the Doctor.

The Cause (said Mr. Prynn) of my standing here, is for not bringing in my Answer, for which my Cause is taken *pro confesso* against me. What Endeavours I used for the bringing in thereof, that God and my own Conscience, and my Counsel knows, whose Cowardise stands upon Record to all Ages. For rather than I will have my Cause a leading Cause, to deprive the Subjects of that Liberty which I seek to maintain, I rather expose my Person to a leading Example, to bear this Punishment: And I beseech you all to take notice of their Proceedings in this Cause. When I was served with a *Subpœna* into this Court, I was shut up close Prisoner, that I could have no access to Counsel, nor admitted Pen, Ink or Paper to draw up my Answer by my Instructions, for which I fee'd them twice (tho to no purpose) yet when all was done, my Answer would not be accepted into the Court, tho I tender'd it upon my Oath. I appeal to all the World, if this were a legal or just Proceeding. Our Accusation is in point of Libel (but supposedly) against the Prelates; to clear this now, I will give you a little Light what the Law is in point of Libel (of which Profession I have sometimes been, and still profess my self to have some Knowledge in.) You shall find in case of Libel, two Statutes: The one in the second of Queen *Mary*, the other in the seventh of Queen *Elizabeth*. That in the second of Queen *Mary*, the extremity and height of it runs thus, That if a Libeller doth go so far and so high as to libel against King or Queen by Denomination, the Height and Extremity of the Law is, that they lay no greater Fine on him than an hundred Pounds, with a Month's Imprisonment, and no corporal Punishment, except he doth refuse to pay his Fine; and then to inflict some Punishment in lieu of that Fine at the Month's end. Neither was this Censure to be passed on him, except it were

fully proved by two Witnesses, who were to produce a Certificate of their good Demeanor for the credit of their Report, or else confessed by the Libeller. You shall find in that Statute 7 *Eliz.* some further Addition to the former of 2 *Maria*, and that only in point of Fine and Punishment, and it must still reach as high as the Person of King or Queen. Here this Statute doth set a Fine of two hundred Pounds; the other but one: This sets three Months Imprisonment, the former but one: So that therein only they differ. But in this they both agree, namely at the end of his Imprisonment to pay his Fine, and so to go free without any further question: But if he refuse to pay his Fine, then the Court is to inflict some Punishment on him correspondent to his Fine. Now see the Disparity between those Times of theirs and ours. A Libeller in Queen *Mary's* time was fined but an hundred Pounds, in Queen *Elizabeth's* time two hundred: In Queen *Mary's* days but a Month's Imprisonment; in Queen *Elizabeth's* three Months, and not so great a Fine if they libelled against King or Queen. Formerly the greatest Fine was but two hundred Pounds, tho against King or Queen; now five thousand Pounds, tho but against the Prelates, and that but supposedly, which cannot be proved: Formerly, but three Months Imprisonment; now perpetual Imprisonment: Then, upon paying the Fine, no corporal Punishment was to be inflicted; but now, infamous Punishment with the loss of Blood, and all other Circumstances that may aggravate it. See now what Times we are fallen into, when that libelling (if it were so) against Prelates only, shall fall higher than if it touched Kings and Princes.

That which I have to speak of next, is this: The Prelates find themselves exceedingly aggrieved and vexed against what we have written concerning the Usurpation of their Calling, where indeed we declare their Calling not to be *Jure Divino*. I make no doubt, but there are some Intelligencers or Abettors within the Hearing, whom I would have well to know and take notice of what I now say. I here in this place make this Offer to them, That if I may be admitted a fair Dispute, on fair Terms, for my Cause; that I will maintain, and do here make the Challenge against all the Prelates in the King's Dominions, and against all the Prelates in Christendom, (let them take in the Pope, and all to help them) that their Calling is not *Jure Divino*. I will speak it again, I make the Challenge against all the Prelates in the King's Dominions, and all Christendom to maintain, that their Calling is not *Jure Divino*. If I make it not good, let me be hanged up at the Hall-Gate: Whereupon the People gave a great Shout.

The next thing that I am to speak of, is this: The Prelates find themselves exceedingly aggrieved and vexed against what I have written in point of Law, concerning their Writs and Process, That the sending forth of Writs and Process in their own Name, is against all Law and Justice, and doth intrench on his Majesty's Prerogative Royal, and the Subjects Liberties. And here now I make a second Challenge against all the Lawyers in the Kingdom, in way of fair Dispute, that I will maintain, the Prelates sending forth of Writs and Process in their own Names, to be against all Law and Justice, and intrenchth on his Majesty's Prerogative Royal, and Subjects Liberty. Lest it should be forgotten, I speak it again, I here challenge all

the whole Society of the Law, upon a fair dispute, to maintain, that the sending forth of Writs and Process in the Prelates own Names, to be against all Law and Justice, and intrencheth on the King's Prerogative Royal, and the Subjects Liberty. If I be not able to make it good, let me be put to the tormentingest Death they can devise.

We praise the Lord, we fear none but God and the King: Had we respected our Liberties, we had not stood here at this time: it was for the general Good and Liberties of you all that we have now thus far engaged our own Liberties in this Cause. For did you know how deeply they have intrenched on your Liberties in point of Popery; if you knew but into what Times you are cast, it would make you look about you: and if you did but see what Changes and Revolutions of Persons, Causes and Actions, have been made by one Man, you would more narrowly look into your Privileges, and see how far your Liberty did lawfully extend, and so maintain it.

This is the second time that I have been brought to this Place, who hath been the Author of it, I

think you all well know: For the first 7 Feb. 1633, time, if I could have had leave given me, I could easily have cleared my

self of that which was then laid to my Charge; as also I could have done now, if I might have been permitted to speak: that Book for which I

suffered formerly, especially for some *Histriomastix*. particular Words therein written, which I quoted out of God's Word and antient

Fathers, for which notwithstanding they passed Censure on me; that same Book was twice licensed by publick Authority, and the same Words I then suffered for, they are again made use of, and applied in the same Sense by *Heylin*, in his Book lately printed and dedicated to the King, and no Exceptions taken against them, but are very well taken.

Dr. Bastwick. And there is another Book of his licensed, wherein he rails against us three at his pleasure, and against the Martyrs that suffered in Queen Mary's days, calling them Schismatical Hereticks; and there is another Book of *Pocklington's* licensed: they be as full of Lyes as Dogs be full of Fleas; but were the Presses as open to us as they are to them, we would pay them, and their great Master that upholds them, and charge them with notorious Blasphemy.

Mr. Prynne. You all at this present see there be no degrees of Men exempted from suffering: Here is a reverend Divine for the Soul, a Physician for the Body, and a Lawyer for the Estate: I had thought they would have let alone their own Society, and not have meddled with any of them. And the next (for ought I know) may be a Bishop. You see they spare none of what Society or Calling soever, none are exempted that cross their own Ends. Gentlemen, look to your selves; if all the Martyrs that suffered in Queen Mary's days are accounted and called schismatical Hereticks and factious Fellows: * What shall we look for? Yet so they are called in a Book lately come forth under Authority. And such factious Fellows are we, for discovering a Plot of Popery. Alas poor England,

what will become of thee, if thou look not the sooner into thine own Privileges, and maintainest not thine own lawful Liberty? Christian People, I beseech you all, stand firm, and be zealous for the Cause of God, and his true Religion, to the shedding of your dearest Blood, otherwise you will bring your selves, and all your Posterities, into perpetual Bondage and Slavery.

Now the Executioner being come to fear him and cut off his Ears, *Mr. Prynne* spake these Words to him: Come Friend, come, burn me, cut me, I fear not. I have learned to fear the Fire of Hell, and not what Man can do unto me: Come fear, fear me, I shall bear in my Body the Marks of the Lord Jesus: Which the Executioner performed with extraordinary Cruelty, heating his Iron twice to burn one Cheek; and cut one of his Ears so close, that he cut off a piece of his Cheek. He said, *The more I am beaten down, the more am I lift up.*

Upon the Day for Execution, *Mr. Burton* being brought into the Palace-yard, unto a Chamber that looked into the Yard, where he viewed three Pillories there set up: Methinks (said he) I see *Mount Calvary*, where the three Crosses (one for Christ, and the other two for the two Thieves) were pitched: And if Christ were number'd among Thieves, shall a Christian (for Christ's Cause) think much to be numbered among Rogues, such as we are condemned to be? Surely, if I be a Rogue, I am Christ's Rogue, and no Man's. And a little after, looking out at the Casement towards the Pillory, he said: I see no difference between looking out of this square Window and yonder round Hole. Pointing towards the Pillory, he said; It is no matter of difference to an honest Man. And a little after that, looking somewhat wishly upon his Wife, to see how she did take it, she seemed to him to be something sad; to whom he thus spake: Wife, why art thou so sad? To whom she made answer: Sweetheart, I am not sad: No, said he? See thou be not, for I would not have thee to dishonour the Day, by shedding one Tear, or fetching one Sigh, for behold there, for thy Comfort, my triumphant Chariot, on the which I must ride for the honour of my Lord and Master: And never was Wedding-day so welcome and joyful a Day as this Day is; and so much the more, because I have such a noble Captain and Leader, who hath gone before me with such undauntedness of Spirit, that he saith of himself, I gave my Back to the Smitters, my Cheeks to the Nippers, they pluck'd off the Hair, I hid not my Face from Shame and Spitting, for the Lord God will help me, therefore shall I not be confounded: therefore have I set my Face like a Flint, and I know I shall not be ashamed. At length being carried toward the Pillory, he met *Dr. Bastwick* at the Foot of the Pillory, where they lovingly saluted and embraced each other; and parting a little from him, he returned and most affectionately embraced him the second time, being heartily sorry he missed *Mr. Prynne*, who was not yet come before he was gone up to his Pillory, which stood alone next the Star-Chamber, and about half a Stone's Cast from the other double Pillory, wherein the other two stood; so as all their Faces looked Southward, the bright

* The Archbishop of Canterbury being informed by his Spies what *Mr. Prynne* said, moved the Lords then sitting in the Star-Chamber, that he might be gagged, and have some further Censure presently executed upon him; but that Motion did not succeed.

Sun all the while, for the space of two Hours, shining upon them. Being ready to be put into the Pillory, standing upon the Scaffold, he spied Mr. *Prynn* new come to the Pillory, and Dr. *Bastwick* in the Pillory, who then hasted off his Band, and called for a Handkerchief, saying, What shall I be laft, or shall I be ashamed of a Pillory for Christ, who was not ashamed of a Crofs for me? Then being put into the Pillory, he said: Good People, I am brought hither to be a Spectacle to the World, to Angels, and Men; and howsoever I stand here to undergo the Punishment of a Rogue, yet except to be a faithful Servant to Christ, and a loyal Subject to the King, be the Property of a Rogue, I am no Rogue. But yet if to be Christ's faithful Servant, and the King's loyal Subject, deserve the Punishment of a Rogue, I glory in it, and I bless my God, my Conscience is clear, and is not stained with the Guilt of any such Crime as I have been charged with, tho otherwise I confess my self to be a Man subject to many Frailties and human Infirmities. Indeed that Book intituled, *An Apology of an Appeal, with sundry Epistles and two Sermons, for God and the King*, charged against me in the Information, I have and do acknowledge (the mis-printing excepted) to be mine, and will by God's Grace never disclaim it whilst I have Breath within me. After a while, he having a Nosegay in his hand, a Bee came and pitched on the Nosegay, and began to suck the Flowers, which he beholding, and well observing said, Do ye not see this poor Bee? She hath found out this very place to suck Sweetness from these Flowers; and cannot I suck Sweetness in this very place from Christ? The Bee sucking all this while, and so took her Flight. By and by, he took occasion from the shining of the Sun, to say, You see how the Sun shines upon us, but that shines as well upon the Evil as the Good, upon the Just and Unjust, but that the Sun of Righteousness (Jesus Christ, who hath healing under his Wings) shines upon the Souls and Consciences of every true Believer only, and no Cloud can hide him from us, to make him ashamed of us, no not of our most shameful Sufferings for his sake: And why should we be ashamed to suffer for his sake who hath suffered for us? All our Sufferings be but Fleabittings to that he endured: he indured the Crofs and despised the Shame, and is set on the right Hand of God. He is a most excellent Pattern for us to look upon, that treading his Steps, and suffering with him, we may be glorified with him. And what can we suffer, wherein he hath not gone before us even in the same kind? Was he not degraded, when they scornfully put on him a Purple Robe, a Reed into his Hand, a thorny Crown upon his Head, saluting him with, *Hail King of the Jews*, and so disrobed him again? Was not he deprived when they smote the Shepherd, and the Sheep were scattered? Was not Violence offered to his sacred Person, when he was buffeted and scourged, his Hands and his Feet pierced, his Head pricked with Thorns, his Side goared with a Spear, &c.? Was not the Crofs more shameful, yea and more painful than a Pillory? Was not he stript of all he had, when he was left stark naked upon the Crofs, the Soldiers dividing his Garments, and casting Lots upon his Vesture? And was he not confined to perpetual close Imprisonment in Man's Imagination, when his Body was laid in a Tomb, and the Tomb sealed, lest he should break Prison, or his Disciples steal him away? And yet did he not rise a-

gain, and thereby brought Deliverance and Victory to us all, so as we are more than Conquerors thro' him that loved us? Here then we have an excellent Pattern indeed.

One said unto Mr. *Burton*, Christ will not be ashamed of you at the last day. He replied, He knew whom he had believed, and that Christ was able to keep that he had committed to him against that Day. One asked him how he did? He said, never better, I bless God, who hath accounted me worthy thus to suffer. The Keeper keeping off the People from pressing near the Pillory; he said, Let them come and spare not, that they may learn to suffer. The same Keeper being weary, and sitting him down, asked Mr. *Burton* if he were well, and bad him be of good Comfort. To whom he replied, Are you well? If you be well, I am much more, and full of Comfort, I bless God. Some asked him if the Pillory were not uneasy for his Neck and Shoulders? He answered: How can Christ's Yoke be uneasy? This is Christ's Yoke, and he bears the heavier end of it, and I the lighter, and if mine were too heavy, he would bear that too. O good People, Christ is a good and sweet Master, and worth the suffering for! And if the World did but know his Goodness, and had tasted of his Sweetness, all would come and be his Servants; and did they but know what a blessed thing it were to bear his Yoke, O who would not bear it? The Keeper going about to ease the Pillory by putting a Stone or a Brickbat between, Mr. *Burton* said, Trouble not your self, I am at very good Ease, and feel no Weariness at all: And espying a young Man at the Foot of the Pillory, and perceiving him to look pale on him, he said, Son, Son, what is the matter you look so pale? I have as much Comfort as my Heart can hold, and if I had need of more, I should have it. One asked him a while after, if he would drink some *Aqua Vitæ*. To whom he replied, that he needed it not; for I have, said he, (laying his Hand upon his Breast) the true Water of Life, which like a Well doth spring up to eternal Life. Pausing a while, he said with a most chearful and grave Countenance, I was never in such a Pulpit before, but little do ye know (speaking to them that stood about him) what Fruits God is able to produce from this dry Tree: They looking stedfastly upon him, he said, Mark my words, and remember them well, I say, Little do you know what Fruits God is able to produce from this dry Tree; I say, remember it well, for this Day will never be forgotten; and thro' these Holes (pointing to the Pillory) God can bring Light to his Church. The Keeper going about again to mend the Pillory, he said, Do not trouble your self so much: But indeed we are the Troublers of the World. By and by, some of them offering him a Cup of Wine, he thanked them; telling them he had the Wine of Consolation within him, and the Joys of Christ in Possession, which the World could not take away from him, neither could it give them unto him. Then he looked towards the other Pillory, and making a sign with his Hand, cheerfully called to Dr. *Bastwick*, and Mr. *Prynn*, asking them how they did? Who answered, Very well. A Woman said unto him, Sir, every Christian is not worthy this Honour, which the Lord hath cast upon you this Day. Alas (said he) who is worthy of the least Mercy? But it is his gracious Favour and free Gift, to account us worthy in the Behalf of Christ to suffer any thing for his

his sake? Another Woman said, There are many hundreds which by God's Assistance would willingly suffer, for the Cause you suffer for this Day. To whom he said, Christ exalts all of us that are ready to suffer Afflictions for his Name with Meekness and Patience; but Christ's military Discipline in the use of his spiritual Warfare, in point of Suffering is quite forgotten, and we have in a manner lost the Power of Religion, in not denying our selves, and following Christ as well in suffering as in doing. After a while Mr. *Burton* calling to one of his Friends for a Handkerchief, returned it again, saying, It is hot, but Christ bore the Burden in the Heat of the Day; let us always labour to approve our selves to God in all things, and unto Christ, for therein stands our Happiness, come of it what will in this World.

One said to Mr. *Burton*, The Lord strengthen you. To whom he replied, I thank you, and I bless his Name he strengthens me. For tho I am a poor sinful Wretch, yet I bless God for my innocent Conscience in any such Crime as is laid against me; and were not my Cause good, and my Conscience sound, I could not enjoy so much unspeakable Comfort in this my Suffering as I do, I bless my God. Mrs. *Burton* sending Commendation to him by a Friend: He returned the like to her, saying, Commend my Love to my Wife, and tell her I am heartily chearful, and bid her remember what I said to her in the Morning; namely, That she should not blemish the Glory of this Day with one Tear, or so much as one Sigh. She returned Answer, That she was glad to hear him so chearful; and that she was more chearful of this Day than of her Wedding-day. This Answer exceedingly rejoiced his Heart, who thereupon blessed God for her, and said of her, she is but a young Soldier of Christ's, but she hath already endured many a sharp Brunt, but the Lord will strengthen her unto the end: And he having on a pair of new Gloves, shewed them to his Friends thereabout him, saying, My Wife yesterday of her own accord bought me these Wedding-Gloves, for this is my Wedding-Day.

One said to him, Sir, by this Sermon (your Suffering) God may convert many unto him. He answered, God is able to do it indeed. And then he called again to Dr. *Bastwick* and Mr. *Prynn*, asking them how they did; who answered as before. Some speaking to him concerning that Suffering of shedding his Blood: He answered, What is my Blood to Christ's Blood? Christ's Blood is a purging Blood, but mine is corrupted and polluted with Sin. One Friend asked another standing near Mr. *Burton*, if there should be any thing more done unto him? Mr. *Burton* over-hearing him answered, Why should there be no more done? For what God will have done must be accomplished. One desiring Mr. *Burton* to be of good cheer: He thus replied, If you knew my Cheer, you would be glad to be Partaker with me; for I am not alone, neither hath God left me alone in all my Sufferings and close Imprisonment since first I was apprehended. The Halberd-men standing round about, one of them had an old rusty Halberd, the Iron whereof was tacked to the Staff with an old crooked Nail; which one observing, and saying, What an old rusty Halberd is that? Mr. *Burton* said, This seems to me to be one of those Halberds which accompanied Judas when he went to betray and apprehend his Master. Mr. *Burton* said again, I am persuaded that Christ

my Advocat, is now pleading my Cause at the Father's Right Hand, and will judge my Cause (tho none be found here to plead it) and will bring forth my Righteousness as the Light at Noon-day, and clear my Innocency in due time. A Friend asked Mr. *Burton*, if he would have been without this particular Suffering? To whom he said, No, not for a World. Moreover, he said, that his Conscience in the Discharge of his ministerial Duty and Function, in admonishing his People to beware of the creeping in of Popery and Superstition, exhorting them to stick close unto God and the King in Duties of Obedience, was that which first occasioned his Sufferings; and he said, as for this Truth I have preached, I am ready to seal it with my Blood, for this is my Crown both here and hereafter. I am jealous of God's Honour, and the Lord keep us that we may do nothing that may dishonour him, either in doing or suffering, God can bring Light out of Darkness, and Glory out of Shame: And what shall I say more; I am like a Bottle which is so full of Liquor, that it cannot run out freely; so I am so full of Joy, that I am not able to express it.

In conclusion, some told him of the Approach of the Executioner, and prayed God to strengthen him. He said, I trust he will, why should I fear to follow my Master Christ, who said, I gave my Back to the Smilers, and my Cheek to the Nippers that plucked off my Hair; I hid not my Face from Shame and Spitting, for the Lord God will help me, therefore shall I not be confounded; therefore have I set my Face like a Flint, and I know that I shall not be ashamed.

When the Executioner had cut off one Ear, which he had cut deep and close to the Head in an extraordinary cruel manner; yet he never once moved and stirred for it, tho he had cut an Artery, so as the Blood ran streaming down upon the Scaffold, which divers Persons standing about the Pillory seeing, dipped their Handkerchiefs in, as a thing most precious, the People giving a mournful Shout, and crying for the Surgeon, whom the Croud and other Impediments for a time kept off, so that he could not come to stop the Blood; he all the while held up his Hands, and said, Be content, it is well, blessed be God. The other Ear being cut no less deep, he then was freed from the Pillory, and came down, where the Surgeon waiting for him, presently applied remedy for stopping the Blood after a large Effusion thereof, yet for all this he fainted not, in the least manner, tho thro' expence of much Blood he waxed pale. And one offering him a little Wormwood-water, he said, It needs not; yet thro' Importunity he only tasted of it, and no more, saying, His Master, Christ, was not so well used, for they gave him Gall and Vinegar, but you give me good strong Water to refresh me, blessed be God. His Head being bound up, two Friends led him away to an House provided him in *King-street*, where being set down, and bid to speak little, yet he said after a Pause, This is too hot to hold long: Now least they in the room, or his Wife should mistake, and think he spake of himself concerning his Pain, he said, I speak not this of my self; for that which I have suffered is nothing to that my Saviour suffered for me, who had his Hands and Feet nailed to the Cross: and lying still a while, he took Mr. *Prynn*'s Sufferings much to heart, and asked the People how he did, for (said he) his Sufferings have been great. He asked also how Dr. *Bastwick* did,

did, with much Compassion and Grief, that himself (being the first that was executed) could not stay to see how they two fared after him.

Soon after the Execution of the Sentence, they were severally sent Prisoners to the respective Castles of *Carnarvan*, *Launceston in Cornwall*, and *Lancaster*, and afterwards on the 27th of *August* following, it was ordered by the King and Council, That Dr. *Bastwick* should be removed to the Castle or Fort of the Isles of *Silly*, Mr. *Burton* to the Isle of *Guernsey*, and Mr. *Prynne* to which of the two Castles of the Isle of *Jersey* the Governor should think fit; and that none be admitted to have Conference with them, or to have Access to them, but whom the Captains of the said Castles or their Deputies should appoint; they not to be allowed Pen, Paper, or Ink, nor any Books, but the Bible and Common-Prayer-Book, and other Books of Devotion, consonant to the Doctrine and Discipline of the Church of *England*; no Letters or Writings to be brought them, but what shall be open'd, nor any to be sent from them: that the Wives of *Bastwick* and *Burton* should not land or abide in any of the said Islands, and if they did, they should be detain'd in Prison till further Order from the Board; and the Conductors of the said three Prisoners, either by Sea or Land, to suffer none but themselves to speak to them in their Passage. Accordingly they were sent to the said three Islands, where they remained till the beginning of the Long Parliament 1641. when upon their respective Petitions they were sent for up, discharg'd and restored. Their Petitions were as follow.

To the Honourable the Knights, Citizens, and Burgeses of the Commons House of Parliament.

The humble Petition of William Prynne, late Exile, and close Prisoner in the Isle of Jersey.

In all humbleness sheweth,

THAT your Petitioner, tho not conscientious to himself of any voluntary or apparent Offence against the Laws of the Realm (to which he ever studied to conform himself) thro' the malicious Practices and Persecutions of some *Prelates and Church-men*, (especially the now *Archbishop of Canterbury*, and *Peter Heylin*, Doctor in Divinity) whose Errors and Innovations, contrary to the Doctrine and Discipline of the Church of *England*, and Extravagancies in the High Commission, and other Ecclesiastical Courts, your Petitioner for his own relief, being there unjustly prosecuted, (had to his weak power oppugned) hath within eight Years last past, undergone two heavy Censures in the Star-Chamber Court.

The first upon an Information there exhibited against your Petitioner, by Mr. *Noy* deceased, then Attorney General, for some misconstrued Passages, inoffensive in themselves, and in your Petitioner's true Intention, being for the most part the words of other approved Authors, comprised in a Book, styled *Histriomastix*, written by the Petitioner, against common Interludes, and Licensed for the Press by Mr. *Thomas Buckner*, Household Chaplain to the then Archbishop of *Canterbury*, authorized by the State to License Books, and by him exactly perused, and approved both in the written and printed Copy, before its

Publication, and so confessed in the Information; for which authorized Book and Passages, your Petitioner, before the hearing of the Cause, was not only imprisoned in the Tower of *London*, without Bail or Mainprize, for a whole Years space, denied access to his Counsel, convenient time to examine Witnesses, and make Breviats to instruct his Counsel (the Information being general, and reciting no particular Clauses of the Book excepted against) the only means of his Defence illegally suppressed, some of his Counsel tampered with to make no Justification, contrary to your Petitioner's Instructions and Desire, whereby his Cause was miscarried; but also at the Hearing, by reason of those malicious and perverse Glosses on the said Passages, which the said *Heylin* had collected and presented to his Majesty's learned Counsel, who repeated his Instructions only, your Petitioner was fined 3000 Pounds to his Majesty, expelled the University of *Oxford*, and *Lincolns-Inn*, degraded from his Profession of the Law, wherein he never offended, set in the Pillory in the *Palace-Yard at Westminster*, where he lost one of his Ears, and two days after on the Pillory in *Cheapside*, where he lost the other Ear: and had his said Licensed Books there publicly burnt before his Face, by the *Hangman*, in a most disgraceful manner; and adjudged after to remain a Prisoner during his Life.

That after the said Censure, to defame and injure your Petitioner the more, he was charged wrongfully in the Decree, as censured for Perjury, (tho not taxed for it by the Court) and between his sufferings in the Pillory, the Books of his Study (twice surveyed, and restored to him by Order from the Lords) before any fine estreated, by a Warrant out of the High Commission, signed by the said Archbishop and others, were seized on by *Cross* a Messenger, who carried them to his House; with which Warrant your Petitioner charging the said Archbishop upon occasion, in the open Court of Star-Chamber; he there publicly disavowed the same (tho your Petitioner can yet produce it under his own Hand) promising withal, that the Books should be restored forthwith; which notwithstanding were all still detained by his Means, till they were extended and sold for your Petitioner's Fine: who shortly after, by an Order out of the said Court sent to the Tower to be executed, was there shut up close Prisoner, and Dr. *Reeves* sent thither to search his Chamber for the Pamphlet, which the said Archbishop would wrongfully have fathered upon your Petitioner, whose Friends have been unjustly prosecuted in the Exchequer, and elsewhere, sundry Years, for his Fine aforesaid.

And your Petitioner further saith, that about *Easter* was three Years, during his Imprisonment in the Tower, by means of the said Archbishop, a new Information was exhibited in the said Court against your Petitioner, and others, with certain Books thereto annexed; *Denying the Prelates Jurisdiction over other Ministers, to be Jure Divino. Charging them with many Errors and Innovations in Religion, Usurpation upon his Majesty's Prerogative, and Subjects Liberty*, Abuses, and Extortions, in the High Commission, and other Ecclesiastical Courts, suppressing Preaching, and painful Ministers without a Cause; Licensing *Popish, Arminian*, and other erroneous Books against the Sabbath; setting up Altars, Images, and Crucifixes; removing and railing in Communion Tables, and bowing

bowing down to them, altering the Book of Common Prayer, the Books for the Gunpowder-Treason, and late Fast, in some material Passages in favour of Popery and Papists. Which things, (tho very notorious, and oft complained against by this Honourable House, in former and late Parliaments) were yet reputed scandalous. And tho neither of the said Books was particularly charged on your Petitioner, in the said Information, nor any Witness produced to prove him either Author, or Disposer of any of them; yet by denying your Petitioner Liberty to draw up his own Answer, (tho once a Barrister at Law) when as his assigned Counsel refused to do it, by close imprisoning your Petitioner, and his Servant, by debarring him, Pen, Ink, and Paper, whereby to answer, or instruct his Counsel; searching his Chamber, and taking away part of his Answer there found; denying him access to his Counsel, and conference with his Co-defendants, even at Counsel, tho jointly charged with him; rejecting the Cross-Bill exhibited by him for his Defence; threatening Master Holt, one of your Petitioner's assigned Counsel, sent by the then Lord Keeper to the Tower, to draw up your Petitioner's Answer, and commanding him not to sign it, after it was engrossed, whereupon he refused to subscribe it, contrary to his promise to your Petitioner; and by refusing to accept your Petitioner's Answers to the said Information, signed with his own, and Master Tomlins, the other of his Counsel's Hands, tho tendred by your Petitioner, both at the Star-Chamber Office, and in the open Court at the Hearing; the said Information, for default of Answer (tho two Answers were thereto tendred by your Petitioner) was taken *pro confesso* against your Petitioner, and he thereupon *Fin'd five thousand Pounds to his Majesty, Pilloried, Stigmatized on both Cheeks, Mutilated and Dismember'd, in a most barbarous manner, and the small remainder of his Ears, left after his first execution, cut off, to the hazard of his Hearing, and Life; and adjudged to perpetual close Imprisonment in the Goal of Carnarvan Castle in North-Wales, a nasty Dog-hole, far remote from your Petitioner's Friends.* Which Sentence was unduly drawn up and executed upon your Petitioner, as his Attorney's Clerk informed him, before it was entred into the Book, or your Petitioner could get any Copy of it, to except against the same, as he had just Cause.

That immediately after the Execution of the same Sentence, your Petitioner sent to the said Archbishop to desire him to release or bail his Servant (who was detained close Prisoner for ten Weeks space in the Messenger's Hands, and oft examined and solicited, by fair Promises and Threatnings, causelessly to accuse your Petitioner against whom they wanted Evidence) that so he might attend him during his Sores, which the said Archbishop out of his Grace and Charity utterly refused; saying that he intended to proceed against his said Servant in the High Commission, where he hath ever since vexed, censured, and banded him from Prison to Prison, only for refusing to accuse and betray your Petitioner.

That after the said heavy Sentence, your Petitioner by an Order in the said Court, (by way of Addition to the said Censure) was inhibited the use of Pen, Ink, and Paper, and all Books; except the Bible, and the Book of Common-Prayer, and some few Books for private Devotion, and before his Wounds were perfectly cured, he was by order remov'd from the Tower to Carnarvan; and some

of his Friends in *Chester*, who visited him there in his Passage, in the Presence of his Conductors, who had no order to restrain any Person from resorting to him, were for this very Cause sent for by a Messenger, to appear before the Lords of the Privy-Council, and likewise cited into the High Commission at *York*, where they were Imprisoned and Fined, to the ruin of their Estates, and enjoined to make a publick Recantation in the Cathedral Church, and in the Town-Hall of *Chester*: The said Commissioners further decreeing, that three Pictures of your Petitioner found in *Chester*, should be publicly burnt at the high Cross there, which was done accordingly.

That your Petitioner since his said Sentence, hath been publicly reviled at, and libelled against, both by the High Commissioners at *York*, and in sundry Churches, both at *Chester* and elsewhere, and in divers licensed printed Books, compiled by the said *Heylin*, and published by the Archbishop's Privy or Command; and that sundry of his Friends Houses, Studies, Books, and Writings have been violently broken up, ransacked and taken away, and themselves prosecuted in the High Commission, out of Malice, for the relation they had to your Petitioner.

That after your Petitioner had continued some ten Weeks space close Prisoner in *Carnarvan*, he was about three years since, by a Warrant from the Lords of the Council, made in the Summer Vacation, (to which the said Archbishop's Hand was first subscribed) order'd by way of Exile, to be imbarked and transported with all privacy into one of the Castles in the Isle of *Jersey*, and his Conductors thereby charged not to admit any Person whatsoever, but themselves only, to speak with your Petitioner in his Passage: Whereupon, after some Injuries there receiv'd by Mr. Griffith, the King's Attorney in those Parts (who endeavoured to seize upon the Furniture of his Chamber for his own use) your Petitioner was imbarked among Papists, in a bruised shipwreck'd Vessel, full of Leaks, and after fourteen Weeks Voyage in the Winter Season, thro' dangerous Storms and Seas, which spoiled most of his Stuff and Bedding, and threatening often Shipwrack to him, he arrived at the said Isle, and was conveyed close Prisoner into Mount *Orgatille* Castle there, where the Lieutenant Governour, by another extra-judicial Order, to which the said Archbishop's name was first, was ordered to keep your Petitioner close Prisoner in a Chamber, suffer none but his Keepers to speak with him, to intercept all Letters to him; to permit him neither Pen, Ink, nor Paper, either to write to his Friends for Necessaries, or to petition for Relief, and to permit him no Book but the Bible, and those aforementioned Books, without giving any order for his Diet there; so that being deprived of his Calling and Estate, exiled and shut up close Prisoner among Strangers, remote from all his Friends, denied all Address to him by Person or Letters, he had certainly perished in his almost three years close Imprisonment there, had not the extraordinary Providence and Goodness of God (which he shall ever adore) and the noble Charity of those under whose Custody he did remain, furnished him with such Diet and Necessaries, as preserved him both in Health and Life, in this his close Imprisonment and Exile.

May it therefore please this Honourable House, to take these your Petitioner's almost eight Years tragical Grievances, of new and dangerous Example,

ple, into your most sad and just Considerations, that so they may not become Precedents to the prejudice of Posterity; to grant him Liberty to send for and examine all necessary Witnesses: to order all Clerks, Registers, and other Officers of the Star-Chamber, or elsewhere, speedily and freely to grant him the Copies of such Orders, Decrees, and Writings, as his Cause shall require, to release him upon Bail, (being now but a Prisoner only upon an extrajudicial Order of the Lords, and not by Virtue of any Sentence or Decree in Court) to grant him Liberty to plead and prosecute his own Cause, since Counsel hath so often failed him, and to give him such Satisfaction and Relief as the Justice and Equity of his Cause shall merit.

*And your Petitioner shall ever pray for your
Safeties,*

William Prynne.

*To the Honourable the Knights, Citizens, and Burgeses
of the Commons House of Parliament.*

*The humble Petition of John Bastwick, Doctor in
Physick, lately retained close Prisoner and Exile,
in the Island of Silly.*

Most humbly sheweth,

THAT your Petitioner having about six Years since set out a Book in *Latin*, called *Elenchus Religionis Papisticæ*, with an Addition thereunto called *Flagellum Pontificis, & Episcoporum Latialium*; being thereunto provoked by one *Richard Short*, a Papist that maintained the Pope's Supremacy, the Mass, and papal Religion: In which Book your Petitioner, (for preventing all Misinterpretations of his pious and good Intentions therein) in his Epistle to the Reader, fully declared himself, That your Petitioner meant nothing against such Bishops as acknowledged their Authority from Kings and Emperors; yet, because your Petitioner (the better to shew the papal Usurpation over other Princes) therein only maintained by way of Argument (as other orthodox Writers of that Subject usually have done) a Parity of the said Bishop of *Rome*, or all other Bishops or Presbyters, by the Word of God, denying his and their Supremacy over other Ministers to be by the divine Institution.

Thereupon a Pursuivant, by Authority from the High Commission Court, came into your Petitioner's House at *Colchester* in *Essex*, in his Absence, and the said Pursuivant, assisted with the then Bailiffs and Constables of *Colchester*, aforesaid, ransacked his said House, together with his Chests and Trunks, and with great Violence broke open your Petitioner's Study, which was in his Apothecary's House, and took and carried away divers of your Petitioner's Books, Writings, Letters, and what else the Pursuivant pleased, without making of Restitution of them to your Petitioner.

And then your Petitioner was prosecuted in the said High Commission Court, principally for his said Book; where, after a long and chargeable Prosecution, he was the 12th of *February* 1634, fined 1000 *l.* to the King, excommunicated, debarred to practise Physick, the chiefest Means of his livelihood; his said Book ordered to be burnt; that he should pay costs of Suit, and be imprisoned till he should make a Recantation. The which heavy Censure was only for the said Book, wherein your Petitioner maintained the Prerogative of a King against the Papacy. Whereas one

Thomas Chawney, of *Essex*, lately wrote a Book in Maintenance of the papal Religion, and in Defence of the Church of *Rome*, and avers it to be a true Church; the which Book is dedicated to the Archbishop of *Canterbury*, and was and is patronized and defended by the said Archbishop, and the said *Chawney* never troubled for it. After which Censure declared as aforesaid, all the Bishops that were then present, denied openly that they held their Jurisdiction from his Majesty; and affirmed, that they had it from God only. And the Archbishop of *Canterbury*, among other erroneous Sayings uttered by him, maintained the said *Chawney's* Book; and maintained that the Church of *Rome* was a true Church, and that it erred not in Fundamentals: and he, and other the said Bishops, there defamed the holy Scriptures, and abused reverend Master *Calvin*. In regard whereof, and for the vindicating of your Petitioner's Innocency in the Matters for which he was most unjustly censured, as aforesaid, your Petitioner published in Print another Book in *Latin*, intitled, *Apologeticus ad Presules Anglicanos*, expressing the Truth of his Proceedings, and Speeches of his said Censure. For which last mentioned Book, and his Book called the *Litany* (not then in Print) an Information was exhibited against him and others in the Star-chamber, to which your Petitioner's Answer being drawn and engrossed, was only subscribed by himself, because he could get no Counsel to set their Hands to it; your Petitioner tendred the said Answer first at the Star-Chamber Office, and after in open Court at the Star-Chamber Bar, but it would not be accepted for want of Counsellors Hands to it; contrary to former Precedents. But the Court of Star-Chamber took the said Information *pro confesso*, and censured your Petitioner 5000 *l.* Fine to the King, to stand in the Pillory and to lose both his Ears, and to be close Prisoner in *Launceston Castle* in *Cornwal*. All which hath been executed upon him with great Extremity, to the Peril of his Life. After all which Extremity, your Petitioner (by what Order he knoweth not, it being no part of his Censure in Star-Chamber) was transported from the said Castle to the Island of *Silly*, a Place so barren that it affords not ordinary Necessaries; where he hath been in close Duration for three Years or more, and not suffered to have any of his Friends come at him, his very Wife being prohibited, by the Lords of the Council's Order, under Pain of Imprisonment, not to set her Foot upon any part of the said Island to inquire of his Welfare. So that your Petitioner hath been exiled from his Wife and divers small Children three Years and more; besides the great Straits and Miseries which he hath sustained during the said Time. All which is contrary to the Law of God and Man, and the Liberties of a free Subject; and to the utter undoing of your Petitioner, his Wife, and Children.

May it therefore please this honourable Assembly, to take these pressing Grievances of your Petitioner into your Considerations, and to afford him such Relief therein, as in your grave Wifdoms shall seem consonant to Justice and Equity; and to assign him for Counsel, Mr. *Atkins*, Mr. *Ludbore*, Mr. *Tomlins*, Mr. *Gurdon*, and Mr. *Randal*, to assist him in this his Complaint; and to order that your Petitioner may take out gratis, such Copies of the said Censures, Warrants, and Orders, and other the Proceedings in the said several

veral Courts, as shall or may any way concern this his sad, yet most just Complaint, with Warrant from this honourable House, to bring in his Witness.

And your Petitioner, as in Duty bound, shall ever pray for your Prosperities.

John Bastwick.

The humble Petition of Henry Burton, late Exile, and close Prisoner in Castle-Cornet, in the Isle of Guernsey,

In all humbleness sheweth.

THAT whereas your Petitioner, on the 5th of November 1636, did preach two Sermons in his own Parish Church in St. Matthew Friday-street, London, for the which he was, in December then next following, summoned to appear before Dr. Duck, one of the Commissioners for Causes Ecclesiastical, at Chiswick in the County of Middlesex; where (with the Register of the High Commission Court) the said Dr. Duck tendred to the Petitioner the Oath *ex Officio*, to answer to certain Articles there presented: Which Oath the Petitioner refusing to take, did then and there appeal from the said Court unto the King's Majesty; which Appeal the said Dr. Duck did admit, and the said Register, by Dr. Duck's Direction, did then and there enter in Writing.

Notwithstanding which said Appeal, a special High Commission Court was shortly after called at London, consisting of four or five Doctors; where the said Commissioners proceeded illegally to suspend the Petitioner in his Absence; by Means whereof, as of the Threatnings of the said Commissioners, he was inforced to keep his House, until a Sergeant at Arms, with divers Pursuivants, and other armed Officers, assisted by Alderman Abell, then Sheriff of London, beset the Petitioner's House at eleven a-clock at Night, and violently broke open his doors with Iron Crows, and the like, and surprized him in his House; he making no Resistance at all. Where having first searched his Study, and taken away such Books as they pleased, they carried your Petitioner to Prison; whence, the next Day, being the second of February, by a pretended Order from the Lords of the Council, he was conveyed to the Fleet, and there kept close Prisoner.

During which Imprisonment, an Information was exhibited against the Petitioner and others, in his Majesty's Court of Star-chamber; whereby he was charged, *inter alia*, with the publishing of a certain Book, containing, *An Apology for an Appeal*, with his said two Sermons, intitled, *God and the King*. Wherein he taught Subjects to yield all manner of due Obedience to their lawful King, and reproved all lawless Innovations in Religion, &c. Which Information the Petitioner upon his Oath under the Hand of Mr. Holt, being then of his Counsel, assigned by special Order from the said Court, did put in his Answer; wherein he alledged such things only as his said Counsel conceived to be material, and pertinent to his just Defence in publishing the said Book; but denied all other Matters in the said Information contained. Which said Answer being admitted and received in Court, the Petitioner (being then a close Prisoner) not only attended the exhibiting of Interrogatories, according to the Custom of that Court, but withal, after some universal Delay, did write unto the King's At-

torney to hasten them; but before the Examiner came, the Petitioner heard that his said Answer was referred to Sir John Brampton Kt. Lord Chief Justice of the King's Bench, Sir John Finch, then Chief Justice of the Common Pleas, and was by them wholly expunged as impertinent and scandalous, save only the not Guilty. And the Petitioner understanding the Answer he was to make to the Interrogatories was to be reckoned as a Part of his Answer, admitted in Court, but afterwards expunged as impertinent and scandalous, as aforesaid: so as if he should then have answered the Interrogatories, he should thereby have assented to the said Act of the said Judges, and so the Condemnation of his Cause before the Hearing; whereby he should have contradicted his former Oath, that his said Answer was a true Answer; and so should justly have brought himself under the Guilt of wilful Perjury, and his Cause under just Censure. For that very Reason he held himself not bound, as he conceived, to answer the Interrogatories; for that his said Answer was so expunged, and the (*Not Guilty*) as the Foot so tied to the Head without the main Body, (and that in the Judge's own Words) as the Petitioner could not in any sort take or acknowledge it now for other than the Judge's own Answer; as may appear upon Record in the same Court.

Nevertheless, the Court taking the same Information *pro Confesso*, and refusing to permit a Copy of the Petitioner's own true Answer, as also of his Reasons of not answering the Interrogatories, both which at his Censure he tendred to the Court, desiring they might be then and there publicly read the 14th of June, 13 Caroli Regis, proceeded to Censure; whereby your Petitioner was censured in a Fine of 5000 l. to his Majesty, to be deprived of his ecclesiastical Benefice, degraded from his ministerial Function and Degrees in the University, and ordered to be set on the Pillory, where both his Ears were to be cut off; confined to perpetual close Imprisonment in Lancaster-Castle, debarred the Access of his Wife or any other to come to him but only his Keeper, and denied the Use of Pen, Ink, and Paper. All which (except the Fine) was executed accordingly. And after his close Imprisonment for twelve Weeks in the common Jail in the said Castle, he was (by what extrajudicial Order he knows not) transported by the Conduct of one Brian Burton, appointed by the High Sheriff of Lancaster, who used your Petitioner very basely and deceitfully, in that his Transportation, which was in the Winter Season thro' dangerous Seas, to the apparent Hazard both of his Health and Life, to the said Castle of Guernsey, where he hath remained a close Prisoner and Exile almost three whole Years; his Wife utterly prohibited, upon Pain of Imprisonment, to set her Foot upon any part of the Island where she might but inquire how her Husband did; contrary to the Laws of God and the Liberties of this Kingdom.

May it therefore please this honourable House, to take the Petitioner's sad Cause into Consideration; and for the better Manifestation of his Grievance in this Cause, to assign him for Counsel Mr. Serjeant Atkins, Mr. Tomlins, and Mr. Gordon, to assist him in his Cause, and to command that he may take out such Copies *gratis* out of the said several Courts as do or may concern his Cause.

And your Petitioner, as in Duty bound, shall daily pray for your Prosperities.

Henry Burton.
These

These Petitions being read, they were referr'd to the Committee appointed for inquiring into the Proceedings of the Star-Chamber and High Commission Court, and upon their Report the House came to the following Resolutions.

As to Dr. Bastwick, Feb. 22. 1640.

1. *Resolved*, That the Precept made by the Archbishop of *Canterbury* and others, High Commissioners for Causes Ecclesiastical within the Realm of *England*, for the apprehending the Body of *Dr. Bastwick*, and searching for and seizing his Books; and the Messengers Actings thereupon in searching *Dr. Bastwick's* House, and seizing his Books and Papers, are against Law and the Liberty of the Subject.

2. *Resolved*, That the Sentence given against *Dr. Bastwick* by the High Commissioners, and the Proceedings whereupon that Sentence is grounded, and the Execution of that Sentence, are against Law; and that the Sentence is void, and that *Dr. Bastwick* ought to be restored to the Exercise and Practice of Physick, and to have Reparation and Recompence for his Damage and Loss sustained by the said Sentence and Execution.

3. *Resolved*, That all those several Commissioners of the High Commission Court which voted against *Dr. Bastwick*, in the Sentence pronounced against him, ought to give Satisfaction to *Dr. Bastwick*.

The House afterwards resumed the Debate concerning *Dr. Bastwick*. Whereupon it was farther,

4. *Resolved*, That the Proceedings against *Dr. Bastwick*, are against the Law and Liberty of the Subject, as also the Sentence against him ought to be reversed, the Fine of 5000*l.* discharg'd, and he have Reparation for his Losses and Sufferings.

5. *Resolved*, That the Orders and Warrants from the Council Board for *Dr. Bastwick's* Exile, and transferring him from the Castle of *Launceston* to the Isle of *Scilly*, and his Imprisonment there, are against the Law and Liberty of the Subject, and that he ought to have Reparation for his Losses and Damages sustain'd by those Orders, and that Imprisonment.

Present at the Sentence in the Star-Chamber these Lords and Privy-Counsellors following:

<i>The Lord Keeper,</i>	<i>Earl Moreton,</i>
<i>Duke of Lenox,</i>	<i>Lord Newburgh,</i>
<i>Earl of Pembroke,</i>	<i>Mr. Secretary Coke,</i>
<i>Earl of Holland,</i>	<i>Lord Privy Seal,</i>
<i>Lord Cottington,</i>	<i>E. of Arundel and Surry,</i>
<i>Sir Thomas Jermin,</i>	<i>Earl of Bridgwater,</i>
<i>Lord Treasurer,</i>	<i>Viscount Wimbleton,</i>
<i>Marquis Hamilton,</i>	<i>Sir Henry Vane,</i>
<i>Earl of Dorset,</i>	<i>Mr. Secret. Windebank.</i>

As to Mr. Burton.

1. *Resolved*, That the four Commissioners, *Dr. Duck*, *Dr. Worrall*, *Dr. Sams*, and *Dr. Wood*, proceeded unjustly and illegally in suspending *Mr. Burton ab Officio & Beneficio*, for not appearing upon the Summons in the first Process.

2. *Resolved*, That the breaking open *Mr. Burton's* House, and Arresting his Person without any Cause shewed, and before any Suit depending against him in the Star-Chamber, and his close Imprisonment thereupon, are against the Law and Liberty of the Subject.

3. *Resolved*, That *John Wragg* hath offended in searching and seizing the Books and Papers of *Mr. Burton*, by colour of a general Warrant dormant from the High Commissioners, and that the said Warrant is against Law and the Liberty of the Subject; and that Serjeant *Dendy* and Alderman *Abel* have offended in breaking open the House of *Mr. Burton*, and ought respectively to make him Reparations for the same.

4. *Resolved*, That *Mr. Burton* ought to have Reparation and Recompence for Damages sustain'd by the aforesaid Proceedings from *Dr. Duck*, &c.

5. *Resolved*, That the Warrant from the Council-Board, dated at *White-hall Feb. 2. 1636.* for the committing *Mr. Burton* close Prisoner, and the Commitment thereupon, is illegal, and contrary to the Liberty of the Subject.

6. *Resolved*, That the Archbishop of *Canterbury*, Bishop of *London*, and the Earl of *Arundel*, the Earl of *Pembroke*, *Sir Henry Vane*, Secretary *Cooke*, and Secretary *Windebank*, do make Reparation to *Mr. Burton* for his Damages sustain'd by his Imprisonment.

As to Mr. Prynn.

1. *Resolved*, That the Sentence given against *Mr. Prynn* in the Star-Chamber *February 17. 9 Car.* is illegal, and given without just Cause, and ought to be reversed; and that *Mr. Prynn* ought to be discharged of the Fine of 5000*l.* imposed by the said Sentence, and of all Extents thereupon, and of his Imprisonment decreed by that Sentence.

2. *Resolved*, That *Mr. Prynn* ought to be restored to his Degrees in the University of *Oxford*, and to the Society of *Lincolns-Inn*, and to the Exercise of his Profession of an Utter Barrister at Law, and to his Chamber again at *Lincolns-Inn*.

3. *Resolved*, That *Mr. Prynn* ought to have Reparation for such Damages and Prejudice as he hath sustained by the said Sentence and Proceedings.

4. *Resolved*, That the Sentence given against *Mr. Prynn* in the Star-Chamber, *14 Junii 1637. 13 Car.* is illegal, and given without any just Cause, and therefore ought to be reversed; and that he ought to be discharged of the Fine and Imprisonment thereby decreed, and that he ought to have Reparation and Recompence for the Damages sustained by that Sentence, and the Execution thereof.

That the Warrant dated *27 Aug. 13 Car.* for the Transportation of *Mr. Prynn* from *Carnarvan-Castle* to the Isle of *Jersey*, and his Imprisonment there, and other Restraints therein mention'd, are against the Law and Liberty of the Subject, and that he ought to be discharged of that Imprisonment, and to have Reparations for his Damages sustained thereby.

5. *Resolved*, That the Imprisonment of *Mr. Prynn*, by a Warrant dated the 1st of *Feb. 1632.* under the Hands of *Thomas Lord Coventry*, Lord Keeper of the Great Seal of *England*; *Richard Lord Archbishop of York*, *Henry Earl of Manchester*, *Edward Earl of Dorset*; *Henry Lord Viscount Falkland*, *William Lord Bishop of London*, *Edward Lord Newburgh*, and *Sir Thomas Jermin*, is unjust and illegal, and that they ought to give *Mr. Prynn* Satisfaction for the Damages sustain'd by his Imprisonment.

*Proceedings in the Case of SHIP-MONEY between the King and JOHN HAMPDEN * Esq; 1637. 13 Car. I.*

The Speech of Thomas Lord Coventry, Lord Keeper of the Great Seal of England; by Command from his Majesty, to all the Judges of Assize of England, in the Star-Chamber, June 17. 1635.

My Lords the Judges,

THE Term being done and ended, the Assizes are at hand: You are to divide your selves for your several Circuits. Circuits are for the Service of the King and the Good of the People; they are the Execution of the King's Laws, and Administration of Justice. In the Term, the People follow and seek after Justice; but in the Circuit, Justice followeth and seeketh after the People. So gracious is the Frame and Constitution of the King's Government, that twice a Year, at the least, Justice followeth the Subjects home to their own Doors; which, as it is a great Ease to the Trouble, Charge, and Travail of the Country, so it giveth the People a better Knowledge of Justice; and the End of it, that they may bless God and the King for the same.

It hath been the Custom, that before your Circuit you should receive such Directions as the King, or his Council, thinks seasonable to impart unto you, for the Service of the King and Weal of the People: In the declaring whereof, I shall say little of the just Acts you are to do between Party and Party, only that you do equal Right between Poor and Rich; the Particulars are left unto your selves, as they happen in your Circuits. But since you are sent by the King to hear the Causes of the People, it is his Majesty's Pleasure, that you so hear and order the same, that they may have no Cause to complain to his Majesty either for Denial or Delay of Justice.

Of the Trial of Capital Offenders, I shall say as little; that Part of Justice moveth in a Frame, and if all Officers under you did their Parts, you should walk in so strait a Path, that you would find it very hard to tread awry: therefore you had need to heed them narrowly; lest they pervert Justice. Look to the Corruptions of the Sheriffs and their Deputies; the Partiality of Jurors; the bearing and siding with Men of Countenance and Power in their Country. When you meet with any such, your Proceedings ought to be severe and exemplary against them, otherwise Justice shall be overborn, howsoever in your own Persons you bear your selves with never so much Uprightness.

And because the Time of Assize is very short, and expireth in a few Days, it is necessary that you afford as much Time as may be unto those Businesses that are most general, and most concern the Publick; the Trials of *Nisi prius*, and particular Causes, they are in the Number of those

things that are not to be left undone: but those things that concern the general and publick Good, you are to account them as the weightier Matters of the Law; and therefore you are to take them into your prime and chief Care and Cogitation. Now among those, I shall commend unto you in the first Place, The presenting and convicting of Recusants; for as it concerneth Religion, so it hath relation to his Majesty's Profits, which are two great Motives, to which you may add a third, because the King hath many Years since assigned these Forfeitures to the Publick Defence.

In the next Place, I do require you, that you make a strict Inquiry after Depopulations and Inclosures; a Crime of a crying Nature, that barreth God of his Honour, and the King of his Subjects: Churches and Houses go down together. His Majesty knoweth and taketh notice, that according to former Directions given you in this Place, you have given it in Charge to the Grand Inquests to inquire of these things, but to little Effect; and without doubt the Freeholders of England do hate and detest them. Depopulation is an Oppression of an high Nature, and commonly done by the greatest Persons, that keep the Jurors under and in Awe; and that is the Cause there are no more presented and brought in question: but however your Charge and Inquiry, touching this Point, hath not taken effect. worthy his Majesty's Care and your Pains, yet his Majesty willeth, that you do not cease, but inquire on still; for it is his Resolution, against all Opposition, to make all Men see he hath a Care of this overspreading Evil, and of the Means of his People having Churches and Towns demolished, and his People eaten up like Bread, to satisfy the greedy Desires of a few, who do waste as profusely, as they do gather together unconscionably, and bring unto their Posterity that Woe which is pronounced against those that lay House to House, and Field to Field, to dwell alone in the midst of the Earth.

The next thing that I shall mention unto you, is, the rectifying and reforming of Ale-houses and Tippling-houses, and those I account one of the greatest Pests of the Kingdom. First, therefore, let none be enabled to set up or continue without License: There are a kind of People that do take upon them Licenses, Recognizances, or Laws, or what you will, and who have been a great deal the worse, because they see a great Multitude tolerated that have no License; and therefore I give it in charge, to take a Course that none be permitted unless they be licensed: And for the licensed Ale-houses, let them be but a few, and in fit Places; if they be in private Corners and ill Places, they become the Dens of Thieves, they are the publick Stages of Drunkenness and Disorder. In Market-Towns, or in great Places or Roads, where Travellers come, they are necessary.

Next unto this, let those that be licensed be held strictly to it, according to the Law. It hath been observed, and very truly, that in the Taverns, Inns, and Alehouses in *England*, by the Falshood of their Measure, and their unjust Prices, they have drawn more Money from the Guest, than out of the Excise of Ale and Beer are drawn out in *Holland*. A strange thing, that People for a publick Work, for any thing that is good, should be loth to part with any thing, and yet, with open Eyes, to see themselves deceived by such base and leud People.

Next unto this, let Care be taken in the Choice of Alehouse-keepers, that it be not appointed to be the Livelihood of a great Family: one or two is enough to draw Drink, and serve the People in an Alehouse; but if six, eight, ten or twelve, must be maintained by Alehouse-keeping, it cannot choose but be an exceeding Disorder, and the Family by this means is unfit for any other good Work or Employment. I have not Skill enough to understand all the Inconveniences that come from this one ill Fountain, and my Memory will not contain what I have so many times observed of them my self; but your Lordships have a Knowledge and Experience of them, therefore I will leave them unto you: only this, that because in many Places these swarm by the Default of the Justices of the Peace, that set up too many, and there are none (except your selves at the Assizes) all the Year long can meet with this Evil, but the Justices of the Peace. And if the Justices of Peace will not obey your Charge herein, certify their Default and Names, and I assure you they shall be discharged. I once did discharge two Justices for setting up one Alehouse, and shall be glad to do the like again upon the same Occasion.

In the next place, I will commend unto you the Punishment of Vagabonds and Wanderers; to beguile the Alehouses of such unruly Guests; it would make some Way of Amendment to those Alehouses: and it cannot be deny'd, but the Law hath appointed Hands enough to do this Work; the Constable, Headborough, Tything-men, and the rest of the inferior Officers, and the Watchmen, who may do all with a particular Warrant from the Justices of Peace; and the Justices of the Peace are bound to call them to an Account, and to punish them for their Neglect. If this were done, and other Officers were chosen as they ought to be, not People of little Wealth, and as little Understanding, but that they were elected out of the better sort of Yeomanry, and the Watches kept by able Men, I am sure that these loose People that wander up and down will quickly be gone: therefore you may do well to let it be known in the Country, that the Lords of Leet, and those that have the Elections of Constables and Officers, they are, by the Law, answerable for their Choice. There have been Precedents, that where an insufficient Coroner hath been chosen by a County, the whole County hath been answerable to the King for the Coroner's Fault. And if the Lords of Leet, and their Homagers, and those that make choice of the Constables and Officers, were sometimes awakened by soon seizing of their Leets, or Fine, or *Quo warranto*, I make no doubt, but the Country would be better served many Years after, for some such Service done; therefore

I could wish that this were made known unto the Country, that the Lords, and those that choose them, were answerable for their Defaults.

Now for bringing loose People in Order, the House of Correction hath need to be looked unto, and be put in Readiness, that those that are idle may not want Work. *Ducere volentes, trahere nolentes*. And for the Houses of Correction, as it is in some Countries, it were convenient they were placed near the Jail; that not idle Persons only, but the Prisoners of the Jail also might be made to work, and eat the Labour of their own Hands: this, as it hath been formerly, so it is now commended by his Majesty to see it effected so soon as may be.

The binding out of Apprentices is a thing fit to be pressed thro'out all your Circuit. Opposition hath been made against it by some, tho without any Ground or Law: Sometimes the Parents are not willing to leave their Children, tho they have not Meat to feed them at Home; sometimes the Parishioners are not willing to give them Clothes, and those that bind them are negligent; and all these must be overruled and made smart for their Opposition and Neglect.

In a word, you are to call upon all to whom it belongeth, but especially to the Justices of the Peace, to see his Majesty's printed Order be put in Execution. You are to justify your selves, what Justices of the Peace are diligent in it, and who neglect, and so to certify to the Lords of the Council.

I have but one thing more to give you in Charge, and it is a thing of great Weight and Importance; it concerneth the Honour of his Majesty and the Kingdom, and the Safety of both. Christendom is full of War, and there is nothing but Rumours of War: what hath been done of late Years abroad by Fire and Sword, it were a Pity and Grief to think of; yet we have, by the Goodness of God and his Majesty's provident Care, all this while enjoyed a most happy Peace and Plenty. As it is a good Precept in Divinity, so it holdeth in Policy too; *Nunc tua res agitur, jam proximus ardet*: which if we observe, to defend our selves, it would be a Warning to all Nations, and we should be the more assured to enjoy our Peace, if the War Abroad do make us stand upon our Guard at Home. Therefore no question it hath ever been accounted the greatest Wisdom for a Nation to arm, that they may not be enforced to fight; which is better than not to arm, and to be sure to fight. Therefore his Majesty in these doubtful Times, hath not only commanded, that all the Land-Forces of the Kingdom should be set in order and readiness, but to set to Sea a Royal Fleet at his Majesty's great Charge, but with the Assistance of the Maritime Places of this Kingdom.

The Causes and Occasions, and Times of War, with the Preparations and Ordering of them, is proper to the King; and dutiful Obedience in such things does best become the Subject. And yet his Majesty hath vouchsafed, even by his Writ, to declare enough to satisfy all well-minded Men, and to express the Clearness of his Princely Heart, in aiming at the general Good of his Kingdom.

The Dominion of the Sea, as it is an antient and undoubted Right of the Crown of *England*, so it is the best Security of the Land; for it is impregnable so long as the Sea is well guarded: therefore, out of all question, it is a Thing of absolute Necessity, that the guarding of the Sea be exactly looked unto; and those Subjects whose Minds are most fixed upon the Honour of their King and Country, will with no patience endure to think of it, that this Dominion of the Sea, which is so great an Honour, should be either lost or diminished. Besides, for safety sake, the Dominion of the Sea is to be kept, and the Seas guarded. The Wooden Walls are the best Walls of this Kingdom; and if the Riches and Wealth of the Kingdom be respected for that Cause, the Dominion of the Sea ought to be respected: for else, what would become of our Wool, Lead, and the like, the Prices whereof would fall to nothing if others should be Masters of the Seas? There is a Case in the Book of Assize, *Fol. 43.* which putteth me in mind of certain Men that went down into the Country, and carried a Report, that no Wool should pass over the Sea that Year; upon this Wool fell to so low Prices, that the Men that carried the Report were questioned and fined. And now if a Report alone, and that a false one too, wrought such an Effect upon the Wools in *England*, think what would be wrought by a real Loss of the Dominion of the Sea in all our Commodities, if our Trade should be at the Command of other Princes and States. Therefore, as his Majesty, out of his great Wisdom, hath found it expedient to set to Sea that Fleet that is now upon the Sea; so his Majesty being engaged both in his Honour, and the Honour of the Kingdom, he findeth it to be of absolute necessity to strengthen this with a greater Strength and more Shipping the next Year. Therefore, upon Advice with his Council, he hath resolved, that he will forthwith send forth new Writs for the Preparation of a greater Fleet the next Year, and that not only to the Maritime Towns, but to all the Kingdom besides: For since that all the Kingdom is interested both in the Honour, Safety and Profit, it is just and reasonable that they should all put to their helping Hands.

Now that which his Majesty requireth from you, and doth command, is, That in your Charges at the Assizes, and in all Places else where Opportunity is offer'd, you take an occasion to let the People know how careful and zealous his Majesty is to preserve his Honour, and the Honour of this Kingdom, and the Dominion of the Sea; and to secure both Sea and Land by a powerful Fleet, that foreign Nations may see, that *England* is both able and ready to keep it self, and all its Rights. And you are to let them know how just it is, that his Majesty should require this for the common Defence; and with what Alacrity and Cheerfulness they ought, and are bound in Duty, to contribute unto it; that foreign Nations may observe the Power and Readiness of this Kingdom, which will make them slow to contend with us either by Sea or Land, and that will be the best way to confirm unto us a firm and sure Peace.

This is the Substance of all that which I received in Commandment from his Majesty; there are many Things else that concern the Publick, but your Judgments are well versed in them. These are the Particulars I had command to men-

tion unto you, so I will trouble you no further, but leave them to your grave Considerations.

The Speech of Thomas Lord Coventry, Lord-Keeper of the Great-Seal of England, to all the Judges of Assize of England, by Command from the King in the Star-Chamber. Feb. 14. 1636.

Together with the King's Letter and Case, touching Ship-Money, and the Judges Opinions thereupon.

My Lords the Judges,

THE Term being now at an end, and the Assizes at hand, his Majesty hath commanded, That according to the Custom in former Times, so now in this Place you should receive some Directions for the Execution of Justice in all Parts of the Kingdom whereto you resort. This (as it may justly be) is a great Comfort to his Majesty's Subjects, to see his Majesty's Care herein; which as it is a Testimony of their own Happiness, in receiving Justice from the King himself, the Fountain of Justice, so it may as justly add Strength and Encouragement to you when you go your Circuits, not only to be armed with your own Authority by Commission, but with your Prince's Instructions.

In the doing of Justice, you will find Things of several Natures and Degrees: In some Places before you, Communicative Justice beareth sway, as in that which concerns *Meum & Tuum*: In other, Distributive Justice, as in *Premium & Pœnam*; some concern one and a few; others concern the Multitude; others concern the King and all the King's People. In some Pleas Things are brought before you that are *ad nocumentum*, of this or that particular Town; some *ad nocumentum totius Regni*. Some Things are brought before you that are *contra pacem Regis*, and others *contra coronam & dignitatem Regis*; and in this variety of Business, as there are many of a lesser and lower Degree, yet not to be omitted, so you have *Graviora Legis*, upon which you ought to pitch your Mark; *hæc oportet fieri, illa non omitti*.

In that Justice which you are to do between Party and Party, his Majesty doth require you, as in all his Courts here, so in your Circuits to administer impartial Justice, and repress vexatious and wrangling Suits, not worthy the Dignity of your own Persons, and the Court where you sit; for those Actions, as they empty the Spleen on the one side, so they never fail to empty the Purse on both sides.

But besides the doing of Justice between Man and Man, there is much more expected from your Lordships; for the publick Business of the Country is of much more Importance than the Trial of a *Nisi Prius*, and fitting you should esteem them so: And therefore it is his Majesty's Command, That those Services which concern himself and the Publick, may be timely thought of, and not posted off to the End of the Assize.

Now before all Things, the Advancement of Religion and Piety towards God, the Peace of the Church, and the Execution of those Laws that tend to those Ends, ought to have the first Place. As oft as I have had occasion to speak to you here,

here, I have seldom spared to give you a Charge of the Laws against Recusants; and I must reiterate it now: for if you convict them not in the Country, there is likely to be little Reformation, or Profit to his Majesty; and whosoever they be that will not be found in the Church, it behoveth you that you take order they be found in the *Exchequer*.

In the next Place, that you proceed roundly against Capital and Felonious Offenders, especially Robbers on the High-ways, who now march in Troops after a high hand. As a good Judge ought in Court to shew Severity to those in the Jail, also the ablest and activest Men in the County, ought to do their utmost Endeavours for the apprehending of those Offenders as are Abroad; that when you are there or here in the Term, the Service may proceed in a good Way, and you be made a Terror to Malefactors, as some of your Predecessors have been; for if your Care be not great, Malefactors will abound: therefore you must shew a severe and constant way of Justice when they are found, and it will soon abate their Pride, wherewith they now bear up themselves; and fit it is with an unanimous Consent you agree of one Course; for if there be a Remissness in any one Circuit, it leaveth a way to Malefactors to overthrow all Reformation, and Justice is thereby discouraged.

In the next place, Care must be had of those Laws which concern Luxury and Idleness, the suppressing and punishing of Vagabonds, the ordering and employing of Houses of Correction, the suppressing of Ale-houses and Tipling-houses, and binding out of Apprentices. If these were well and constantly observed, they would save many able Bodies that die miserably at the Gallows, and cut off a multitude of Enormities that pester the Commonwealth, and lessen the Number of Thieves and Robbers; and therefore your Lordships should do well to have a special Care of the Execution of those Laws. And this giveth me occasion to put you in mind of those printed Orders published by his Majesty in the Year 1630, wherein at first there was a Direction given for an Account to be made by the Sheriff and Justices of the Peace; this same was orderly kept in divers Places, in others not so well. It was afterwards advised by your selves, that the way of Account should be changed, and that you should receive it at the Assizes, and present it to the Council-Board; yet it is my part to tell you, that it hath not so appeared by the Account that is come to the Council-Table, and it is expected a better be given by you the next Term.

Now in respect the publick Service dependeth much upon the Justices of the Peace in the County, it will be necessary that you cast your Eye upon them, that they give due Attendance at the Assizes: it is their Duty to do it, and yours to enforce it upon them. An Assize lasteth but a few Days, but the Instructions that they may receive from you in that short time, may be of great use for the County for the whole Year: Also that you examine whether they give due Attendance at the Quarter-Sessions. Altho there is an express Article in their Oath that they should give it; I hear many neglect it: Therefore it is a Thing very fitting, and well worthy your Labour, that at the Beginning of every Assize, you trust not to the

Clerk of the Peace his Information, but that your selves do cast an Eye upon his Book, and command him to return the Names of such Justices of Peace as you find by his Book were absent at the Quarter-Sessions. Fit it will be that you let them know, that to prefer a Riding, or Bowling, or Hunting-match, before their Attendance at the Quarter-Sessions, is little less than Perjury; and if your Admonition will not serve the turn, a Remedy shall be taken. In the third Place it is necessary for you to inquire how they attend the Monthly Meetings, or other times of publick Service; for this I am sure of, they are all within one Commission, and have the same Oath, and the same Attendance is imposed upon all; and why the greatest Number exempt themselves, and leave the publick Service upon a few, I know not; but if I may know the particular Men (of which I hope I shall henceforward by your Lordships) I shall rid them out of Commission, and put others in their Places.

My Lords, I have but one Particular more, and that is of great Importance; whereof by special Direction and Command from his Majesty, I am to speak unto you at this time. All of you are the Witnesses of his Majesty's Proceedings, tho the Candour and Clearness of his own Heart exceedeth your Testimony, and your Testimony is not only fit to be declared in this Place, but in all the Places of this Realm.

His Majesty hath now the third time sent forth Writs* to require the Aid of his Subjects for the guarding of the Dominion of the Sea, and Safety of the Kingdom. This his Majesty did upon great Deliberation and Advice, and upon important and weighty Reasons. In the first Year when the Writs were directed to the Ports and Maritime Places, they received little or no Opposition; but in the second Year, when they went generally thro' out the Kingdom (tho by some well obeyed) have been refused by some, not only in some Inland Counties, but in some of the Maritime Places; and Actions have been brought against some that have been employed in the execution of these Writs. I suppose that no Man will expect that *Arcana Regni*, the private Reasons of a Prince, should either upon this or other Occasions be made publick; but so many Reasons as were fit to be opened, were formerly declared by me in this place to you the Judges of this Realm.

The *First* was, That the whole Kingdom is concerned in point of Safety; admitting there were no other Counsel or Attempt against us, but only to interrupt us in the Dominion of the Seas, our most secure and safe Defence, better either than Castles or Forts; which if it be commanded by others, it lays us open to much Peril and Danger.

Secondly, The whole Kingdom is concerned in point of Honour: for it is one of the most antient and honourable Rights of the Crown of *England*, even the Dominion of the Sea. And all Records do shew, how the Kings and People of *England* have ever been careful that this Honour should never perish: and certainly the whole Kingdom is concerned in point of Trade and Profit; for the Traffick does not only enrich the Maritime Parts, but the Inland Towns; and if Trading fail, the Inland Places will find it in the fall of the Prices of Wool, Lead, and other Staple Commodities. This Experience sheweth daily, when upon every Stop of the vent of Cloth, there come such Out-

* See the particular Taxation in *Rush. Col. Vol. 2. p. 453.*

cries by the Weaver, the Fuller, the Spinner and Wool-growers themselves; and the Authority of the Law sheweth the same: 43. in the Book of Assize, which your Lordships know better than I, it appears that certain Men went into the Country, and cast out a Fame, that for that Year no Wool should be transported beyond the Seas; presently upon this the price of Wool fell, and those Men were called in question, and were adjudged in a Fine for it. Now if a Rumour did so much abate the Trade in the Heart of the Kingdom, what would the loss of the Dominion of the Sea do, which exposeth us, and all our Trade, to the Mercy of our Neighbours? Therefore since the whole Kingdom is concerned in point of Honour, Safety, and Profit, what Reason is there but that all should contribute to the Maintenance of it? This, or to the like Effect, I did formerly declare to you the Judges, by his Majesty's Command; and his Majesty received Satisfaction, in that you made a full Declaration thereof in your Circuits: and this I may say, for the most part the Subjects have shewed themselves most dutiful and obedient in this Service of his Majesty; and this Year the Sum imposed upon the County of *York*, being twelve thousand Pounds, is brought in already by the Sheriff, and so is most part of *Lancashire*, and other Shires: but when his Majesty heard of some Refusals, tho he had Cause to be sensible of it, yet he was far from being transported with Passion, but thought good to resort to the Advice of you his Judges, who are sworn to give him faithful and true Counsel in that which pertaineth to the Law; and this his Majesty, as well for the Direction of his own Course, as for the Satisfaction of his Subjects, required you to deliver your Opinions herein, to which you returned an Answer under your Hands. And because the Command which you received from the King, is expressed in a Princely Letter under his own Signature, I shall not take upon me to repeat it, you shall hear it read.

Which being delivered by my Lord-Keeper to one of the Clerks in Court, was read in hæc Verba.

CAROLUS Rex,

TRUSTY and Well-beloved, we greet you well. Taking into our Princely Consideration, that the Honour and Safety of this our Realm of *England*, the Preservation whereof is only intrusted to our Care, was, and is now more nearly concerned than in former Times, as well by divers Counsels and Attempts, to take from us the Dominion of the Sea, of which we are sole Lord and rightful Owner; the Loss whereof would be of greatest Danger and Peril to this Kingdom, and other our Dominions: We, for avoiding these and the like Dangers, well weighing with our selves, that where the Good and Safety of the Kingdom in general is concerned, and the whole Kingdom in Danger, there the Charge and Defence ought to be borne by all the Realm in general; did, for prevention of so publick a Mischief, resolve with our selves to have a Royal Navy provided, that might be of Force and Power, with Almighty God's Blessing and Assistance, to protect and defend this our Realm and our Subjects therein, from all such Perils and Dangers; and for that purpose We issued forth Writs under our Great Seal of *England*, and directed to all our Sheriffs of all our several

Counties of *England* and *Wales*, commanding thereby all our said Subjects, in every City, Town and Village, to provide such a Number of Ships, well furnished, as might serve for this our Royal Purpose; and which might be done with the greatest Equality that could be. In Performance whereof, tho generally thro'out all the Counties of this our Realm, we have found in our Subjects great Chearfulness and Alacrity, which we graciously interpret as a Testimony, as well of their dutiful Affections unto us, and to our Service, as the Respect they have to the Publick, which well becometh every good Subject; nevertheless finding that some few, haply out of Ignorance what the Laws and Customs of this our Realm are, or out of a Desire to be eased and freed in their Particulars, (how general soever the Charge ought to be) have not yet paid and contributed the several Rates and Assessments that were set upon them, and foreseeing, in our Princely Wisdom, that from hence divers Suits and Actions are not unlikely to be commenced and prosecuted in our several Courts at *Westminster*: We, desirous to avoid such Inconveniencies, and out of our Princely Love and Affection to all our Subjects, being willing to prevent such Errors as any of our loving Subjects may happen to run into, have thought fit, in a Case of this Nature, to advise with our Judges, who we doubt not are all well studied and informed in the Right of our Sovereignty. And because the Trials in our several Courts, by the Formality in Pleading, will require a long Protraction, we have thought it expedient, by this our Letter directed to you all, to require your Judgments in the Case, as it is set down in the inclosed Paper, which will not only gain Time, but also be of more Authority to over-rule any prejudicate Opinions of others in the Point.

Given under our Signet at our Court at White-hall, the Second Day of February, in the Twelfth Year of Our Reign. 1636.

This being thus Read, the Lord-Keeper commanded the Case inclosed to be read, being as followeth.

CAROLUS Rex,

WHEN the Good and Safety of the Kingdom in general is concerned, and the whole Kingdom is in Danger; Whether may not the King, by Writ under the Great Seal of *England*, command all the Subjects of this Kingdom, at their Charge, to provide and furnish such Number of Ships, with Men, Victuals and Munition, and for such Time as he shall think fit, for the Defence and Safeguard of the Kingdom, from such Danger and Peril; and by Law compel the doing thereof in Case of Refusal or Refractoriness? And whether, in such a Case, is not the King sole Judge, both of the Danger, and when and how the same is to be prevented and avoided?

The Judges Answer.

May it please Your Most Excellent Majesty,

WE have according to your Majesty's Command, every Man by himself, and all of us together, taken into Consideration, the Case and

and Question, signed by your Majesty, and inclosed in your Royal Letter: And We are of Opinion, That when the Good and Safety of the Kingdom in general is concerned, and the whole Kingdom in Danger, your Majesty may, by Writ, under the Great Seal of *England*, command all the Subjects of this your Kingdom, at their Charge, to provide and furnish such Number of Ships, with Men, Munition, and Victuals, and for such Time as your Majesty shall think fit, for the Defence and Safeguard of the Kingdom from such Danger and Peril: And that by Law your Majesty may compel the doing thereof, in case of Refusal or Refractoriness. And we are also of Opinion, That in such Case, Your Majesty is the sole Judge, both of the Danger, and when, and how the same is to be prevented and avoided.

Jo. Brampton,	Rich. Hutton,	Geo. Vernon.
Jo. Finch,	W. Jones,	Fra. Crawley,
Hump. Davenport,	Geo. Crooke,	Rob. Berkley,
Jo. Denham,	Tho. Trevor,	Fra. Weston.

The said Case, with the Judges Opinions thereunto, (formerly in private deliver'd to his Majesty) being thus publickly made known by my Lord-Keeper, who, withal, caused their several Names to be read, as they were in order subscribed; (all the Judges being present save only Judge Crooke) the Lord-Keeper spake as followeth.

My Lords,

This being the Uniform Resolution of all the Judges of *England*, with one Voice, and set under their own Hands; I say, this being so resolved, as they do here express upon every Man's particular studying the Case, and upon a general Conference amongst themselves, it is of very great Authority: for the very Lives and Lands of the King's Subjects are to be determined by these Reverend Judges; much more a Charge of this Nature, which God knows cannot be burdensome to any, but is of singular Use and Consequence, and for the Safety of the whole Kingdom. The Command from his Majesty is, that I should publish this your Opinion in this Place, and give Order, That it should be entered in this Court, in the High-Court of *Chancery*, and in the Courts of *King's-Bench*, *Common-Pleas*, and *Exchequer*; for this is a Thing not fit to be kept in a Corner: And his further Command is, that You the Judges do declare and publish this general Resolution of all the Judges of *England*, thro' all Parts of the Kingdom, that all Men may take notice thereof, and that those his Subjects which have been in an Error, may inform themselves, or be reformed. You have great Cause to declare it with Joy, and you can hardly do it with Honour enough to the King, that in so high a Point of his Sovereignty, he hath been pleased to descend, and to communicate with you his Judges; which sheweth, that Justice and Sovereignty, in his Majesty, do kiss each other. His further Pleasure is, That you let all know it is not his Purpose by this Resolution to stop, or check, the Actions or Suits which any have brought, or shall bring, concerning this; for it is his Majesty's Command, that all such as proceed in any Action about the same, have equal and meet Justice, and that they be suffered to proceed in Course of Law, so as you call the King's Learned Counsel

unto their Proceedings, that they may not be surprized.

Now, my Lords, I have little more to say, but this I am sure of, that if any contrary Opinion shall yet remain amongst Men, it must proceed from those that are Sons of the Law, (*Felices essent artes*, &c.) and you the Judges of the Realm have been accounted the Fathers of the Law; then, in good Faith, it will ill become the Son to dispute against the Father. Having thus delivered unto You, what I received in Command from his Majesty, as his Majesty doth, so do I, leave it to your Judgments.

By Writ. Of the Term of the holy Trinity, in the 13th Year of King Charles.

Memorandum; that the Writ of our Lord the King under the Seal of the *Exchequer*, by the consent of the Barons here, issued out in these words.

' If Charles by the Grace of God, of *England*, *Scotland*, *France* and *Ireland* King, Defender of the Faith, &c. To the Sheriff of *Bucks* greeting. Whereas several and divers Sums of Money, specified in the Schedule to this Writ annexed, by virtue of our Writ under our Seal of *England*, bearing Date the fourth Day of *August* in the eleventh Year of our Reign, were assessed and charged upon several Persons in the said Schedule named, for and towards the providing of a Ship of War, together with the Rigging and other things thereunto belonging, in the said Writ particularly mentioned; which said several Sums of Money being so assessed and charged, and unpaid and not satisfied, the Names of the said several Persons, together with the several Sums of Money charged upon them, were certified into the Court of our *Chancery* by our Writ of *Certiorari*, bearing Date the ninth Day of *March* in the 12th Year of our Reign, issuing under our great Seal aforesaid: And by our Writ of *Mittimus* under the said Seal, bearing Date the 5th Day of the Month of *May* Instant, were sent into our *Exchequer* for further Process thereupon to be had, as by the Tenor of the said Writ, bearing Date the 4th Day of *August* in the 11th Year of our Reign, and by the Writ of *Certiorari*, and Certificates thereupon made, sent into our said *Exchequer*, and there of Record, remaining in the Custody of our Remembrancer, more fully doth appear: We command you, that you do not, by reason of any Liberty, omit entering thereupon; and by good and lawful Men of your Bailiwick, make known to the several Persons aforesaid, named and specified in the said Schedule, that they appear before the Barons of the *Exchequer* at *Westminster* on the *Octave* of the Holy Trinity ensuing; to shew and propose, if they have or know any thing to say for themselves, why they ought not to be charged with the aforesaid several Sums of Money upon them assessed in manner and form aforesaid, and not paid, in the said Schedule specified, and to satisfy the same; and further, to do and receive in the Premises, what our Court shall then there think fit to be ordered; and there bring then this Writ, and the Names of those by whom you have so made known unto them. Witness *Humphry Davenport* Kt. at *Westminster*, the 22d Day of *May*, in the 13th Year of our Reign. By the Roll.

Memorandum of the same Year of the King in the Record Roll of this *Easter*, and by the Barons *Fenbaw*, and the Tenour of the aforesaid Schedule in the aforesaid Writ mentioned as touching *John Hampden*, followeth in these Words, *viz.* A Schedule of the Names of certain Persons in the County of *Bucks*, and of certain Sums of Money upon them assessed, and charged for and towards the providing of a Ship of War, together with the Rigging and other things thereunto belonging; by the virtue of a certain Writ under the Great Seal of *England*, bearing Date the 4th Day of *August* in the 11th Year of *Charles* our now Lord the King, and certified into the Court of *Chancery* of our said Lord the King to be unpaid, by virtue of a Writ of *Certiorari*, issuing out under the Seal aforesaid, bearing Date the 9th Day of *March* in the 12th Year of his Reign; and by Writ of *Mittimus* under the said Seal sent into the *Exchequer* of our said now Lord the King, for further Process thereupon to be made, as by the Tenour of the aforesaid Writ, bearing Date the 4th Day of *August* in the above said 11th Year of our said now Lord the King, and by the Writ of *Certiorari*, and the Certificates thereupon made sent into the said *Exchequer*, and there of Record remaining in the Custody of the Remembrancer of our Lord the King, more fully doth appear: ff. *Stoake Mandivile*, ff. *J. Hampden Esq;* 1 l. At which Day *Anthony Chester* Bar. Sheriff of the County aforesaid, as touching the aforesaid *John Hampden*, returned, that he by *Nicolas Aris*, *Robert Alexander*, *Richard Harrison*, and *William Heyborne*, good and lawful Men of his Bailiwick, made known to the aforesaid *John Hampden* amongst other things, that he appear before the Barons within written, at the Day and Place within contained; to shew and propose, if he hath or knoweth of any thing to say for himself, why he ought not to be charged with the aforesaid Sum upon him assessed, and not paid, in the said Schedule specified, and to satisfy the same, as it is further commanded him. And now, that is to say, from the Day of the holy Trinity, upon three Weeks the aforesaid *John Hampden* in the aforesaid Schedule named, here cometh in his proper Person, and prayeth Oyer of the Writ of *Sciri Facias* aforesaid, the Return of the same, and the Schedule unto the same annexed, and they are read unto him. He likewise prayeth Oyer of the aforesaid Writ, bearing Date the 4th Day of *August* in the 11th Year of *Charles* our said now Lord the King in the Writ of *Sciri Facias* mentioned, and it is read unto him in these Words, ff. *Charles*, by the Grace of God, of *England*, *Scotland*, *France* and *Ireland* King, Defender of the Faith, &c. To the Sheriff of our County of *Bucks*, the Bailiff and Burgeffes of the Burrough and Parish of *Buckingham*, the Mayor, Bailiff, and Burgeffes of the Burrough of *Chipping-Wicombe* alias *Wicombe*, and the good Men in the said Burroughs, Parish, and their said Members; and in the Towns of *Agmondesham*, *Wendover*, and *Great Marlowe*, and in all other Burroughs, Villages, Hamlets, and other Places in the said County of *Bucks*, greeting. Because we are given to understand, that certain Thieves, Pirates, and Sea-Robbers, as well *Turks*, Enemies of Christianity, as others confederated together, wickedly take away and despoil the Ships, Goods, and Merchandizes,

not only of our Subjects, but also of the Subjects of our Allies upon the Sea, which of old used to be defended by the *English* Nation; and at their Pleasure have carried away the Men therein, enslaving them in a most wretched Captivity: And whereas we see them daily preparing Shipping further to annoy our Subjects, and to aggrieve the Kingdom, unless a more speedy Remedy be applied, and their Endeavours more vigorously obviated: Considering also the Dangers which every where in these Times of War hang over us; so that it behoves us and our Subjects to hasten the Defence of the Sea and Kingdom with all possible Expedition: We being willing by the help of God, in the highest degree to provide for the Defence of the Kingdom, the Protection of the Sea, the Security of our Subjects, the safe Convoy of Shipping and Merchandize coming to our Kingdom of *England*, and going from the said Kingdom to foreign Parts: And since we and our Progenitors, Kings of *England*, have hitherto been Lords of the Sea aforesaid; and it would in the highest manner concern us, if this Royal Honour should in our days be lost, or any ways diminished; since also this Burden of Defence which touches all, ought to be borne by all, as hath been accustomed to be done by the Law and Custom of the Kingdom of *England*: We firmly enjoin and command you the aforesaid Sheriff, Bailiffs, Burgeffes, Mayor, good Men, and all others whomsoever above-mentioned, in the Burroughs, Towns, Villages, Hamlets and Places aforesaid, and their Members, in the Faith and Allegiance whereby you are bound to us, and as you love us and our Honour, as also under the forfeiture of all things you can possibly forfeit to us, that you cause to be fitted out one Ship of War of the Burden of four hundred and fifty Tuns, with Men, as well skilful Officers as able and experienced Mariners, a hundred and fourscore at least; as also with a sufficient quantity of Cannon, Muskets, Gunpowder, Pikes and Spears, and other Arms necessary for War, with double Tackling; as also with competent Victuals for so many Men, until the 1st Day of *March* now next ensuing; and from thence for six and twenty Weeks at your Costs, as well in Victuals, as the Men's Wages, and other things necessary for War by that time, on account of defending the Sea at our Command in Company with the Admiral; to whom we shall before the aforesaid first Day of *March*, commit the Custody of the Sea, to be and remain where he on our behalf shall appoint; and that you cause the same to be brought into the Port of *Portsmouth* before the said first Day of *March*, so that they may be there that Day at farthest; thence to proceed with our Ships, and the Ships of other loyal Subjects for the Protection of the Sea, the Defence of you and yours, to repel and vanquish all those whosoever they are, that endeavour to molest and annoy on the Sea our Merchants and other loyal Subjects aforesaid, coming into our Dominions on account of Traffick, or returning thence to their own Country. We have also appointed you the Sheriff of our County of *Bucks*, the Bailiff and Mayor of the Burroughs and Parish aforesaid, or any two or more of you, of whom our Will is, that you the aforesaid Sheriff of our County of *Bucks* be one, within thirty days after the Receipt of this Writ,

to assess as much of the Charges aforesaid upon the aforesaid Burroughs of *Buckingham* and *Chipping Wiccombe* alias *Wiccombe* with their Members, as ought severally to be laid on or assessed. And if such Assessment within the aforesaid thirty days shall not happen to be made by you, two or more of you; then we have appointed you the aforesaid Sheriff of our County of *Bucks*, to make such Assessment upon the aforesaid Burroughs, and Parish, and Members, as you shall see reasonable to be done. And our Will is, that of your so doing, you the aforesaid Sheriff of *Bucks*, wholly certify under your Seal the Mayor and Bailiffs aforesaid. We have also appointed you the aforesaid Bailiff of the Burrough and Parish of *Buckingham*, to assess every Man in the said Burrough and Parish, and in the Members thereof, and the Land-Tenants in the same, not having the Ship aforesaid, or any Share thereof, or not serving therein, to contribute to the Expences about Provision of the necessary Premises; and to assess and lay upon the aforesaid Burrough and Parish with the Members thereof, so as aforesaid, that is to say, every one of them according to their Estate, Goods, and Employment, and the Portions on them assessed by Distresses, or other due Ways and Means to levy, and Collectors in that behalf to nominate and appoint; and all those whom you shall find rebellious and refractory in the Premises to imprison, there to remain till for their Delivery we shall further think fit to direct. We have also appointed you the aforesaid Mayor of the Burrough of *Chipping-Wiccombe* alias *Wiccombe*, to assess every Man in the same Burrough, and in the Members thereof, and the Land-Tenants in the same, not having the Ship aforesaid, or any Share thereof, or not serving therein, to contribute to the Expences about Provision of the necessary Premises; and to assess and lay upon the aforesaid Burrough with the Members thereof, so as aforesaid, that is to say, every one of them according to their Estate and Goods, or Employment, and the Portions on them assessed by Distresses, or other due Ways and Means to levy, and Collectors in that behalf to nominate and appoint; and all those whom you shall find rebellious and refractory in the Premises to imprison, there to remain till for their Delivery we shall

further think fit to order and direct. And further, we command you all, that you diligently apply your selves to the Premises, and effectually do and execute the same, as you shall answer the contrary at your Peril. But our Will and Pleasure is, not that under Colour of our Mandate aforesaid, you cause to be levied from the said Persons more than shall suffice for the necessary Expences of the Premises; or that any one who shall levy any Money of the Contributors to the Charges aforesaid, detain the same or any Part thereof in his own Possession, or presume to appropriate it to other Uses under any Pretence or Colour whatsoever. It being our Will, that if more shall be collected than is sufficient, that the same be paid back again to those who shall have so paid the same, according to every Man's respective Share and Proportion. Witness my self at *Westminster* the 4th Day of *August* in the 11th Year of our Reign. He prayeth also Oyer of the aforesaid Writ of *Sciri facias* above mentioned, and it is in like manner read unto him. ff. *Charles*, by the Grace of God, of *England*, *Scotland*, *France* and *Ireland* King, Defender of the Faith, &c. To those who were Sheriffs of our County of *Bucks* between the 4th Day of *August*, in the 11th Year of our Reign, and the first Day of *March* then next ensuing, to those who were Bailiffs of the Burrough and Parish of *Buckingham*, and the Mayor and Bailiffs of the Burrough of *Chipping-Wiccombe* alias *Wiccombe*, in the said County of *Bucks* within the time aforesaid, greeting. Whereas by our Writ made under our Great Seal of *England*, bearing Date the aforesaid 4th Day of *August* in the 11th Year aforesaid, for the Defence of the Kingdom, the Protection of the Sea, the Security of our Subjects, and the safe Convoy of the Ships and Merchandize coming to our Kingdom and passing thence to foreign Parts; we commanded the Sheriff of our County of *Bucks*, the Bailiff of the Burrough and Parish of *Buckingham*, as also the Burgeses of the said Burrough, the Mayor and Bailiffs of *Chipping-Wiccomb* alias *Wiccombe*, as also the Burgeses of the said Burrough, and the good Men in the said Burroughs and Parish, and in the said Burroughs and Parish and Members of the same, and in the Towns of *Agmondesham*, *Wendover*, and *Great Marlow*, and in all other Places, Towns, Burroughs, Villages, Hamlets, and other Places in the said County of *Bucks*, that you should cause to be fitted out one Ship of War of the Burden of four hundred and fifty Tuns, with Men, as well skilful Officers, as able and experienced Mariners a hundred and fourscore at least, as also with a sufficient Quantity of Cannons, Muskets, Pikes and Spears, Gunpowder, and other Arms necessary for War, with double Tackling, as also with competent Victuals for so many Men, at a certain Day in the said Writ contained, and from thence for six and twenty Weeks at the Costs of the Men and Land Tenants of the Burroughs, Parish, Towns, Villages, Hamlets, and other Places above mentioned in the said County of *Bucks*, as well in Victuals, as the Mens Wages, and other things necessary for War, by that time, for defending the Sea; and that you should cause the same to be brought into the Port of *Portsmouth* within the time in the said Writ limited. And whereas by the said Writ, we appointed the Sheriff of our County of *Bucks* aforesaid, the Bailiff of the Bur-

rough and Parish of *Buckingham* aforesaid, and the Mayor of the Burrough of *Chipping-Wiccombe* alias *Wiccombe* aforesaid, or any two or more of them, of whom our Will was that the Sheriff of our said County of *Bucks* should be one, to assess as much of the Costs aforesaid, upon the aforesaid Burrough and Parish of *Buckingham*, and upon the aforesaid Burrough of *Chipping-Wiccombe* alias *Wiccombe*, with their Members, as ought severally to be laid on, or assessed. And whereas we appointed the Bailiff of the Burrough and Parish of *Buckingham*, and the Mayor of the Burrough of *Chipping-Wiccombe* alias *Wiccombe*, severally and respectively to assess every Man in the said several Burroughs and Parish, and the Members thereof, and the Land-Tenants in the same, not having the Ship aforesaid or any Share thereof, or not serving therein, to contribute to the Expences about the Provision of the necessary Premises: And upon the aforesaid Burrough and Parish of *Buckingham*, and upon the aforesaid Burrough of *Chipping-Wiccombe* alias *Wiccombe*, so as aforesaid, then to be severally and distinctly laid, that is to say, every one of them according to their Estate and Goods, or Employment, and the Portions upon them assessed by Distresses, or other due Ways and Means to levy, and Collectors in that behalf to nominate and appoint, in Manner and Form as in the said Writ was commanded. And whereas, by our said Writ we moreover appointed the Sheriff of our said County of *Bucks*, to assess every Man in the aforesaid Towns of *Agmondesham*, *Wendover*, *Great Marlowe*, and in the Members thereof, and in all the other Towns, Villages, Burroughs, Hamlets, and other Places in the aforesaid County of *Bucks*, and the Land-Tenants in the same, to contribute to the Expences about the Provision of the necessary Premises, and the other things to do and execute in Manner and Form as by the said Writ was commanded. And because some Men and Land-Tenants in the said County, Burroughs, Parish, Towns, Villages, Hamlets, and other Places, by several Taxations, and Sums of Money, by you upon them respectively laid and assessed towards the Contribution of the Burden aforesaid, according to the Exigency of the Writ aforesaid, have not yet paid and satisfied the same, but have refused and yet gain say to pay the same, as we are informed. And whereas our late Will was to be certified as well of the Names of the Men and Land-Tenants who had been assessed towards the Contribution of the Expences aforesaid, and had not paid the Money so assessed, as also of the several Portions or Sums of Money laid upon them. You nevertheless in contempt of us, have sent nothing upon the Return of our Writ limited. We therefore command you, the late Sheriff of our County of *Bucks*, as we heretofore have commanded you, that you certify to us, as well of the Names of the Men, and Land-Tenants, in the aforesaid County, by virtue of our said Writ by you respectively assessed, as the Sums of Money on them so assessed, which they have not yet paid, nor satisfied, but refuse to pay the same; as also of the several Portions and Sums of Money, by you the aforesaid late Sheriff of our County of *Bucks* upon them assessed, reduced into Writing, with all things touching the same, into our Chancery, distinctly and openly, under your Seals,

without Delay, or at farthest before the six and twentieth Day of *April* next ensuing, whereof ever you shall then be, together with this Writ. And we command you the aforesaid late Bailiff of the Burrough and Parish of *Buckingham*, and the Mayor of the Burrough of *Chipping-Wiccombe* alias *Wiccombe*, as we heretofore have commanded you, that you severally certify us, as well of the Names of the aforesaid Men and Land-Tenants, in the Burrough and Parish of *Buckingham*, and Burrough of *Chipping-Wiccombe* alias *Wiccombe*, by virtue of our said Writ first above mentioned by you respectively assessed, as the Sums of Money on them so assessed, which they have not yet paid, nor satisfied, but refuse to pay the same; as also of the several Portions and Sums of Money by you upon them respectively assessed, reduced in like manner into Writing, with all things touching the same, into our Chancery aforesaid, distinctly and openly without Delay, or at farthest before the six and twentieth Day of *April* next ensuing, whereof ever you shall then be, together with this Writ. Witness my self at *Westminster*, the ninth Day of *March*, in the twelfth Year of our Reign. *ETRE*. At which Day, *Peter Temple* and *Heneage Proby* return'd the aforesaid Writ, by Indorsement, thus, *ff*. The Execution of this Writ appears in certain Schedules to this Writ annexed. The Tenor of which Schedules as to the aforesaid *John Hampden* return'd by the aforesaid *Peter Temple*, follows in these Words: *ff*. *Bucks*, *ff*. *I*. *Peter Temple* Knight and Baronet, who was Sheriff of the County of *Bucks*, that is to say, between the 4th day of *August*, in the eleventh Year of the Reign of our Lord *Charles* now King of *England*, &c. and the twenty second Day of *February* then next following; on which Day I went out of my Office of Sheriff of the County of *Bucks* aforesaid; by virtue of the said Writ of our Lord the King to this Schedule annexed, do certify unto our said Lord the King into his Chancery, that by virtue, and according to the Exigency of the Writ of our said Lord the King issued out of his Chancery, and there inrolled of Record, and, amongst others, directed to the Sheriff of the said County of *Bucks*, bearing Date the fourth Day of *August*, in the eleventh Year aforesaid; have assessed upon several Men and Land-Tenants of the County of *Bucks* aforesaid, whose Names are under-written, the several Portions and Sums of Money at their particulars placed below, to contribute to the Expences about the providing of the Ship in the said Writ mentioned; which said Portions and Sums of Money, or any parcel thereof, before my going out of my Office of Sheriff of the County aforesaid, the said Men and Land-Tenants, or any of them whose Names are under-written, have not paid, but have refused to pay the same to my Hands, or the Hands of the Collector by me in that behalf appointed, by virtue of the Writ last mentioned, *viz*. *Stoake Mandiville*, *ff*. *Mr. John Hampden* Esq; 1*l*. And the Tenure of the other Schedule by the aforesaid *Heneage Proby* in like manner returned, and to the said Writ annexed also, follows in these words: *ff*. *There is to be accounted upon by the Assessors, High Constables, Petty Constables within the said County in general, which cannot be accounted for by Sir Peter Temple, being as it is conceived short four Pounds.*

I Heneage Proby Esq; who was Sheriff of the County of Bucks, between the twenty second Day of February, in the eleventh Year of the Reign of our Lord Charles now King of England, &c. and from the said Day and Year, to the first Day of March then next following; by virtue of the Writ of our said Lord the King to this Schedule annexed, do certify unto our said Lord the King into his Chancery, that the Men and Land-Tenants of the County of Bucks aforesaid, or any one of them whose Names are expressed in certain Schedules to this Writ annexed, who were assessed by Sir Peter Temple Knight and Baronet, late Sheriff of the County of Bucks aforesaid, whilst he was in the Office of Sheriff of the County aforesaid, in the several Portions and Sums of Money placed at their several Names above, to contribute to the Expences about the providing of the Ship; by virtue, and according to the Exigency of the Writ of our said Lord the King issued out of his Chancery, and there inrolled of Record, directed amongst others to the Sheriff of the said County of Bucks, bearing date the fourth Day of August, in the eleventh Year aforesaid, have not paid, but have refused to pay the same to Heneage Proby being Sheriff of the said County of Bucks, next after the going out of Sir Peter Temple Knight and Baronet, from the Office of Sheriff of the said County, or to the Hands of the Collector in that behalf appointed by virtue of the Writ last mentioned. And further, the aforesaid John Hampden in like manner prayeth Oyer of the aforesaid Writ of *Mittimus*, of which mention is made in the Writ of *Sciri Facias* aforesaid, and it is read unto him in these Words: *ff Charles* by the Grace of God, of England, Scotland, France and Ireland King, Defender of the Faith, &c. To the Treasurer and Barons of his Exchequer, Greeting: By the tenor of a certain Writ of ours made under our Great Seal of England, bearing date the fourth Day of August, in the eleventh Year of our Reign, inrolled in the Rolls of our Chancery; by which we commanded the Sheriff of our County of Bucks, the Bailiff and Burgeffes of the Burrough and Parish of Buckingham, the Mayor or Bailiff and Burgeffes of the Burrough of Chipping-Wiccombe alias Wiccombe, and the good Men in the said Burroughs, Parish, and the Members thereof, and in the Towns of Agmondesbam, Wendover, and Great Marlow; and in all other Burroughs, Towns, Villages, Hamlets, and other Places in the said County of Bucks; that for the Defence of the Kingdom, the Protection of the Sea, the Security of the Subjects, and safe Convoy of the Ships and Merchandize coming to our Kingdom of England, and thence going to foreign Parts, they should fit out one Ship of War of the Burden of four hundred and fifty Tuns, with Men, as well skilful Officers, as able and experienc'd Mariners an hundred and fourscore at least; as also with a sufficient quantity of Cannons, Muskets, Gunpowder, Pikes and Spears, with other Arms necessary for War, and with double Tackling; as also with competent Victuals for so many Men, at a certain Day, and from thence for six and twenty Weeks at the Costs of the Men and Land-Tenants of the Burroughs, Parish, Towns, Villages, Hamlets, and other Places above-mentioned in the said County of Bucks, as well in Victuals as the

Men's Wages, and other things necessary for War for that time, on account of the Defence of the Sea under our Command, in Company of the Admiral to be and remain; and that they should cause the same to be brought into the Port of Portsmouth about the time limited in the said Writ; and that they should respectively assess every Man in the said Burrough and Parish of Buckingham, and Burrough of Chipping-Wiccombe alias Wiccombe, and in the rest of the Burroughs, Towns, Villages, Hamlets, and other Places in the said County of Bucks, and the Members thereof, and the Land-Tenants in the same, to contribute to the Expences about the Provision of the necessary Premises, and other things to do and execute in Manner and Form as was commanded by the said Writ: We send to you being present the inclosed Writ; for that the Safety of our Kingdom of England, and our People thereof were in Danger, which we have taken care to have issued out of our Chancery amongst other Writs, to make such Provision and Assessment thro' every County, City, Burrough, Town, Village, Hamlet, and Places of our Kingdom of England, and of Wales, and the Members thereof, out of our Chancery aforesaid lately issuing, and there in like manner inrolled. And also a certain other Writ of ours to certify us into our Chancery, as well of the Names of the Men and Land-Tenants in the aforesaid Burrough and Parish of Buckingham, and Burrough of Chipping-Wiccombe alias Wiccombe, and in the rest of the Burroughs, Towns, Villages, Hamlets, and Places of the said County of Bucks, who by our Command aforesaid were assessed to contribute towards the Provision of the Premises, and have not paid the Sums of Money upon them so assessed; as also of the several Portions and Sums of Money so charged and laid upon the said Men and Land-Tenants; as likewise certain Certificates by virtue of the said Writ reduced in writing, and sent into our Chancery. We also send you being present the inclosed, commanding you, that having inspected the Writs and Certificates aforesaid, you further cause to be done thereupon for the levying, collecting, and receiving all and singular the aforesaid Sums of Money of the aforesaid Contribution as yet unpaid, as by Right, and according to the Law and Custom of our Kingdom of England hath been used to be done. Witness my self at Westminster the fifth Day of May, in the thirteenth Year of our Reign. EYRE. As in the said Writs and Schedules thereunto annexed, certified into the Exchequer of our said Lord the King, and there in the Custody of the Remembrancer of our said Lord the King remaining of Record, more fully is contained. Which being read, heard, and by him understood, the said John Hampden complaineth, that by colour of the several Writs, their Returns and Schedules to them annexed, he hath been grievously vexed and disquieted, and that unjustly; because he saith, that the aforesaid several Writs above mentioned, their Returns and Schedules to them annexed, and the Matter in them contained, are not sufficient in the Law to charge the said John Hampden on or with the payment of the aforesaid Sum of twenty Shillings on him in the Schedule aforesaid, in the manner and form aforesaid taxed and assessed, or any Parcel thereof; to which he hath no necessity,

or is obliged by the Law of the Land to make Answer: Whereupon by reason of the Insufficiency of the aforesaid several Writs above-mentioned, their Returns, the Schedules to them annexed, and the Matter in the said Writs and Schedules contained, he the said *John Hampden* prayeth Judgment, If our said now Lord the King ought, or is willing further to assess or charge him with the aforesaid twenty Shillings, or any Parcel thereof.

ROB. HOLBORNE.

And *John Banks* Knight, Attorney-General of our now Lord the King, who sueth for our said Lord the King, being present here in Court, the same Day in his proper Person, saith, that the aforesaid several Writs, and their Returns, and the Schedules aforesaid to the same annexed, and the Matter in the same contained, are sufficient in the Law to charge the aforesaid *John Hampden* with the aforesaid twenty Shillings upon him assessed in the Form, and for the Cause aforesaid; which said Matter, he the said Attorney-General of our said Lord the King, for and in behalf of our said Lord the King, is ready to verify; and which Matter the aforesaid *John Hampden* doth not deny, nor any wise make Answer thereunto, but wholly refuseth to admit the Verification thereof, and therefore prayeth Judgment; and that the aforesaid *John Hampden* be charged with the said twenty Shillings, and satisfy the same.

JOHN BANKS.

The First Day's Argument of Mr. St. John, on the Behalf of Mr. Hampden, before all the Judges in the Exchequer-Chamber, in the Great Case of Ship-Money.

May it please your Lordships,

PASCH^{xiiij} Car^a a *Sciri Facias* issued to the Sheriff of Bucks, reciting, that whereas several Sums of Money mentioned in a Schedule to that Writ annexed, by a Writ under the Great Seal of England, dated 4^{to} Augusti 11 Car^a sessed upon several Persons for providing of a Ship of War, were not paid: And that upon a *Certiorari* dated 9^{no} Martij 13 Caroli, these Sums and the several Persons upon whom they were assessed, were certified into the Chancery, and from thence by *Mittimus* dated 5^{to} Maij, were sent into the Exchequer, that Process might be issued against these Defaulters: Thereupon the Sheriff is commanded, *Quod sciri faceret* to those several Persons to appear in the Exchequer Octab^a Trinitat^a 13 Caroli, to shew Cause why they should not pay those Sums assessed upon them.

The Sheriff returns, *Quod sciri fecit John Hampden* Esq; who was assessed at 20 s. and he hath not paid it. Mr. *Hampden* hath appeared and demanded Oyer of the *Scir^a fac^a* of the Schedule of the Writ dated 4^{to} Augusti, the *Certiorari* and the *Mittimus*, and of their several Returns, and hath thereupon demurred in Law.

The Writ dated 4^{to} Augusti 11 Car^a because it is the Ground of the issuing forth the *Scir^a fa^a*, and so by necessary Consequence, is that which first occasioned any Process against him, it will be the Subject from whence will be fetch'd all that shall be said either for or against my Client. I will endeavour by breaking it into Parts, more clearly to present it to your Lordships View.

The Thing commanded is, that this County should provide a Ship of War of 450 Tuns, with 180 Men, Guns, Gunpowder, double Tackling, Victuals, and all other Things necessary, and to bring her to *Portsmouth* by the first of *March* following, and from that time to provide her of Victuals, Mariners Wages, and all other Necessaries for six and twenty Weeks. For effecting this, there is Power given to assess each Person within the County *secundum Statum & Facultates*, and to bring in these Sesses by Distress, & quos Rebelles invenirent to imprison their Persons.

My Lords, if the Writ had staid here, and gone no further, the Command tho full in Word, it had been void in Law, because as yet it appears not for what End this Ship was to be provided. 40 *Ass. Plow.* A Commission to seize Mens Goods notoriously suspected of Felony, before Conviction, adjudged void, because therefore the Command, without Cause shewn, and that sufficient in Law too, would be void.

In the second Place therefore they are set down to be these: *Pro Defensione Regni, Tutitione Maris, Securitate Subditorum, & salva Conduetione Navium*, both outward and inward, the Sea being infested with Pirates, and more Shipping being daily prepared *ad Regnum gravandum*; these are the Ends.

In the third Place, the Legality of it, that every Man *secundum Statum & Facultates* should be hereunto assessed, is thus enforced. First from Custom and continued Use, in these Words; That the Sea *per Gentem Anglicanam ab olim defendi consuevit.* And Secondly, this Use proved to be from a common Ground of Equity; *Onus defensionis, quod omnes tangit, per omnes debet supportari*: And the Rule of Equity back'd by the Common Law in these Words, *Prout per legem & consuetudinem Regni Angliæ fieri consuevit.* The Argument stands thus; All have Benefit by Defence of the Realm, and therefore by Law the Charge ought to be born by all.

Then it is further inferred, that every Man, even by his Allegiance, is bound to contribute to this Charge, the Command being *in fide & legiancia quibus nobis tenemini.* Of these Parts the Writ consists, which all being put together, in brief declare the Scope and End of the issuing forth thereof to be the Defence and Safety of the Kingdom; a thing so necessary, that it must needs be legal: For it is too near and too narrow a Conceit of the Wisdom and Policy of the Law to think, that whilst the Care thereof should be confined only to the Preservation of the general Members of the Body Politick from the Wrongs and Pressures that might be offer'd from others to the Fellow-Members, that in the mean time it will leave the whole to the Violence and Will of Enemies: so that whilst each Subject, considered as a part of the whole, hath a known and sure Estate in Lands, and real Property in his Goods, not to be impeached by any whatsoever within the Realm; yet considered altogether as they make the *Unum Compositum*, they should have in them only *precariam Possessionem*, or Tenancy at will in regard of Foreigners. My Lords, this cannot be; for the Law is so careful herein, that even afar off it foresees and prevents all Dangers in this kind; and that is the reason that an Alien, tho a Friend, hath not Capacity to purchase any Land in the Realm. And if the Law be so quick-sighted, as that to prevent but possibility of Danger, it keeps such Strangers from having any Land within the Realm, which desire to

to come by it peaceably and for valuable Considerations; by this we may easily see the great Care it hath to prevent apparent Dangers, which usually proceed from open Force and Violence. Which further appears by the Greatness of the Punishment which the Law inflicts upon Offenders in this Kind, which is High-Treason, of all other the greatest. 13 Eliz. Dyer 298. Story conspired beyond Sea with a foreign State to invade the Realm; and tho nothing was attempted, yet it was adjudged High-Treason. And 21 Ed. 3. fo. 23. and 45 Ed. 3. 25. a Man killed a Captain that was going with twenty Men at Arms to the King in his Wars, and it was adjudged to be High-Treason. And so by some Opinions in Print it is, to burn or sink any of the King's Ships. By the Greatness of the Punishment for the breach of the negative part of the Law, we might understand the Peremptoriness and Force of the affirmative part. So that, my Lords, in this Case the Question is not *de Re*, for by the Law the Safety of the Realm is to be provided for; *Salus Populi suprema lex*: Neither is the Question *de Personis*, either in respect of the Persons who are to bear the Charge of it, or of the Persons whom the Law hath intrusted with the Care and Power of this common Defence.

For the first, that is, the Persons that are to bear this Charge, that in the Writ, *Quod omnes tangit per omnes debet supportari*: The Reasons of the Writ are weighty, and agreeable to the Rule both of the Civil and Common Law, *Qui sentit commodum, sentire debet et onus*: So that I conceive the Burden lies upon all. In respect of our *Bona Naturæ*, our Lives and Persons be equally as dear to one as another: In respect of our *Bona Fortunæ*, so *secundum Statum & Facultates*; because the greater the State and Means of Livelihood, the greater the Benefit by the Defence. The Law in this Case of Defence against the Invasion of living Enemies, being the same with that against our Soil and Ground by the Inundations and Outrages of the Sea and fresh Water; for by the Law, as appears by the Commission of Sewers, as well before the Statute of 28 Hen. VIII. as since, to the repairing of a Bank or Causey, River, or other Sewer, all are chargeable that have *Defensionem, Commodum, vel Salvationem qualitercunque*. All that have Defence must be assessed, the Asses must be equally distributed, and therefore laid upon every Man within the Level, *Pro rata portionis Tenuræ suæ, seu pro quantitate Communis Pasturæ vel Piscariæ*; the more Land, Common, or Benefit of Fishing each Man hath, according to the Proportion thereof the Asses must be. So that, my Lords, in the second Place, the Question will not be, Whether my Client by Law be exempted from the Charge of the Defence of the Realm; for with other his Majesty's Subjects he ought to help to bear the common Burden, and more or less may be laid upon him proportionably to his Estate and Means of Livelihood.

Neither, *Thirdly*, is there any Question to be made, but the Law hath intrusted the Person of his Royal Majesty with the Care of this Defence. The Defence and Protection which we have in our Bodies, Lands, and Goods, against any within the Realm, we know it is from him; for all Jurisdiction legal, both Ecclesiastical and Civil, which defends us in them, is wholly in his Majesty. The same it is in case of Foreign Defence, even by the *Jus Gentium*, as appears in the Text, by the Peoples desiring that they might be like o-

ther Nations, by having a King that might go in and out before them, and fight their Battles. That the King, and that legally, calleth the Kingdom *Regnum nostrum*, and every City and great Town *Civitatem & Villam nostram*: *Quoad Proprietatem* it cannot be, because they are the several Land-Owners; it must be so therefore principally in this respect, *Quoad Protectionem & Defensionem*. Neither hath the Law invested the Crown with this Height of Sovereignty only as a *Honorarium*, for the greater Splendor of it, but likewise as a Duty of the Crown, or *Pars Ministerii*, for the Good and Safety of the Realm, which in many of the antient Commissions of Sewers, before the Statute of 28 Hen. VIII. is thus expressed, The King *ratione Regiæ Dignitatis & per Juramentum est adstrictus ad providendum Salvationi Regni undique*; so that both in Honour, and by his Oath he is bound to provide for the Safety of the Realm, and that *circumquaque*.

My Lords, by the Law the King is *Paterfamilias*, which by the Law of *Æconomicks* is, not only to keep Peace at Home, but to protect his Wife and Children, and whole Family from Abroad. It is his Vigilancy and Watchfulness that discovers who are our Friends and who are our Foes, and that after such Discovery first warns us of them, for he only hath Power to make War and Peace.

Neither hath the Law only entrusted the Care of Defence to his Majesty, but it hath likewise, secondly, put the *Armat^{us} Potestas* and Means of Defence wholly into his Hands: for when the Enemy is by him discovered and declared, it is not in the Power of the Subject to order the Way and Means of Defence, either by Sea or by Land, according as they shall think fit; for no Man without Commission or special Licence from his Majesty, can set forth any Ships to Sea for that purpose; neither can any Man without such Commission or Licence, unless upon sudden coming of Enemies, erect a Fort, Castle, or Bulwark, tho upon his own Ground; neither, but upon some such emergent Cause is it lawful for any Subject, without special Commission, to arm or draw together any Troops or Companies of Soldiers, or to make any general Collections of Money of any of his Majesty's Subjects, tho with their Consent.

Neither, in the third place, is his Majesty armed only with his primitive Prerogative of *Generalissimo* and Commander in Chief, that none can advance towards the Enemy until he gives the Signal, nor in other manner than according to his Direction; but also with all other Powers requisite for the full Execution of all things incident to so high a Place, as well in Times of Danger as of actual War. The Sheriff of each County, who is but his Majesty's Deputy, he hath the *Possessio Comitatus*; and therefore it must needs follow, that the *Possessio Regni* is in himself.

My Lords, not to burn Day-light longer, it must needs be granted that in this Business of Defence, the *Suprema Protestas* is inherent in his Majesty, as Part of his Crown and kingly Dignity. So that as the Care and Provision of the Law of England extends, in the first place, to Foreign Defence; and, secondly, lays the Burden upon all; and, for ought I have to say against it, it maketh the Quantity of each Man's Estate the Rule whereby this Burden is to be equally proportioned upon each Person: So likewise hath it,

in the third Place, made his Majesty sole Judge of Dangers from Foreigners, and when and how the same are to be prevented; and, to come nearer, hath given him Power by Writ under the Great Seal of *England*, to command the Inhabitants of each County to provide Shipping for the Defence of the Kingdom, and may by Law compel the doing thereof.

So, my Lords, as I still conceive, the Question will not be *de Persona*, in whom the *Suprema Potestas* of giving the Authorities or Powers to the Sheriff, which are mentioned in this Writ, doth lie, for that is in the King: But the Question is only *de Modo*, by what Medium or Method this Supreme Power, which is in his Majesty, doth infuse and let out it self into this Particular; and whether or no in this Case such of them have been used, as have rightly accommodated and apply'd this Power unto this Writ in the intended Way of Defence: For the Law of *England*, for the applying of that Supreme Power which it hath settled in his Majesty to the particular Causes and Occasions, hath set down a Method and known Rules, which are necessarily to be observed.

In his Majesty there is a twofold Power, *Voluntas* or *Potestas Interna* or *Naturalis*, and *Externa* or *Legalis*, which by all the Judges of *England*, 2 Ric. III. fo. 11. is expressed *per Voluntatem Regis in Camera*, and *Voluntatem Regis per Legem*.

My Lords, the Forms and Rules of Law are not observed in this Case; this Supreme Power not working *per Media*, it remains still in himself as *voluntas Regis interna*, and operates not to the Good and Relief of the Subject that standeth in need. To instance; his Majesty is the Fountain of Bounty; but a Grant of Lands without Letters Patent transfers no Estate out of the King, nor by Letters Patent, but by such Words as the Law hath prescribed. His Majesty is the Fountain of Justice; and tho all Justice which is done within the Realm, flows from this Fountain, yet it must run in certain and known Channels. An Assize in the *King's-Bench*, or an Appeal of Death in the *Common-Pleas*, are *coram non Judice*, tho the Writ be by his Majesty's Command; and so of the several Jurisdictions of every Court. The Justice whereby all Felons and Traitors are put to Death, proceeds from his Majesty; but if a Writ of Execution of a Traitor or a Felon be awarded by his Majesty without Appeal or Indictment preceding, an Appeal of Death will lie by the Heir against the Executioner. If the Process be legal and in a right Court, yet I conceive that his Majesty alone, without Assistance of the Judges of the Court, cannot give Judgment. I know that King *John*, *Henry III.* and other Kings, have sat in the *King's-Bench* and in the *Exchequer*, but, for ought appears, they were assisted by their Judges: This I ground upon the Book Case, 2 Ric. 3. fo. 10, 11. where the Party is to make Fine and Ransom at the King's Will and Pleasure. This Fine by the Opinion of the Judges of *England*, must be set by the Judges before whom the Party was convicted, and cannot be set by the King. The Words of the Book are thus: *In Terminis & non per legem per se in Camera sua, nec aliter coram se, nisi per Justiciarios suos, & hoc est voluntas Regis, scilicet per Justiciarios suos & per legem suam*, to do it.

And as without the Assistance of his Judges, who are his settled Council at Law, his Majesty

applies not his Laws and Justice in many Cases; neither is this sufficient to do it without the Assistance of his great Council in Parliament. If an erroneous Judgment was given before the Statute of 27 Eliz. in the *King's-Bench*, the King could not relieve his grieved Subject any way but by Writ of Error in Parliament: neither can he out of Parliament alter the old Laws, or make new, or make any Naturalizations or Legitimizations, nor do some other things: And yet is the Parliament his Majesty's Court too, as well as other his Courts of Justice: It's his Majesty that gives Life and Being to it, for he only summons, continues and dissolves it, and he by his *le Veut* enlivens all the Actions in it; and after the Dissolution of it, by supporting his Courts of Justice, he keeps them still alive, by putting them in Execution. And altho in the Writ of Waste, and in some other Writs, it is called *Commune Concilium Regni*, in respect that the whole Kingdom is representatively there; and, secondly, that the whole Kingdom have Access thither in all things that concern them, other Courts affording Relief but in special Cases; and, thirdly, in respect that the whole Kingdom is interested in, and receives Benefit by the Laws and Things there passed: Yet it is *Concilium Regni* no otherwise than the Common Law is *Lex Terræ*, that is, *per modum Regis*, whose it is, if I may so term it, in a great Part, even in point of Interest, as he is the Head of the Commonwealth, and whose it is wholly in Trust for the Good of the whole Body of the Realm; for he alone is trusted with the Execution of it. The Parliament is the King's Court, and therefore in the Summons the King calls it *Parliamentum nostrum*. So the Returns of the Knights and Burgeses, *Quod sint ad Parliamentum Domini Regis*. *Fleta Lib. 2. Cap. 2. Habet Rex curiam suam in concilio suo in Parliamentis suis*; and therefore the Pleadings there antiently were usually wont to begin for the most part, *Queritur Domino Regi*; of Petitions by private Persons, *Supplicavit Domino Regi*, tho for Relief against others. Inquisitions and *Venire fac'* returnable there sometimes *Coram Domino Rege & Concilio suo*, as appears by infinite Precedents in the Parliament-Pleas of *Edward the First* and *Edward the Second's Time*, both in the *Tower*, and many Cases adjourned into the *King's-Bench*.

The Patents pass'd by Authority of Parliament, and likewise the Acts of Parliament, had antiently so much of the King's Name and Style in them, that as it appears in the Prince's Case in the eighth Report, it was a hard matter, otherwise than by Circumstances, to know whether they had any thing of the Parliament in them or not. And from those Times even until now, the Alteration is nothing in Substance, for the Acts for the most part are thus: *It is enacted by our Sovereign Lord the King, with the Assent of the Lords Spiritual and Temporal, and Commons*. The King both then and still is *Pars agens*, the rest are but *Consentientes*.

My Lords, to apply all to the Case in question: By the Cases before cited it appears, that what was done in Parliament by the Law-Phrase and Dialect, is said to be done by the King; for as the Civilians say of the Senate, that it is *Pars Corporis Caesaris*, so we of the Parliament, that it is *Pars Corporis Regis*. The Maxim of *Justinian*, *Quod Principi placet legis vim habet*, is agreed by *Bracton* and all the Civilians. And yet both he and many of them say, that those must pass the Senate, and tho done in the Senate, yet they be *Placita Principis*.

cipis. So it is, altho when we speak *ut Vulgus*, we say Fines are said to be set by the King's Court; yet the Law, when it saith that they be done and set, saith they be done and set by the King. By the same Reason therefore, tho when we speak *ut Vulgus*, we say such a Thing is done by the Parliament, yet in the legal Account these are done by the King; the *Medium*, or Way of doing of them, is with the Assistance or Consent of his great Council in Parliament.

The second thing which I observe is this: By the Cases before cited it appears, that without the Assistance in Parliament, his Majesty cannot in many Cases communicate either his Justice or his Power unto his Subjects.

Hence, thirdly, it necessarily follows, as I conceive, that the kingly Dignity doth most appear and manifest it self there; which was the Opinion of all the Judges of *England*, declared in a Parliament 34 *Hen. VIII.* as appears by *Crompton's Jurisdickt. fo. 10.* who by the King's Commandment meeting together about Point of Privilege of Parliament, the King afterwards in declaring of their Opinions, doth it in part of the Case in these Words: *Further, We be informed by our Judges, that we at no time stand so highly in our Estate Royal, as in time of Parliament, wherein we as Head, and you as Members, are conjoined and knit together in one Body Politick.* Which Declaration of it shews likewise that it was the King's own Opinion, that he at no time stood so highly in his Estate, as in the Time of Parliament.

It appears not by the Record, that this Writ, which giveth Power to sell and alter the Property of the Defendant's Goods, issued from his Majesty sitting in his Estate Royal in Parliament, and therefore cannot be intended by your Lordships and the Court so to do. If therefore it hath issued from his Majesty in the *Chancery*, otherwise than in Parliament, where he stands in the Height of Sovereignty and Perfection, that he hath not so much as a *Posse nocere*; the Question is, Whether it be erroneously issued, yea or no.

My Lords, I have now put the Case, which altho in this particular Case it concerns the Defendant only; yet in Consequence, as it appears, it concerns both his Majesty and the whole State, and that in Matters of the greatest and highest Nature possible. His Majesty is concerned in the Way and Manner of Execution of the highest and greatest Trust which the Law hath reposed in him, the Safety and Preservation of the Kingdom; the Subject is concerned in that, wherein he is most tender, in the Property of what he hath.

My Lords, the Greatness and Weight of the Case puts me in this *Dilemma*: Not to argue it, were to deny that full Submission to the Command of some of your Lordships that are sitting in the Court, neither should I do my Client that Service which he expects. If I proceed, the Case is too weighty and too great for me to argue. But I know the safest way is Obedience, and that the Court cannot expect much from me. Having therefore already put the Case, I will go on in the next Place to state it, and afterwards to argue it.

The Question being concerning the Validity of the Command in the Writs, which extends so far as to the altering of the Property of the Subjects Goods without their Consent; and yet this

being for a Thing so necessary as the Defence of the Kingdom both at Land and Sea; for the Ends of issuing forth of the Writ are, *Pro Defensione Regni, Tutitione Maris, Securitate Subditorum, salva Conduetione navium*, both outward and inward.

In the stating of this great Question, I will in the first place endeavour to present your Lordships those known and undoubted Ways and Means, whereby the Law hath provided for the Defence of the Realm both at Land and Sea, without the Way in the Writ.

The first whereof is by Tenure of Lands. The Services which hereby grow due are of two sorts; Service in Kind, which tends immediately to Action in Times of War, some whereof are for Land-Service, and some for Sea-Service. The second are such as supply his Majesty for that purpose.

The second Way is those many Prerogatives which the Law hath settled in the Crown, and made peculiar unto it for the Defence of the Kingdom in general.

The third is the particular Supplies of Money for the Defence of the Sea alone in Times of Danger, both ordinary and extraordinary, the Thing principally intended in the Writ. These, my Lords, will be the Materials, whereupon afterwards I shall state the Question.

In that of Tenure, I shall begin with the Service, and those which tend immediately to Action in Times of War.

The Kings of this Realm, as they are the Head of the Commonwealth in general, so are they the Head and Root from whence all Tenures spring; for as our Books agree, all the Lands within the Realm are held mediately or immediately of the Crown. As therefore the Law hath appropriated the Defence of the Kingdom to the Kings thereof, so hath it, as one of the principal Ways for effecting thereof, trusted them with the Reservation of such Tenures, as might serve for that Purpose.

Amongst which, intending first to speak of Land-Service, I will begin with the Tenures of Knights-Service; every Man that holds by this Service, from a whole Knight's Fee to any part thereof, ought to find a Man completely armed for the War. Neither doth the finding of Arms satisfy this Tenure; for he that holds by a whole Knight's Fee, ought to be forty Days in the Service; and he that holds by a Moiety of a Knight's Fee twenty Days; and so in proportion. In the Books of the Knight's Fee of *Hen. II. Edw. I.* and *Hen. VIth's* times, in the *Exchequer*, it appears, that there were many thousand Knights Fees held of the Crown. And in the *Red Book* it is said, that it was *in ore omnium*, that in the Conqueror's Time there were thirty Thousand held of him: some since have computed them to three-score Thousand, which perhaps may be with the Addition of those that were held of common Persons, which are not of those upon which I shall insist.

But it may be objected, that in respect these Services are reserved by the King, that therefore they were not instituted only for the Defence of the Realm, but may be exacted for foreign Wars, or other-where for his Majesty's peculiar Service, as he shall think fit: which may be inferred both from the Name which our old Books and Deeds style

style this Service by, when due to the Crown, that is, *forinfecum servitium*; and, secondly, from the Use thereof, it having been performed in Normandy, Gascoyne, Tholouse, and Ireland, as appears by the Red Book, and many Cases put together in the Institutes, in the Chapter of Escuage.

To the first Objection of the Name, the Answer is clear; for antiently, when those that held immediately of the Crown by this Service, did infeoff others of the Land so held, desiring to free themselves of the Burden of this Service, besides the Service which they reserved to themselves, they likewise commonly in the Conveyance, made Provision for their own acquittal against the King, and the Feoffee took the whole Burden thereof upon himself: and therefore in the Book of Knights Fees of Hen. II's Time, in so many hundred Certificates of those that held immediately of the King, William London of Wilts certifies thus; *Quod nullum Militem habeo Feofatum, sed debeo defendere feodum meum per servitium Corporis mei*. Of this Nature are three or four others. All the rest after certifies, by how many Knights Fees he holds: then likewise he certifies that *Defendit*, &c. of the King by such and such *Milites Feofatos*. And in these Deeds of Feoffment, after the Reservation to the Feoffor, was this Clause; *& faciend' inde*, sometimes *Forinfecum servitium*, sometimes *Regale servitium*. Bract. lib. 2. fol. 36, 37. and Fleta. lib. 3. cap. 14. saith, that it is called *Regale servitium, quia est servitium Domini Regis*; and by them *Regale servitium*, and *servitium Domini Regis*, are all one and the same thing. To that therefore I shall need to give no further Answer. By the same Authors it is called *Forinfecum, quia capitur foris sive extra servitium, quod fit Domino Capitali*; and that is the meaning of the Word: and that it is called *Forinfecum*, in regard the Service is to be done *Foris*, that is, out of the Kingdom, is cleared to your Lordships by these Cases, P' 49 Hen. III. Com. 31 Ed. 1. Rot. 32. Dorf. Com. Hil. 33 Ed. 1. Rot. 52. Dorf. Cornage, which we know is to wind a Horn within the Realm, in all those three Cases is called *servitium Forinfecum Domini Regis Cornagij*; and *Castleguard* in the County of Northumberland, at the Castle of Bamburgh, called *Forinfecum servitium Domini Regis*.

To the second Part of this Objection, that this Service hath been often performed beyond Sea; for the present I shall give Answer thereunto but in part, by telling your Lordships, without making Proof thereof, that Escuage, which is all the Penalty that lies upon the Tenant for his Default, cannot be assessed but in Parliament; which, if it be so, proves that the King cannot command this Service, otherwise than for the Good and Defence of the Realm, in regard that if it be otherwise, no Escuage can be assessed without consent in Parliament; which by intendment, according to the good the Kingdom is likely to receive by the Service, will proportionably lessen or increase the Escuage.

My Lords, That this Service was instituted for the Defence of the Realm, appears by the Care the Law hath always taken for the Increase and Preservation of these Services; so that if the Lord purchase part of the Land, yet the whole Service remains; which being entire, and to be done by the Body of a Man, in that of being a Steward or Bailiff, or other private Service, makes an Extinguishment of the whole. The Authorities in Point are many; the Statute of Mortmaine 7 Ed. I.

the Mischief by conveying Lands to Houses of Religion is there expressed to be, *Quod servitia quæ ex hujusmodi feodis debentur, & quæ ad defensionem Regni ab initio provisæ fuerunt, indebite subtrahantur*. And besides the Declaration that they are for the Defence of the Realm, that Statute likewise promises for the Increase of them; for if the Lord enters not within a Year and a Day after the Feoffment, the King is to enter; and as the Words of the Statute are *alios inde feoffavimus per certa servitia nobis inde ad defensionem Regni nostri facienda*, the Words are observable, *per servitia nobis inde facienda*; for tho the Service be to be done to the King, it is to be done *ad defensionem Regni*. This explains the Charter of Hen. I. inrolled in the Red Book in the Exchequer, and cited in Mat. Paris, in the first Leaf of Hen. I.'s Reign; where the King frees Knights-Service Lands from all Gelds and Taxes; that being eased of this Burden, *apti & parati sint ad Servitium meum, & ad defensionem Regni mei*. In the Black Book in the Exchequer, fo. 3. Scutage is thus defined, *ut inveniente in Regnum hostium machinatione*, it is then due: see Bracton in his second Book fol. 36 and 37. that they are so, *Propter exercitum & Patriæ tuitionem*, and to be performed *certis temporibus cum casus & necessitas evenerit*. Bract. fol. 162. Les Fees de charitre fuerunt purveans ad defence de notre Realme. The Books are express, the 35 Hen. VI. 41. 8 R. fol. 105. Talbot's Case, 6 Rep. fo. 2. Bruerton's Case, Institut. pl. 103. Co. Preface to the ninth Report.

For the further clearing of what is said already, and what I am to add, it is observable, that these Services are not created *ex provisione hominum*, but *ex provisione legis*; for as it is in 33 Hen. VI. 7. and sixth Rep. fol. 7. Wheeler's Case, if the King grants Land without reserving any Service at all, or *absque aliquo inde reddendo*, the Patentee shall hold the Land by Knights-Service *in Capite*. The Book of 24 Ed. III. 65. Stamford Prerogat. fol. 10. Institut. pl. 73. it's said, the first Kings of this Realm had all the Lands of it in their own Hands; which appears likewise by this, that all the Lands within the Kingdom are held mediately or immediately of the Crown. In the transferring of these Lands to the several Inhabitants, we see, by the Cases before cited, that the Care and Provision of the Law was, that all should by Tenure of the Crown be made liable to the Defence of the Kingdom. I shall briefly therefore shew how the Kings of this Realm have executed the Trust for the Defence both of Land and Sea.

And first, a little further to prosecute the Land-Service, because the Tenure by Knights-Service ties the Tenant only to forty Days Service, and that for the Defence of the Realm only in general; they therefore reserved divers other Tenures for particular and certain Services; as Grand Serjeanties, some whereof, as in the Institutes, fol. 106. is observed were for Service of Honour in times of Peace; and some for Military Service, of which last sort, as appears in the Book of Serjeanties in the Exchequer, and many Rolls of them in the Tally-Office, were very many; some whereof were to carry the King's Banner, some to summons the Tenants *ad exercitum*, some to be of the Vanguard, some of the Rear; some to serve in Wales, some in Scotland, some *infra quatuor maria*, some *infra Cinque Portus Angliæ*. Of these are Services of all sorts necessary for an Army; and in respect of the Multitude of these Military Serjeanties over others, as forgetting them, Brit. fol. 164. in his Defini-

Definition of Grand-Serjeanty, saith, that they are *Pur defence del Royalmé*; and *Pleta lib. 3. cap. 16. Magna Serjeantia Regem tantum respiciunt & Patriæ defensionem*. Besides the Grand-Serjeanties, of this Nature likewise are the Tenure of Cornage, to give warning of the Enemies coming into the Kingdom, and the Tenures by *Castle-Guard*: These by *Littleton* were eleven Thousand, to defend the Castles when the Enemy enters the Realm, within Forts and Bulwarks of the Realm. Mr. *Camden* p. 515. observes, there were 1115 in Henry II.'s Time, whereof a great part, and especially such as were upon the Sea-Coasts and Frontiers of *Scotland* and *Wales*, the Places of greatest danger, were the King's. And besides these Grand-Serjeanties that were to be perform'd by the Bodies of Men, there are Petty-Serjeanties for finding of Armour of all sorts for the War.

My Lords, That the former Kings did execute this Power of Tenures for the Defence of the Realm, according to the Trust the Law reposed in them, appears further in this, that in the Places of greatest Danger there ever were most of them. All along the Sea-Coasts of *Kent* and *Sussex*, nearest of all others to *France*, are the Cinque-Ports, which for their Sea-Service have all the Jurisdiction within themselves, that the Inhabitants for weakening these Parts, might not be compelled to travel out of them for any Matters of Justice, and divers other Privileges; both to invite the People to live there, and to encourage them to the Defence of those Parts. And *Dover* Castle, the Key of the Kingdom, as of greatest Consequence, so hath it two hundred Tenures by *Castle-Guard*, wanting very few, besides divers Tenures for the repairing of the Castle; which appears by the Record called the *Quire of Dover*, remaining in the *Exchequer*; which that it is a Record, and determines the Service of the Cinque-Ports, as *Doomsday-Book* doth the Tenures of antient Demesne, appears in *Comm' 27 Edw. I. Rot. 35.* and by another Record added to that *Quire of Dover*, 20 *Edw. IV.* it likewise appears, that in the time of War the King is to maintain in that Castle, one thousand Foot, and one hundred Horse. Next, to come to the Borders of *Scotland*, there we find the Franchisement of the Bishoprick of *Durham*, instituted likewise for that Purpose, for the Defence of those Parts; which *William* the Conqueror, as *Malmf. fo. 157.* observes, first made a County Palatine, and *Walthe* Bishop thereof, *Ducem pariter & Episcopum, ut refrænarét Rebellionem Gentis gladio, & reformaret mores eloquio*. And besides all this, in all the Counties of *Cumberland*, *Northumberland*, and *Westmoreland*, are more such Tenures for the Defence of the Realm, than in any of the Inland Counties, and those likewise most proper for Bodies. *Com. Pa. 31 Edw. I. Rot. 32.* It's there found by Inquisition returned into the *Exchequer* out of Parliament, that every Lord of a Town within the County of *Northumberland*, held by Cornage when the Scots entred the Realm. Mr. *Camden* in his *Britannia*, pag. 794, and 799. mentioning the great Number of Petty-Baronies and Castles all along those Marches, which *Brit. fol. 87.* and *Instit. fol. 73.* say were instituted for the Defence of the Realm; observes here likewise the Policy of the Law, and likewise in the many Serjeanties there, in advancing of the King's Army, to be of the Vanguard, and in the Retreat in the Rear, those People best knowing the Ways and Passages of the Country.

VOL. V.

Whence, my Lords, when we come to the Marches of *Wales*, there we find another County Palatine, I mean that of *Chester*, and the Care of *Chester* and his Barons to oppose the *Welsh* Invasions upon these Marches; besides the like Services, as upon the Borders of *Scotland*, there were likewise many Lords Marchers of several Baronies, who had Administration of all Justice within themselves, *secundum legem Marchiæ*: and for their Service to be done against the *Welsh*, they had two special Privileges, that is, the third Penny of all the Spoils in the War, as was adjudged in Parliament, the 20 *Edw. I. Banc. Regis Rot. 123.* in that great Case between the Earls of *Glocester* and *Hereford*, and in the Parliament Book, 20 *Edw. I.* And, Secondly, all the Prisoners that they took in the Wars, *per consuetudinem Marchiæ*, belonged to the Takers of them. *Trin. 25 Edw. I. Rot. 28. Co.* Roger de Kownwell, in *partibus Montgomery, in guerra Walliæ*, 23 *Edw. I.* had taken three *Welsh* Prisoners; and because, by the King's Command, they were released of their Imprisonment, it is there adjudged, that the King should pay him forty Pounds in Recompense thereof. And so it was adjudged, *Com' Hil. 25 Edw. I. Rot. 11. dorf.*

My Lords, His Majesty is in the actual Possession of these Military Services, by taking the Profits of Wards, Marriages, Releases, Licenses, Forfeitures for Alienations, and *primer seisin*, as Fruits of them.

That the Profits of Wards and Marriages are to be spent in Wars, for the Defence of the Realm as well as for the bringing up the Ward, the Books are, 35 *Hen. VI. 41. Brit. 162.* That the King receives the Profits, because he is not able to do the Service. If the King's Ward was within Age, when the Tenants were summoned *ad exercitum*, he paid no Escuage, as is adjudged, *M. 20 Edw. I. Rot. 9. & 20. Comm' and M. 23 Edw. I. Br. irrot.* So it is for Reliefs and Licenses; and Forfeitures of Alienation of the King's Tenant without his Consent might not be altered; and for *primer Seisin*, the King was to receive the Profits till the Tenant, by his Homage, had assured the King of his Service; the Summons always commanding him to be at the Place of Rendezvous, *in fide & homagio quibus nobis tenemini*. All these things being but Fruits that fall from these Military Services.

My Lords, Now to come to the Sea-Service, the Care and Execution of this Trust by Tenures, was extended likewise to the Defence of the Sea. The Town of *Lewes* in *Sussex* holds by this Service, *quod si Rex ad mare custodiend' suos mittere voluisset*, they paid so much Money, *& hos habebant qui in navibus arma custodiebant*. This, my Lords, is in *Doomsday-Book*, in *Colchester* every House to pay 6 d. per ann. *ad victum Soldior' Regis, ad expeditionem terræ vel maris*. *Warwick*, *Si Rex per mare contra hostes ibat*, the Town was to find four Boatswains. *Salisbury*, then to pay so much Money, *ad pascendum Bussecorlos Domini Regis*, which, as *Florentius* explains the Word, be *Ministros Nauticos*. *Glocester*, and other Places, such a Weight of Iron, *ad Claves navium Regis*. Others, to find Horses to carry Armour and Weapons to the Ships. My Lords, of this Nature are many in that Book, which particularly to mention, to gain Time, I will omit.

That the Tenures of this kind after the Conqueror's Time, continued in Use, and were well

P known

known, appears by the Register fo. 2. where, amongst other Services, is this of Shipping also instanced in these Words; *Quod clamat tenere de nobis per liberum servitium inveniendi nobis quinque Naves per annual' Servitium*. In the Iter-Roll of Essex, 13 Edw. I. Rot. 7. it is presented that the Town of Maldon tenet per Serjeantiam inveniendi unam navem quodocunque Rex necesse habuerit ire vel mittere propter negotium Regni. And from the Time they came to the Place of their Rendezvous, to stay in the Service forty Days, *sumptibus propriis*. And being there presented, that they made Default at the Welsh War, they plead they had no Summons.

So, my Lords, in the Book of Serjeanties of Edward the First's Time, in Kent, the Town of Killingborne is to find one Ship; and in the County of Berks, Fulke Caudry holds the Mannor of Padworth, per Serjeantiam inveniendi servientem to perform Sea-Service, *Bract.* 20. 8 Edw. II. Rot. 40. William Dier, in the County of Sussex, to find a certain Proportion of Cordage. *Iter Cantuar.* 21 Edw. I. Rot. 46. Solomon de Campis holds per Serjeantiam tenendi Caput Domini Regis, when he is at Sea, *si necesse fuerit*; and so Rot. 30. another in the same Iter-Roll. The Cinque Ports and their Members are to find twenty Men, and a Master, *bene armatos & bene ariatos*; from the Time that they come to their Rendezvous, they are to continue in the Service fifteen Days, at their own Charge, and afterwards so long as the King pleaseth; but after the fifteen Days, the King is to pay the Master 6 d. a Day, and the rest 3 d. a Day for their Wages. This Service appears by the Record of the Quire of Dover beforementioned, and the Patent Roll 7 Hen. VII. both which Records imply, that this Service of theirs cannot be exacted, otherwise than for the Defence of the Sea; for it cannot be demanded but once in a Year, nor then neither, *nisi necesse fuerit*. *Parl. Pet.* 1 Edw. III. Rot. 4. the Barons of the Ports, in consideration of this Sea-Service, pray a Confirmation of their Liberties, *pro salvatione dicti Navigii & Regni*; and commonly when the Land-Service was summoned, these were likewise summoned to the same Service at Sea, as appears by the close Rolls, 28 Edw. I. M. 15. 31 Edw. I. and 34 Edw. I. M. 15, 16. In all which Years the Land-Service was summoned for Scotland, and the Summons both for the one and the other run in the same Words, commanding them to be at the Place, *cum toto servitio vestro quod nobis debetis*, which shews it to be a Service by Tenure. That these Services of theirs are for the Defence of the Realm, and likewise that there are many other of the like Nature besides these, which by a superficial reading of two or three Iter-Rolls, I have cited, appears by the Parliament Roll, 13 Edw. III. pars 1. M. 11. where it is declared in these Words, That the Cinque Ports and other great Towns and Havens are franchised, *pur estre & mure inter nous & Aliens*, if it shall fall out that they shall endeavour, *notre enter & assay & sunt tenuis a ceo faire*. My Lords, a fuller Declaration than this there cannot be, that both the Ports, and Havens, and Sea-Towns, are bound to the Service of Shipping, for the extraordinary Defence of the Realm, as well as the ordinary.

I have now done with the Service in kind: and because these which immediately tend to Action alone, were not sufficient to defend the Real; and this in the Frame and first Constitution of the

Commonwealth, being foreseen, and that the Land, or *Fundus Regni*, the most visible and constant Supplier of our Wants, was best able to supply this likewise; therefore besides them, there were divers other Tenures created for that Purpose. Those which I am next to speak of, are such as supply his Majesty with Money for that Purpose.

In the Black Book in the Exchequer, lib. 1. cap. 7. it is said, that in particular *Regni statu ad stipendia & donativa Militum & alia necessaria & castellis*, and other Lands in quibus agricultura non exercebatur pecunia numerata successebat. It might from hence be colourably infer'd, that in respect *ex provisione Legis*, upon the King's passing of Lands, a Tenure for Knights Service for the Defence of the Realm was to be reserved; that in case upon such Grants, Rents only, without any such Tenure, were reserved, yet that Money should be employ'd for Soldiers Wages, and other necessary Affairs of the Commonwealth, *ad stipendia Militum & alia necessaria*. But not to press this further, it is plain, That all Men within the Kingdom were not equally inheritable, either to the Body or Propriety of Lands or Goods, but that there are Degrees and Ranks, and each differing from other in all these. *First*, Villains. *Secondly*, Freeholders, either by Knights Service, or Free Socage. *Thirdly*, Tenants of antient Demesn, and that held by Burgage within Cities and Burrough Towns.

First, for the Villain, we know, that as to his Lord he had Freedom in neither; in respect of his Body, he could not *ire qua voluit*; but the Lord at his Will might imprison him, and in respect of his Land and Goods he might tax him *de haut & de bas*.

Secondly, The Freeholders, the greatest Part of the Realm, always had an absolute Freedom in them both.

The third Sort, and those are the Tenants in antient Demesn and Burgers, they had an absolute Freedom in their Persons, but qualified in the other of Property, not taxable at the Will, as Villains, but for the Defence and other necessary Affairs of the Realm, they might be taxed without Consent in Parliament. My Lords, That these had a divided Estate from other free Tenants, is clear. And first, for Tenants in antient Demesn: It is to be questioned whether such Land be antient Demesn, yea or no; the Issue is in these Words, whether it be antient Demesn or frank Fee. By this it appeareth they have not a frank and free Estate, as the others have; and as all our Books agree, they have no Vote in Parliament, for they have no Voice in the Election of Knights, nor pay to the Expences of the Knights that serve in Parliament, nor Soldiers granted in Parliament, *Na. Brev.* 79. and 14. It is often disputed in our Books, whether Acts of Parliament extend to them, unless they be especially named; neither can they sue at Common-Law for any thing that concerns the Freehold, but only by a Writ of Right close within themselves. And therefore *Bracton*, fo. 209. calls them *villanos Privilegiatos*. The same it is of Burgeses within Cities and Burroughs; and therefore the Statute of *Merton* makes it a Disparagement for the Lord to marry his Ward, *villanis & aliis sicut Burgesibus*, *Na. Br.* 7. and other Books. No Assizes will lie for such Lands, but they are impleadable without Original Writ, by a Bill of fresh Force; and as a Chattel, they may devise their Land. By

the Statute 1 *Edw. II. de militibus*, for such Land and antient Demesne, no Man is compellable to take the Order of Knighthood. Much more might be brought in Proof of this, which I omit.

My Lords, all our Books agree, the Tenants in antient Demesne, were to plow and manure the King's Lands, being his Demesne. In a Manuscript that I have seen, the Author saith, that he hath an antient Manuscript which saith, "That the Corn, and other Victuals, arising hereby, was to store the King's Garisons and Castles; and considering the Numbers of those Garisons, there being above a Thousand of them in the King's Hand at the Conquest, as appears by *Doomsday-Book*, and that those Mannors for the most part are great, and the greatest Part of the Socage-Tenures, till Henry II'd's Time, as appears by the *Black-Book*, lib. 1. cap. 23. were to find Victuals of all Sorts, in kind, for the Provision of the King's Household, and were in his Time turned into Rents." Altho this may seem probable, yet because I have not seen the Manuscript, I will insist no more upon it.

That for which these, and the Tenures of Burgage in the King's Cities and Burroughs, were mentioned in the raising of Moneys for the necessary Affairs of the State; that these were antiently talliable without their Consent in Parliament, is so plain and frequent in the *Exchequer Rolls*, as that I intend to cite nothing in Proof thereof; it will be admitted by them that argue on the other Side. That which I shall endeavour to prove is, That these were not talliable at the King's Will and Pleasure, but only for the Defence and other Necessities of State, *Na. Br. fo. 15. 49 Edw. III. 22.* They be not talliable, *de baut & bas*, as Villains are; and therefore *Bracton*, fo. 209. calls them *villanos Privilegiatos*, lib. Parl. fo. 112. *talliare & rationabile auxilium dare pro necessitate. Na. Br. 14. talliable pur grand Cause. Rot. Parl. 6 Edw. III.* Commissions to tax Cities and Burroughs, and antient Demesne, upon Petitions of the Commons revoked, and Writs in due form to be sent; and for the time to come, the King shall not assesse, but in such a manner, *come ad estre fait en temps de seux Ancestors & come il denera pur reason.* The Occasion not requiring it, I shall say nothing of it, when these Taxes were refused. My Lords, I have now done with the Tenures, the first Way whereby the Law hath provided for the Safety of this Realm; which of themselves not enabling the Kings intrusted therewithal sufficiently to do it, the Law therefore, besides the Honours, Castles, Mannors, and other constant Revenues of the Crown, for the Supportation of the ordinary Charges thereof, hath appointed unto it divers Prerogatives, for the Extraordinary, and for this of the Defence of the Realm, as one of the chiefest of them; these Prerogatives then have an Influence into the States of all the Subjects in the Realm, and are so many, that to gain Time, I will omit to mention any of them.

That which I will insist upon, will be to prove, that the Things coming to the Crown by this Prerogative way, are to be employed for the Defence, and other publick Affairs of the Realm.

In his Majesty there is a double Capacity, Natural and Politick. All his Prerogatives are *Jure Coronæ*, and of all such Things he is seised *Jure Coronæ*; and therefore, as in other Corporations, such Things are *Patrimonia & bona publica*, to be employed for the common Good, so likewise by

the same Reason here. The Reason why the King hath Treasure Trove, and Gold and Silver Mines in the Earth in the Case of Mines, is declared to be, because the King is hereby to defend the Kingdom: and in the *Institute*, in the Title of *Socage fo. 28. 137.* the reason of many of the rest, *Quia thesaurus Regis est fundamentum belli & Firmamentum Pacis*: This I conceive to be the Reason, that by the Statute 14 *Ed. 3. cap. 1.* Escheats, Wardships, Customs and Profits arising of the Realm of England should be declared to be spent for the Safeguard of the Realm, more than the Profits of the King's Mannors and Lands; and of the Difference made in the *Comm' M. 3. Rich. 2. London*, between *Reftas promissiones Regni*, which by the Advice of the Lords of the Council were to be spent in the Household, and the other Profits of the Crown to be spent *Circa salvationem & defensionem Regni.* In the Parliament Roll 6 *Rich. N. 42.* the Commons petition that the King will live of his own Revenues; and that Wards, Marriages, Releases, Escheats, Forfeitures, and other Profits of the Crown, may be kept to be spent upon the Wars for the Defence of the Kingdom: which sheweth, that there was always a Difference made between the Profits arising of the King's Mannors and Lands, and that which rose by the Prerogative, casual and accidental Ways. My Lords, I have now done with these.

The third Way the Law hath provided for the Defence of the Kingdom, is particular Supplies of Money for the Defence of the Sea alone in times of Danger, both ordinary and extraordinary: for besides the Supplies of Money before mentioned, which are to be employed for the Good and Defence of the Realm in general, as in the other Cases where the Law putteth the King to any particular Charge for the Protection of the Subject, it always inables him thereunto, and yields him particular Supplies of Money for the Maintenance of the Charge; so here the Courts of Justice, for the Preservation of us in our Rights, are supported at his Charge; and that is the Reason why he hath all Fines and Amerciaments, the Goods of Out-Law'd Men in personal Actions, *Bract. Lib. 3. cap. 13. fol. 129.* and Fines for purchasing of Original Writs, & *pro licentiis concordandi*, which in Supposition of Law, are paid for not proceeding, and Troubling the Court without Cause. The King's Justices who are maintained in their Places at the King's Charge, these are the *vestigal' Justiciar'*. The Defence of the Realm extends it self to many Particulars of the Church, and of Religion; and therefore in the Summons of Parliament, the Cause of the calling the Parliament is always declared to be *Pro defensione Ecclesiæ Angliæ* in particular, as well as *Totius Regni.* His Majesty therefore hath the Temporalities of Bishopricks, *Sede vacante*, a great Prerogative, and that which Patrons have not; with an Addition of the First-Fruits and Tenths of them, and all other Ecclesiastical Promotions and Benefices in Henry the Eighth's time, and likewise the Tithes of all Lands which lie not within any Parish.

For Defence of the Land alone, besides those Military Services before mentioned, the Profits of Wards and Marriages, which, as I have read, no other Christian Prince hath as a Fruit of them, are received for that purpose. So it is for the Sea, in *Rot. Sco. 10. Ed. 3. M. 16.* it is said that the King and his Ancestors are *Domini Maris Anglicani & Defensores contra hostium invasiones ante hoc tempus existentes.* For the supporting of this

Charge therefore, they have not only had the Grand Customs of the Mark and Demy-Mark upon the Wool, Wool-Fells and Leather, and the Prifage; that is one Tun of Wine before the Mast, and another abaft the Mast of every Ship, which were even due by the Common Law, as appears by the Book of my Lord Dyer, 1 *Eliz.* 165. and Sir *John Davies Reports*, fo. 8. & 9. and implied by *Mag. Char. cap. 30.* that Merchants may trade *per Rectas & antiquas Consuetudines*; but likewise divers other Things were afterwards granted by Act of Parliament in Addition to them. As First, the Petty-Customs began 31 *Ed. 1.* and were made Perpetual by the Statute of 27 *Ed. 3. cap. 26.* and likewise divers Aids and Subsidies, which are an increase of Custom upon the Staple Commodities of Wool, Wool-fells, &c. Leather, and Tonnage upon Wines, and Poundage, and Increase upon all other things either imported or exported, either by Denizens or Aliens. That which in this kind was taken by his Majesty in the 11th Year of his Reign, when this Writ issued forth, was three hundred thousand Pounds and upwards. The Aids and Subsidies, and likewise the Tonnage and Poundage antiently granted upon particular occasions only, and afterwards to the late Kings and Queens for their Lives by Act of Parliament; and now taken by his Majesty, and likewise the new Imposition, altogether makes up the aforesaid Sum of three hundred thousand Pounds. Of the Legality thereof I intend not to speak, for in case his Majesty may impose upon Merchandize what himself pleaseth, there will be less Cause to tax the Inland Counties; and in case he cannot do it, it will be strongly presumed, that he can much less tax them. The proving these two things herein will serve my turn:

That his Majesty *de facto* takes them, and that this judicially appears to your Lordships in the Court; and Secondly, that these and the antient Customs, are for the Defence of the Sea.

For the First, it was declared by his Majesty in the last Parliament, and annexed to the Petition of Right as part of it, that his Majesty took them, and could not be without them; whereof he likewise desired the Judges to take notice, and that they might so do, it is inrolled both in this and other the Courts of *Westminster-Hall*.

For the second, that the Grant of Custom is principally for Protection of Merchants at Sea against the Enemies of the Realm, and Pirates, the common Enemies of all Nations, Sir *John Davies Reports*, fo. 9, & 12; and that those, and likewise the Impositions are for that purpose, was held by many of the Judges in the Argument of *Ball's Case* 7 *Jac.* in the *Exchequer*, in the Case of Impositions upon Currants, and likewise by the King's Council, when the same Case afterwards came to be debated in Parliament, and was one of the main Reasons urged by them for the Maintenance of that Judgment. That the Aids and Subsidies, and likewise Tonnage and Poundage, before they were granted for Life, were not only for the Protection of Merchants, and the ordinary Defence of the Sea, but also for the Defence thereof in times of extraordinary Danger, and from Invasion from Enemies, appears by the several Grants of them in the Parliament Rolls. *Rot. Parl. 1 Rich. II. pars 2. M. 9, & 27.* the Kingdom being in Point to be lost by the Enemies of *Spain* and *France*, and divers others there men-

tioned, who made War against us both at Land and Sea, a Subsidy upon the grand Customs was granted, as the Words are, *pur le defence & secours del Kingdome*; this was for two Years, and Persons assigned to receive and expend the Money. *Comm' Mich. 3. Rich. II. London: William Wailworth and John Philpot*, Citizens of *London*, appointed the Treasurers of it, upon their Account, shew the Particulars how this Money was expended, *circa salvationem & defensionem Regni*, and were discharged. *Rot. Parl. 3 Rich. II. M. 16, & 17.* The same Cause continuing, Enemies intended to blot out the Name of the *English* from under Heaven, the Subsidy continued for a Year longer, *Rot. Parl. 5 Rich. II. pars 2. M. 14, & 15.* Tonnage and Poundage granted *assint pre soit apply sur safeguard del Mers*, and the King at the Petition of the Commons appoints Receivers. 6 *Rich. II. M. 13.* the Commons complain, that notwithstanding the Grant of Tonnage and Poundage the Sea is not kept, and therefore Persons named and assigned in Parliament to receive the Money, and to do it. 10 *Rich. II. M. 1.* Tonnage and Poundage for a Year. 11 *Rich. II. M. 6, & 12.* Tonnage and Poundage and Subsidy for a Year. 12 *Rich. II. M. 20.* both for a Year. 14 *Rich. II. M. 16.* both for a Year. 17 *Rich. II. M. 12.* both for three Years. 20 *Rich. II. M. 28.* Subsidy for five Years, and Tonnage and Poundage for three Years. 2 *Hen. IV. M. 9.* both for two Years. 6 *Hen. IV. M. 9, & 10.* both for two Years, upon condition to cease if the King before *St. Hilary* provide not a sufficient Army for the Sea. 8 *Hen. IV. M. 9.* and 9 *Hen. IV. M. 16.* both for two Years for the common Commodity and Defence of the Realm. 13 *Hen. IV. M. 10, & 11.* for one Year, so as the same be confessed to proceed out of their own good Will, and not out of Duty. 5 *Hen. V. for four Years, upon many Conditions. 1 Hen. VI. M. 9.* for two Years. 3 *Hen. VI. M. 17.* Subsidy for three Years, Tonnage and Poundage for one Year. 4 *Hen. VI. M. 22.* 6 *Hen. VI. M. 11.* for two Years Tonnage and Poundage; and 6 s. 8 d. upon every Man within a Parish-Church that hath twenty Nobles, and 6 s. 8 d. upon every Knights-Fee held immediately of the King. 8 *Hen. VI. M. 15.* Tonnage and Poundage to continue until the next Parliament. 9 *Hen. VI. M. 14.* both, and for two Years. 10 *Hen. VI. M. 21.* for two Years. 23 *Hen. VI. M. 16.* for four Years, and double upon Strangers. 27 *Hen. VI. M. 20, & 23.* for five Years. 37 *Hen. VI. M. 8, & 42.* Tonnage and Poundage first granted for Life; and *M. 41.* assigned into the Subjects Hands for three Years for the good of the Seas.

My Lords, either by the Grant itself of them, or by the Declaration of the Cause of the calling of the Parliament, it appears, that these were all granted upon extraordinary Occasions: and when they come to be granted for Life, as appears by the Rolls and printed Statutes of 12 *Ed. IV. cap. 13.* they were not only granted for the ordinary Defence of the Realm, and principally of the Sea; but likewise that the Kings might always have in readines a Stock of Money in their Hands to withstand an Invasion, as is declared by the very words of those Statutes.

My Lords, his Majesty is in Possession of them, and was pleased by his Proclamation printed 1626, declaring the Cause of the Dissolution of the last Parliament, as appears Page 17, to declare that they were always granted to his Progenitors, for the

the guarding of the Seas, and Safety and Defence of the Realm; and Page 18, is graciously pleased in these words, to declare that he doth, and must still pursue those Ends, and undergo that Charge for which they were first granted to the Crown; and Page 44, that he receives them for the guarding of the Seas, and Defence of the Realm.

My Lords, I have now done with the Ways which I first propounded, whereby the Law hath provided for the Defence of the Realm. I shall add this only, That by the Statute of *Winchester*, which was made in 13 *Edw. I.* every Man *secundum statum & facultates*, for the words of the Statute are according to the quantity of his Lands and Goods, is to find Horse and Armour for the Defence of the Realm; for that the Statute in this Particular, extends not only to the keeping of the Sea, but likewise to the Defence against Foreigners, is declar'd in the Parliament Roll of 3 *Rich. II. M. 36.* and by the Statute of 5 *Hen. IV.* in the Parliament Roll *M. 24.* not printed, *juxta quantitatem terrarum & bonorum*, against Invasions each Man is to find Armour. And by the Statute 1 *Ed. III. cap. 5.* these Men upon sudden coming of strange Enemies into the Realm, may be compelled to march out of their own Counties where they live: whether they may be compelled so to do without Wages, I shall have occasion afterwards to speak. How far the Statute of *Winchester* and 5 *Hen. IV.* for Arms upon the Statutes of 4 and 5 *Phil. & Mar. cap. 2.* and 1 *Jac. cap. 25.* are in force, I shall not speak.

My Lords, I shall now proceed to the stating of the Question. *Bracton* in the Beginning of his Book saith, *That in Rege necessaria sunt hæc duo, Arma & Leges, quibus utrumque tempus Bellorum & Pacis recte possit gubernare.* *Glanvill*, in the Beginning of his Book, saith, *Regis Majestatem Armis contra gentes sibi regnoque insurgentes oportet esse decorat.* His Majesty, as he is Lord of Sea and Land, so by that which hath been said, it appears that he is armed for the Defence of both.

My Lords, The Reasons in the Writ, as they are weighty, so from these known Supplies, whereby the Law hath provided for the Safety of the Realm, they will all of them be confessed; and yet thereby receive Answer, that the Law hath foreseen and provided the Supplies accordingly without the Way in the Writ.

First, The Command in the Writ being *In fide & legiancia quibus nobis tenemini*, it's thence inferred, that each Subject's Allegiance binds him to contribute to the Defence of the Realm. In the old Customs of *Normandy*, cap. 43. Allegiance binds *ad concilii & auxilii adjumentum*. This tho it be principally perform'd by the Parliament, both in Advices and Aids, yet besides these extraordinary, by that which hath been said, we see both by the Tenures in kind, and pecuniary Supplies, that without the Assistance thereof, our Persons, Lands, and Goods, by his Majesty's Command alone, are made contributory thereunto, and that in a large Proportion. Secondly, The Rule whereby this Contribution must be regulated, as in the Writ, *secundum statum & facultates*, that likewise is satisfied, and that both for Sea and Land.

For Land, in case either the Statute of *Winchester*, or 5 *Hen. IV.* be on foot, then in Words that of finding Arms, *juxta quantitatem terrarum & bonorum*. So, Secondly, in respect of the Tenures, by Knights-Service, by the Wards, Marriages and Reliefs; these, I confess, concern the

Tenant only; but those other Tenures *in Capite* and *Grand Serjeanty*, these concern all others, in respect of the Licenses of Alienation, and of the Wardships of Lands, held of other Lords, and that all the Tenants are become hereby wardable. And, Thirdly, in respect of the Prerogatives before mentioned; for the greater the Subjects Estate is, the greater Influence they have into it, and proportionably raise more Profit out of it.

In respect of the Sea, this is so by the Customs, Aids, Subsidies, Tonnage and Poundage, before mentioned; for the Charge of these is not born by the Merchants alone, but by each Subject within the Kingdom, and that *secundum statum & facultates suas*.

For, First, in respect of the Export: The greater the Estate, the more Wool and Wool-fells, and Leather, Lead, and other Commodities; if that be done by the Owner, he bears the immediate Charge; if by the Merchant, according to that Proportion is his Abatement in Price to the Owner. So it is for Goods imported; for the greater the Estate and Means of Livelihood are, the more each Person buys of these and at a dearer Rate. This is cleared by the Petition of the Commons in Parliament 22 *Ed. III. Rot. 22 M. 41.* that the Merchants had granted to the King forty Shillings upon a Sack of Wool, *en charge del people & nemy des Marchants*. And by the Statute 36 *Ed. III. cap. 11.* that no Subsidy or Charge be granted to the King by the Merchants upon Wool, without assent in Parliament.

Hence likewise that other Ground of Equity in the Writ, *quod omnes tangit ab omnibus debet supportari*, receives answer: For as all have benefit by the Defence, so is the *Compensatio publica*, we see it comes from all. The fuller Answer is the Parliament Summons of 23 *Ed. I.* for Provision against the French, who intended *Linguam Anglicanam omnino delere*. *Rot. Claus. 23 Ed. I. M. 14. Lex justissima provida & circumspectione sacrorum principum stabilita, statut. Quod omnes tangit ab omnibus approbatur*; the Charge must be born by all, so it must be approved by all.

If his Majesty be intrusted with the Defence of the Realm, as in the great Case between the Earls of Hereford and Gloucester, it is said, that *incumbit Domino Regi salvatio populi sibi commiss.* and that *per juramentum est astrictus ad providendum salvationem Regni circumquaque*, because no Man goeth to War at his own Charge. We see by that which is already said, that the Law hath provided the *Stipendia Ministerii*; which that they do bind his Majesty to the Defence and Safety of the Kingdom, not only in point of Care and Vigilancy, but even in point of Charge too, I shall endeavour to prove to your Lordships and the Court.

Allegiance we owe as an Act of Reciprocation; for as it binds the Subject to Tribute and Subjection, so therefore the King to the Charge of Protection by the Expence of these, *Rex ad tutelam corporum & bonorum erectus*. The Supplies he hath, for these Purposes, tie him to the Supportation of the Laws, and the Execution of Justice. 20 *Ed. I.* in the Case before mentioned between the Earls of Gloucester and Hereford, it is said, that *Dominus Rex est omnibus & singulis de regno suo Justitie debitor*; which that he is so, even in point of Charge, appears in his Majesty's Supportation of the Courts of Justice, and the Salaries not only to your Lordships, and other the inferior Ministers of Justice, and antiently to the Sheriffs, but likewise many other

other Ways. 4 *Hen. VII. cap. 12.* the King shall not let for any Favour of Charge, but that he shall see his Laws fully executed. *Parl. 23 Ed. I. Rot. 12. Exchequer,* A Clerk that attended a Committee of Grievances recover'd Salary from the King, altho the Commission was for the Relief of that County. This I conceive to be the Reason of the Declaration in the Statute of 14 *Ed. III. cap. 1.* and other Statutes, That Aids, tho granted in Parliament, for Defence, shall not be brought into Example; in that it might be conceived, that the Commons were to bear that Charge which principally belonged to the King. *Pat. 48. Hen. VII. M. 8.* it is recited, That whereas a late Parliament in *Articulo necessitatis pro defensione regni contra hostilem adventum alienigenarum,* the Commons granted him a large Subsidy, *ultra quam retroactis temporibus facere consueverant;* now the King *eorum indempnitati prospicere volens,* grants, that *non cedat in præjudicium, nec in posterum trabatur in consuetudinem.* In *Wiseman's Case,* in the second Report, *fo. 15,* it's resolv'd that a Covenant to stand seized to the Use of Queen *Elizabeth,* that she is the Head of the Common-wealth, and hath the Care of repelling foreign Hostility, is not good, because, saith the Book, the King is bound to do that *ex Officio. Com. 315.* One Reason why the King is to have Royal Mines, alledged by all that argued for the King, is, because he is at his own Charge to provide for the Defence of the Realm, which he cannot do without Money. In the Earl of *Devon's Case, Co. 11. 91. 6 Institut. fo. 28, & 131. Theſaurus Regis* is called *Nervus Belli.* For the Practice, the Proof of the particular Charges, the several Kings have been at for Defences of all forts, would be so tedious, that I will omit the citing of any thing in this kind. Sir *John Davies Reports, fo. 12.* many Authorities, and in the Treatise *de Regalibus, pag. 81. Principes totam Navigationem pro vectigalibus præstare coguntur.*

But because his Majesty, in the forementioned Proclamation, *pag. 18, and 44,* is graciously pleased to profess, that he holds himself obliged to undergo the Charge of the Defence of the Realm, and of the Sea in particular, I shall spare any further Proof in this.

If that in the Writ, that the Sea *per Gentem Anglicanam ab olim defendi consuevit,* be not answered by the *Scotish Roll of 10 Ed. III.* before recited, which says, that the King and his Ancestors *Maris Anglicani defensores antebac constituerunt,* nor by what is now said, if it be admitted, yet that even the Charge of this Defence is born *per gentem Anglicanam,* is before proved.

The next, and one of the main things whereupon I shall state my Question, is this. His Majesty is in the actual Possession, not only of the Service in kind, for the Defence of the Land, by taking of the Benefit of the Wardships, Marriages, Reliefs, Fines, and Licenses of Alienations, and *primer Seisin,* and of the Prerogatives before mentioned, but likewise of the Services of the *Cinque Ports,* unless they be released since 7 *Hen. VII.* (for then their Services were summoned) and of the Tonnage and Poundage, and other Duties, for the Defence of the Sea: it appears not by any part of the Writ, nor by any thing in the Record, that either the Services of the *Cinque Ports* were summoned, or that any Money at all of his Majesty's was expended, either for this Service, or at any other time for the Defence of the Sea. My

Lords, I desire to be understood, I do not affirm that none was expended; only this appears not to your Lordships and the Court: all that can be inferred from the Writ to this Purpose is, that this Ship for *Bucks,* is commanded to be at *Portsmouth* by such a Day *ad proficiscend' exinde cum Navibus dicti Domini Regis & Navibus alior' fidelium subditorum suorum.* By this it appears not to the Court, that tho the Ships are the King's, that they are to be set forth at the King's Charge; for the Charge may be born by the Subject for ought appears.

Neither, *Secondly,* doth it appear, how many these Ships were, whereby the Charge, in case it were born by the King, might in any Proportion appear to be answerable to the Supply beforementioned. Those other Ships, *aliorum fidelium subditor' nostror' Regis,* as in truth they were not those of the *Cinque Ports,* neither can they be so intended unless it had been so expressed.

The Service of the *Cinque Ports,* and Tonnage and Poundage, and other Duties are the ordinary settled and known Ways by the Law appointed for the Defence of the Seas; the Way in the Writ by seising and altering the Property of the Subjects Goods without their Consent, as in the Writ, must needs be granted to be a Way more unusual and extraordinary. Against the Legality of it, I shall thus frame my Argument by Way of Admission: *First,* That in case the Service of the Ports had been summoned, and the Money by the forementioned Ways raised had been expended upon the Defence, and they had not been sufficient, that tho in this Case the Writ had been legal; yet, as now it is, it is not. *Rylie's Case* in the 10th Report, fol. 139. and *Trin. 18. Ed. II. Banc. Regis 174,* adjudged, that so long as he that is bound by Tenure, or Prescription, is able to do it, the whole Level cannot be assessed to the repairing of a Wall or Bank. It's a Maxim, *Lex non facit Salutem,* nor that we are to run to extraordinary, when the ordinary Means will serve the Turn; these Rules are often put in our Books, I intend to instance but in one or two Cases.

The Common Law is the common Reliever of Persons wrong'd; that in *Chancery* is extraordinary, and therefore no Man can sue there, when he may have Remedy at the Common Law. The ordinary Way of Trial for Life is by Indictment and a Jury; when therefore this may be done, and that the Sheriff, with the *Posse Comitatus,* is able to keep the Peace, it cannot be done by Martial Law, or by Judgment of the King and Peers in Parliament without Indictment, as was adjudged in the Case of the Earl of *March, Trin. 28. Ed. III. Banco Regis Rot. 21.* My Lords, the Reason of this Maxim of Law is, as I conceive, these Actions extraordinary are done *extra ordinem,* and done only in Times of Necessity, when we are not tied to any Rules of Law, and therefore not to be brought into Example, nor have any Warrant but only that of Necessity; nor any Rule to guide them but what, *pro hic & nunc,* shall serve for the bringing of them about: the same Power then that may once do them, in the omitting of the ordinary Way, may, by the same Rule, always do them, and so by Consequence, how far such Power is tied at any time or in any thing to any Rules of Law, I shall humbly submit to your Lordships Consideration. My Lords, I have now done stating the Question, those things whereupon I shall spend the rest of my Time are these.

First

First, Admitting that the ordinary Means above-mentioned had been all used, and that they had not been sufficient; whether in this Case his Majesty without Consent in Parliament, may in this Case of extraordinary Defence, alter the Property of the Subjects Goods for the doing thereof?

In the next Place, I shall endeavour to answer some Objections which may be made to the contrary.

In the third Place, for qualifying of this, I shall admit, that in some Cases the Property of the Subjects Goods for the Defence of the Realm, may be alter'd without consent in Parliament; and shall shew what they are in particular, and compare them and the present Occasion together.

In the fourth Place, because of some Precedents of the Matter of Fact, and likewise of all Authorities that may seem to prove a Legality in this Particular of Shipping for Defence of the Sea, whatever it be in the General, I shall therefore endeavour to answer to such of them as I have met withal.

For the *First*, that to the altering of the Property of the Subjects Goods, tho for the Defence of the Realm, a Parliamentary Assistance is necessary. In this it must be granted in the first place, that the Law ties no Man, and much less the King, to Impossibilities: And *Secondly*, that the Kingdom must be defended.

As therefore the Law hath put this great Trust upon his Majesty, so when the Supplies, which by the Ways before-mentioned it hath put into his Hands, fail therein, it hath provided other Ways for a new Supply.

The first thing that I shall present unto your Lordships and this Court, are the Aids and Subsidies granted in Parliament. That amongst the *Ardua Regni negotia*, for which Parliaments are called, this of the Defence not only is one of them, but even the chief, is cleared by this; that of all the rest none are named in particular in the Summons, but only this: for all the Summons of Parliament shew the Cause of the calling them to be, *pro quibusdam arduis negotiis nos & defensionem Regni nostri Angliæ & Ecclesiæ Anglicanæ concernentibus*; and in the Conclusion the Party summoned to be there, *Sicut honorem nostrum & saluationem & defensionem Regni & Ecclesiæ diligit*. And in all the antient Summons of Parliament, when Aid was demanded, the particular Cause of Defence, and against what Enemy in special, was mentioned.

My Lords, to gain time I will instance but one or two of each King's Reign. *Claus. 23. Ed. I. M. 4. dorf.* that the French *ad expugnandum Regn' nostr' Classe maxima & bellatorum copiosa multitudine Regn' nostrum invadunt & linguam Anglicanam omnino proponunt*, &c. *Claus. 3 Ed. II. M. 3. dorf.* and *7 Ed. II. M. 8. dorf.* that the Scots had enter'd, burnt and destroy'd the Marches, and put them to a Tribute. *Claus. 1. Ed. III. pars 2. M. 6. and 22 Ed. III. M. 31 dorf.* that the Scots and French had invaded the Realm. *Claus. 7 Hen. IV. M. 29. dorf.* that the French were with a great Fleet, *Quasi in ore Thamefis*, to invade the Kingdom, and the King to go in Person; after this King's Reign, the Summons was as now it is.

That these *Ardua defensionem Regni concernen'*, are the Aids and Means of Defence, and not the Way and Manner of doing of it, as their Counsel therein, is clear. In the Parliament Roll *6 Ricb. II. M. 9.* This of the Manner and Way and Prosecution of the War being given in Charge to the

Commons to advise upon, they answer this, *Nec doit, nec soluit appartaine al eux mes al Roy. Rot. Parl. 13 Ed. III. pars 1. M. 11.* the same being given in Charge to the Commons, they pray *que ils ne sont charge al Council doner al choses del queux ils n'ont pas conuzance*: and so *Rot. Parl. 21. Ed. III. M. 5.* they excuse themselves, and say, that this belongs to the King and his Council.

And that these *ardua circa defensionem*, were the Aids, is expressed in words in some of the Summons. *Claus. 7 Ed. II. M. 8. dorf.* the Cause of the Parliament to withstand the Scots, and that in *tam arduis debetis extendere manus adjutrices opportun' auxili' faciendo. Claus. 31 Ed. III. M. 21. dorf.* that *circa necessariam defensionem Regni quam ad dictum negotium expediend' auxilium necessar' nos habere oportet. Claus. 5 Ricb. II. M. 2. dorf.* the King being to make a Voyage *pro defensione Regni*, which could not be done without borrowing great Sums of Money; therefore the Parliament was called to advise about the assurance. So that, my Lords, it is clear, that the Law hath provided this Parliamentary Way for supplying of the King's Wants for the extraordinary Defence, and hath likewise put the Power of using of it into his Majesty's own Hands, for he may call Parliaments when, and so often as he pleaseth.

My Lords, as the Parliament, *First*, are best qualified and fitted to make this Supply; (for some of each Rank, and that thro' all the Parts of the Kingdom, being there met, his Majesty having declared the Danger, they best know the States of all Men within the Realm, and are fittest, by comparing the Danger and Mens Estates together, to proportion the Aid accordingly;) and, *Secondly*, are fittest for the Preservation of that Fundamental Propriety which the Subject hath in his Lands and Goods; because each Subject's Vote is included in whatsoever there is done: So that it cannot be done otherwise, I shall endeavour to prove to your Lordships both by Reason and Authority.

My First Reason is this, that the Parliament by the Law is appointed as the ordinary Means of Supply upon extraordinary Occasions, when the ordinary Supplies will not do it. If this in the Writ therefore may without resorting to that be used, the same Argument will hold as before, in resorting to the Extraordinary by way of the Ordinary, and the same Inconveniency will follow.

My Second Reason is taken from the Actions of former Kings in this of the Defence. The Aids demanded by them, and granted in Parliament even for this purpose of the Defence, and that in times of imminent Danger, are so frequent, that I will spare the citing of any of them. It's rare in a Subject, and more in a Prince, to ask and take that of Gift, which he may and ought to have of Right.

The second way was Loans and Benevolences demanded by them, with promise of repayment both for the ordinary and extraordinary Defence of the Realm; and that as well of all the Subjects equally, as of some few. *Pat. 48 Hen. III. M. 16.* a Commission to the Earl of Leicester and others, *contrahendi mutuum in nomine nostro de denariis & victualibus*, and other things in *munitionem Navium ponendis & Nautarum stipendiis contra hostilem adventum Alienigenar' in Regnum nostrum, & ad defensionem & tuitionem ejusd' Regni*; and promiseth repayment. *Visis computis* in the Exchequer, *26 Ed. I. Rot. 100.* the King borrows of the Merchants

28966 l. *pro defensione Regni*, and promifeth Repayment. *Hil. 31 Ed. I. Rot. 4.* and *Trin. 31 Ed. I. Rot. 41.* divers Sums borrowed *pro Defensione*, and repayment promised. *Br. irrot. 34 Ed. I. Rot. 82.* ten thousand Pounds paid by the King at one time for Money borrowed, this I confefs is *Arduis Regni negotiis*. *Br. irrot. 11 Ed. II. Rot. 1.* the Scots having entred the Kingdom, *diversa homicidia, incendia, & deprædationes perpetrantes*, the King being in Person to go againſt them, writes to his Council to provide Money; and they, *diversas vias pro denariis providendis exquirentes*, reſolve to borrow. *P. 12 Ed. II. Commu'* for the ſame Cauſe a Loan upon all Merchants Strangers. *Rot. Scot. 1 Ed. III. M. 3.* the Scots having entred the Realm and taken divers Caſtles, and threatned a Conqueſt of England, and *Quia creſcit ſumptuum multitudo in tantum quod Theſaurus noſter ad ſuſtentionem exercituum noſtr' nequaqu' ſufficit*, he borrows. *Clauf. 14 Ed. III. M. 8.* the King had borrowed 3333 l. *pro ſalvatione & defensione Regni*, & vult promptam ſolutionem fieri prout decet; and now aſſigns it to be paid out of the Cuſtoms. *Walsingham Pag. 179. 44 Ed. III.* the King *Siniſtro uſus concilio magnas ſummas pecuniæ* of all Sorts *mutuo petiit, aſſeuerans quod in defenſionem Eccleſiæ & Regni illas expenderet*; but the People would not lend. *Clauf. 5 Rich. II. M. 12. dorf.* the King *pro defensione Regni*, being to make a Voyage to Sea, deſired to borrow Money, and a Parliament called to give Aſſurance. *7 Hen. IV. Rot. Franc.* Money borrowed *pro defensione*, *volens promptam & ſecuram ſolutionem fieri.* *Rot. Parl. 11 Hen. VI. M. 13.* ten thouſand Pounds borrowed *pro defensione* and ſpent, and the Parliament order the Security. *Rot. Parl. 15 Hen. VI. M. 3.* ten thouſand Pounds borrowed *pro defensione* by the King. *Stat. 11 Hen. VII. cap. 10.* it appears that a Benevolence had been deſired by *Hen. VII.* for the Defence of the Realm, and wherein he went in Perſon. The known Commiſſion to Cardinal *Wolſey* for the Benevolence in *March, 16 Hen. VIII.* it was to withſtand *Infeſtiſſimos hoſtes* of France and Scotland, who intended to invade the Realm; and that the King's Coſſers were now empty, and therefore they have Power *Communicandi & inducendi, perſuadendi & practicandi cum ſubditis Regis ſuper amicabilem pecuniarum conceſſionem.* 2 pars Pat. 37 Hen. VIII. *cum pro ſuſtentione ingentis oneris noſtrarum Copiarum, quas in preſenti tam per mare quam per terram conficere, & in promptu habere cogimur ad reſiſtend' propellend' hoſtem noſtrum Francorum Regem, in defenſionem tutelam & ſecuritatem dilectorum ſubditorum noſtrorum, quorum ill' damnum & interitum omnibus viis & modis molitur, Statut' & ex conſenſu & ſcientia concilii noſtri decrevimus aliquam opem de diſtis ſubditis noſtris petere, & eand' cum eorum benevolentia recipien' pro eorum cujuſlibet facultate miniſtrand' nihil dubitans quin ſponte & liberaliter quiſq; pro ſua portione & facultate elargiturus ſit, eoque magis & citius quod id totum conſumat' & cedat in ſuam ipſorum defenſionem*; and the Power is given to levy it as a Benevolence only. By the Statute of 35 Hen. VIII. cap. 12. it appears that for the Defence *Hen. VIII.* had borrowed divers Sums of Money.

The third Way was by anticipating their Rents. *Trin. 29 Ed. I. Rot. 58.* in the Exchequer, Writs went to all the Sheriffs of England, *pro ſalvatione Regni ejuſq; incolarum ſalvatione, & inimicorum depreſſione*; that all the Profits ariſing out of their Counties, and the Rents of all the King's Tenants due at *Michaelmas*, be paid at *Midſummer*,

and allowance promiſed in the next half Year's Rent; and that this *ad tam ardua negotia neceſſaria, & in conſuetudinem non trabatur.*

My Lords, that not one or two, but ſo many Kings, and of ſuch Power and Wiſdom as many of them were, and that in a Matter of ſuch Conſequence, and in times of Neceſſity, ſhould ſo far deſcend from their Greatneſs, or ſo far prejudice their Right, as to borrow that of the Subject, which without being beholden unto them, they might take of Right, and bind themſelves to Repayment, and all without any *ſalvo* of their Right, your Lordſhips will conceive that it can hardly be imagined.

My third Reaſon is taken from the Incertainty of the Way intended by the Writ; for the Law delighting in Certainty, to the end that the Subject might be ſure of ſomewhat that he might call his own, hath made all thoſe Things that the King challengeth as peculiar to himſelf from the Subject, either certain in themſelves, or elſe reducible to a Certainty either by the Judges, Jury or Parliament, (or ſome other way than by his Maſteſty himſelf) as indifferent between the King and his People. In this I intend not ſuch Things as are common to the King with the Subject, of which Nature are the Aids for marrying the King's eldeſt Daughter, or Knighting his eldeſt Son; for theſe are due to ſeveral common Perſons that are Lords of a Manor, as well as to the King, as appears by the Statute of *Westm' 1. 3 Ed. I. cap. 35. M. 28.* and are not due by any ſpecial Prerogative, but by Tenure; and yet the Common Law for avoiding Exceſs therein, calls it *Rationabile auxilium*; and even this by the Statute of *Westm' 1. 3 Ed. I. cap. 35.* is put into Certainty; and the Cauſe of making the Statute, as therein is expreſſed, is, becauſe the People were grieved by paying more than was requiſite; and thereby that which was reaſonable, became an unreaſonable Aid. This Statute was general, and named not the King in particular; but the Statute 25 Ed. III. cap. 11. is only in caſe of the King, and *Na. Br. fo. 82.* gives the Reaſon of the making of that Statute, becauſe the King before did diſtrain for more than was fit, and therefore by reaſon of the Exceſs, was reſtrained to a Certainty as well as the Subject. Neither are the Taxes and Talliages upon Cities and Burroughs, or antient Demeſne againſt this, in reſpect of the baſeneſs of their Tenures before mentioned. And Secondly, becauſe the Subject that is Lord of ſuch Burrough and Mannor of antient Demeſne, hath them as well as the King, as appears by the Caſe of *New-Saliſbury, 33 Ed. I.* in the Parliament Book, and in the New Parliament Roll, 8 Ed. II. for the Burrough of *Cirenceſter*, and *Br. Trin. 33 Ed. I. Rot. 22.* and *Na. Br. 97.* Theſe things which are peculiar to the King, either they be certain in themſelves, as are Treafure-Trove, Deodands, Wrecks, and the like, where the King is to have the thing itſelf; and ſo if it be in Money, as the Demy-Mark; when in a Writ of Right the Tenant prayeth, that the Seifin may be inquired, *Fines pro licentia concordandi*, it is the tenth Part by the Law comprized in the Writ of Covenant, and the Poſt-Fine one half ſo much more, and Fines for purchaſing Original Writs *ii s. viii d.* where the thing demanded is forty Pounds, or ten Shillings where one hundred Pounds, and ſo in proportion. Or elſe it is reducible to a Certainty, as in all Caſes where the Party is to be amerced, tho he is *in miſericordia dom'*

dom' Regis, yet the Jury must find the Amerciamment; and when he is to make Fine and Ransom *ad voluntatem Domini Regis*, yet this Fine must be set by the Judges: when the Tenant by Knight-Service makes default in the Summons *ad exercitum*, which is to pay Escuage for the Default; this cannot be set but in Parliament, as I shall prove hereafter.

My Lords, to apply all to the Thing in question, there is a Cause for raising Money for the Defence of the Realm, *non definitur in lege*, what will serve the turn. If his Majesty, as in the Writ, may without Parliament lay 20 s. upon the Defendant's Goods, I shall humbly submit it to your Lordships, why by the same Reason of Law it might not have been 20 l. and so *ad infinitum*; whereby it would come to pass, that if the Subject hath any thing at all, he is not beholden to the Law for it, but it is left intirely in the Mercy and Goodness of the King.

My Lords, I am now come to the second kind of Proofs, and that is by Authorities. The Cases which in the first Place I will insist upon, will be to prove it by Induction: for if I shall prove that his Majesty without Parliament cannot tax his People for setting forth of Land-Forces for Defence, for making and maintaining of Forts and Castles for Defence, for Victuals for a defensive Army, for Maintenance of Prisoners taken in a defensive War, for Pledges and Hostages given by foreign States for the keeping of Peace; if it cannot be in all or any of these Particulars, the five Supports of a defensive War: I shall then offer it to your Lordships, whether it can be done at all.

Before I proceed to these Particulars, I shall observe thus much, my Lords, in the general; that if those that hold by antient Demefn and Burgage, which are but base Tenure, cannot be taxed *nisi sur grand cause*, and that have many Privileges in point of Ease and Profit in consideration thereof, as they have; much less then can the Tenants by Knights-Service and Socage, that are free Tenants, and have no Privilege in support of the Charge, be taxed. And as they are not taxable, but *sur grand cause* in the general, so neither in particular for this of Defence, as is proved by that of Escuage; for if his Majesty without consent in Parliament, cannot tax his own Tenants, nor proportion the Fine according to his Pleasure, when the Tenant holds the Land *ad exercitum*, for the Defence of the Kingdom, much less can he do it where there is no Tenure for that Purpose. That Escuage cannot be set without Parliament, is first the Statute of *Running Mead*, *Nullum Scutagium vel auxilium ponatur in Regno nostro nisi per commune concilium Regni nostri*; which tho it be not printed, yet it is of Record, and inrolled in the *Red Book* of the *Exchequer*, and cited in *Mat. Paris* p. 343. And that as well before the Confirmation of it 9 Hen. III. as since, it hath been by the Judges reputed to be a Statute and of Force, appears by the Book of 5 Hen. III. *Mordam*. 53. where it is pleaded and called by the Name of *Magna Charta*, and allowed; and *M. 19 Ed. I. finiente* 20. *incipiente Banc. Regis Rot.* 56. in the Case of *Ralph de Tunney*, it's pleaded by the Name of *Magna Charta Johannis Regis de Running Mead*, and allowed.

In the Book of Knights-Fees of *Ed. I.*'s time, there is a Writ cited, which went to the Sheriff of Hereford thus; *Datum est nobis intelligi quod plures*

sunt qui tenent per servitium Militarium de nobis, qui contradicunt solvere Scutagia quæ nobis sunt concessa per commune concilium Regni nostri; therefore he is commanded to levy them. *Comm' M. 8 Ed. II. Rot. dorf.* many Processes issued for the levying of Escuage granted in *Ed. I.*'s time superseded, and quite releas'd; the Reason entred on the Roll is, *Quia dictum servitium non fuit communiter factum*; that is, as I conceive, that it was not done *per commune Concilium Regni*: the Books are exprefs, 13 Hen. IV. *Com. Banc. Na. br.* 83. *Institut. Sect.* 97.

My Lords, that those that held in Socage or Fee-Farm, or not by so many Knights-Fees as they were distrained for, were always discharged, as appears by infinite Precedents, I shall make no use of it, as the manner of entring these Discharges upon the Roll; it is observable, that he is distrained *ac si teneret per servitium Militare*, whereas he holds the Lands in Socage, *pro quibus servitium aliquod Regi in exercitiis suis facere non debet*, and in some Rolls that *Ratione alicujus autoritatis*, he ought not to be distrained; therefore *Quia Dominus Rex non vult illum in hac parte injuriari prout justum est*, the Distresses are released. Amongst divers Precedents for this, I shall cite but one or two, *Br. Trin.* 34 *Ed. I. Rot.* 20. the Abbot of *Abington* and *John Arden*, the Iter Roll of *Suffex*, 7 *Ed. I. Rot.* 107. of *Gilbert Gifford*. My Lords, if the King might have raised Money, and seized Money for finding of Soldiers, or for their Arms, this manner of Entry, as I humbly conceive, would never have been suffer'd.

I am now come to the first Particular that I have instanced; that is, the charging the Subject for finding of Soldiers to go out of their County for the Defence of the Realm. My Lords, in that I shall in the first place admit these three Things.

1. That every Man after the Statute of *Winchester, secundum statum & facultates*, was to find all manner of Arms, as well for the Defence of the Realm against Foreigners, as for the Peace; and that I have before proved by that of 3 *Rich. II. M.* 16. and after by the Statute 5 *Hen. IV.*

2. That upon sudden coming of strange Enemies, these are compelled to travel out of their own Counties, is the Statute of 1 *Ed. III. cap.* 5. and so for appeasing of any notable Rebellion, when the King for the doing thereof goes in Person, as appears by the Statute 11 *Henry IV. cap.* 1, and 18.

3. I shall admit, that so long as they remain at home, and go not out of their Counties, they are to have no Wages; and that the Maritime Shires, and those that border upon *Scotland* and *Wales*, were not to be at the King's Charge, so long as they remained at home in their own Counties for the Preservation of them; but that they were in that Case themselves to bear the Charge against foreign Invasion, as of making Hue and Cry, assisting the Sheriff when he took the *Posse Comitatus*, and all other Things concerning the keeping of the Peace.

But that the Subjects are taxable either for Wages or Victuals, or otherwise for finding of Soldiers out of their Counties, tho for Defence of the Kingdom, or that any are compellable to do it at their own Charge, I shall humbly deny. The Statute 1 *Ed. III.* says, that in this Case it shall be done, as usually hath been done in times past, for

the Defence of the Realm. My Lords, I shall not deny, but that before *Edward III.*'s time Commissions have issued out of the Chancery for that purpose; against which Matters of Fact, not only to ballance them, but even to weigh them down, it's as clear that whole Armies, some of them of 30000 at the least, over and above them that were summoned by their Tenure, have been maintained at the King's Charge, from the time that they have departed out of their Counties, during the whole time of their Service, and that not only with Promises of Payment, but that they were paid *ex Thesauro Regis*, out of the *Exchequer*; and many times upon failure of Payment, Victuals, Wages, and other Things, upon Suit for them in the *Exchequer*, full Payment has been made; of which sort in most Kings Reigns there are many Cases.

My Lords, this is the Answer that I give to the Commissions to the Country, That *de facto* the King was at the Charge usually for defensive War. By the Statute 19 *Hen. VIII. cap. 1.* those that have Annuities of the King, must attend him when the King in Person goes for the Defence of the Realm, or against Rebels: But there is a special *Proviso*, that they shall have Wages of the King from the time they set out till they come to the King, allowing twenty Miles a Day, and afterwards as long as they shall remain in the Service. Upon a Rebellion in the North 28 *Hen. VIII.* against which the King intended to go in Person, Privy-Seals were sent to most of the Gentry to attend the King with the best Retinue that they could make, and likewise to bring the Bills of their Expence, and Payment promised, as appears by many of those Privy-Seals remaining in the Palace-Treasury. And besides the Indentures themselves, whereof I have seen many, it appears by the Statute 2 & 3 *Ed. VI. cap. 2.* that the Retainer of Soldiers at the King's Charge, was as well for Defensive as Offensive Wars; and also by the Statute of 3 *Hen. VIII. cap. 5.*

My Lords, in the next Place I shall endeavour the Proof hereof by clear Authorities. The Statute of 25 *Ed. III. cap. 8.* is, that none shall be compelled to find Arms, but such as hold by such Service, if it be not by Grant in Parliament. That this was not *introdutivum novæ legis*, appears by a Petition whereupon the Statute is made, that it is *encounter le droit del Royme*. That the Common Law was so before the Statute, and likewise in case of a Defensive War, appears by the Authorities following: *P. 26 Ed. I. Rot. 35. dorf.* the Scots entering the Borders, a Commission issued *Reginaldo de Gray*, to press Soldiers in *Lancashire*; he certified by his Letter inrolled there, *que sans denieres prest*, he could not procure them to march out of those Parts; and therefore Order is taken in the *Exchequer* to send Money. That the Scots had now invaded the Kingdom, appears by *Br. irrol' m. 26 Ed. I. in Scaccar.* where Commissions are inrolled for many Thousands to be levied for this War at the King's Wages. *Br. Trin. 32 Ed. I. Rot. 18. Communia.* The Wardens of the Marches of *Cumberland* and *Westmorland* write to the Barons of the *Exchequer*, that whereas the Scots lay near the Marches with a great Army, and that the People of these Counties would not march out of their Counties without Wages and Victuals, that they would provide for both. 2 *Pars Pat. 10 Ed. II. M. 26.* and 9 *Ed. II.*

in *Parl.* a Grant to find one Soldier for sixty Days at the Charge of the Town against an Invasion of the Scots. Now the King grants, *Quod hujusmodi concessio non reddat in præjudicium, nec trabatur in exemplum in futuro.* At the Time when this Aid was granted, the Scots had entered the Realm, and wasted the Bishoprick of *Durham*, as appears in 14 *Ed. II. Banc' Reg. Rot. 60. Rot. Scot. 12* and 13 *Ed. II. M. 7. and 13.* The same Indemnity upon the like Occasion of Defence, when they found the Soldiers *ad rogatum Regis*, and the King commanded the Chancellor to declare as much. *Claus. 13 Ed. III. M. 38. dorf. pars 1.* the Abbot of *Ramsay* discharged *pro Custodia Maritima* in the County of *Norfolk*, because he remained in his own County of *Huntington*, *cum equis & armis*, for the Defence thereof, with this, that therefore it was not *rationi consonans* to charge him farther. The same it is *Rot. Fra. 21 Ed. II. M. 1. Pars 1. Oxon.* because they were *prompti & parati* at home to defend the County. But the Practice, it seems, not agreeing with the Right in the Parliament, 20 *Ed. III. M. 12.* the Commons complain, that Commissions had issued out of the Chancery to charge the People in this Particular and otherwise, without Consent in Parliament, and pray, that they may disobey such Commissions. The Answer is, that the Commons had heretofore promised to assist the King with their Bodies and Goods in the War with *France*, and likewise for the Defence of the Realm; and that the great Lords, considering the Necessity as well for Defence as for the King's Wars, agree thereunto, and yet promise that this which is done *in cess Necessitate, ne soit troit en consequence n' ensample.* My Lords, this is a full Declaration of the Right, even when for the Defence, and yet some practise to the contrary. Before the making of the Statute 25 *Ed. III.* procured the Complaints in this Particular, in the Parliament 21 *Ed. III. M. 22 Ed. III. Pat. 8 Hen. III. Fulcassius de Brent inimicus publicus & excommunicatus*, that imprisoned the Justices Itinerant in *Bedford-Castle*, and held the Castle against the King; the King, *propter graves & manifestos excessus quibus regnum multipliciter perturbavit*, besieged the Castle; and whereas the Clergy, *de mera gratia*, had granted the King Aid for the doing thereof, *Rex nolens gratiam sic nobis exhibitam ad debitum retorqueri*, declares as much by his Letters Patent. My Lords, it is here declared, that the King cannot *de debito, or de jure*, take any Aid against the Subjects Wills for besieging of a Castle, held against the King by a publick Enemy. *Rot. Inquisition' 3 Ed. I. Rot. 4. Kent' coram auditoribus querelarum post bellum Evesham & pacem proclamatum.* The Castle of *Tunbridge* being held against the King, the Hundred of *Feversham* was assessed at fifteen Pounds *per insultationem* of the Castle: The Jury presents this as a Grievance, which the Justices would never have received, nor suffer'd to be entred into the Roll, if this Assessment might have lawfully been made. My Lords, this Castle and Hundred they were both in the same County, and being before the Statute of *Winchester*, they are not compellable to besiege the Castle; and if they were compellable to go in Person and with Arms, yet no Assessment could be laid for the doing thereof. My Lords, I shall only offer to your Lordships Consideration the *Scotish* Roll of 20 *Ed. III. M. 6.* the Wardens of the Marches of *Scotland* were to appoint

appoint *Exploratores & Vigiles*, which were to espy out and give notice of the Enemy's Intentments. By the Commissions in Henry IV. Henry V. and Henry VI.'s Times, they were *explorandum defensione Regni, & partium sumptibus incolarum*: But how? Only *de assensu & voluntate sua, prout fieri consuevit*.

My Lords, I am now come to that of Victuals. The Statute 14 Ed. III. cap. 19. is, That for the Wars the Provision for them shall be done by Merchants without Commission or other Power from the King, or any other Power, that the People may not be compelled to sell against their Wills. That this was as well for Defensive as Offensive War, and that this was not *introducivum novæ legis*, but was so at Common Law, is by your Lordship's Favour, clear. *Pat. 29 Ed. I. M. 16, 19. ad reprimendam malitiam Scotorum*, and to repel them, Commissions to most Counties to provide Victuals; and because they refuse to do it, the King then offers them Security. *Br. Trin. 8 Ed. II. Rot. 99. Victuals bought juxta forum patriæ, pro munitione marchie Scotiæ*, and there Payment upon Suit adjudged. Sometimes at Newcastle, sometimes at Carlisle, sometimes at Berwick, as the War required, were Store-Houses, where the Victuals were laid, and Clerks of the Stores to issue them out. That the King not only paid for the Victuals, but for the Houses where they were laid, appears. *Br. Trin. Ed. III. about the End of the Roll, dorf. the Burgeffes of Newcastle complain in Parliament, that their Houses had been taken up long time for the keeping of those Victuals; this was transmitted into the Exchequer by Writ, which says, Volumus iis pro domibus suis prædictis sic occupatis, satisfacere, prout debet & prout justum fuerit, & prout temporibus Progenitor' nostror' fieri consuevit.*

My Lords, in the next place for the Defence. When those that served with Horse *ad vadia Regis* lost their Horses in the Service, the Owners did not bear the Loss, but they were always paid for by the King; and therefore when they were first entred into the Service, the Marshal, or else the Wardens of the Marches, who had the Command of them, did set down in a Roll the Horse of each Man, and the Mark and Price of each Horse, to the intent that the Owner by this Certificate might be assured of the full Value to be paid him, in case the Horse was lost. This appears *Claus. 34 Ed. I. M. 16. where the custodes Marchiæ Scotiæ assigned pro defensione Marchiæ were to do it. Br. irrat. in the 26 Ed. I. Rot. 105, 106. the Scots having entred the Realm divers homicidia, incendia & alia facinora perpetrantes, there the Horses ad vadia for Defence were to be appraised. 2 Pars. Pat. 10 Ed. II. the same; and the Scottish Roll of the 21 Ed. III. M. 7. the same, prout jus est. That thereupon, since, the Subject hath recover'd of the King, are many Cases. I will instance but in two or three. In 24 Ed. I. Rot. 16. dorf. Robert Heibam recover'd twenty Marks in the Exchequer, *pro equo perduto in conspectu Dover inter homines Regis & inimicos Franciæ*; at which time the French had assaulted Dover, and burnt the Priory and a great part of the Town. *Br. Hil. 17 Ed. II. pro restauratione trium equorum perditor' at Carlisle. 9 Ed. II. Com. P. 9 Ed. II. Richard Waldgrave recovered for Horses lost at**

Carlisle. Com. Hil. 2 Ed. III. for Wages pro restauratione equorum perditor' and burying of the Dead when the Scots had entred the Realm at Stanope-Park, for one Troop fifty eight thousand Pound allow'd, babita inde deliberatione, and adjudged.

For Castles the antient Forts and Bulwarks for Defence, the Statute 14 Ed. III. cap. 19. says, that Merchants without any Commission or Power from the King shall victual them, so that the People shall not be compelled to sell against their Will. That this Statute in this Particular is not *introducivum novæ legis*, is cleared by the Case *Trin. 16 Ed. I. Rot. 93. Wilts*, in a little Roll, and in a great Roll of the same Year, *Rot. 19. when in Trin. by John Eveshorne against John Flavell, Quia blada & garbas suas cepit, the Defendant says, he was Constable of the King's Castle of the Devises, and that he had in præceptis Domini Regis, quod mur' faceret to the Castle de morturo stauro vel de bladiis; and of these things, and that by Virtue of this Writ, he took an Inquest to know where he might have best these Provisions, ad minus nocumentum patriæ; and the Jury found it, that the Defendant might take it ad minus nocumentum patriæ of the Plaintiff; and that he came to the Plaintiff's House, and offered to buy pro Denariis & ad usum Regis; and that because the Plaintiff refused to sell, they departed from his House, the Issue joined, and found against the Defendant; 100 Marks Damages given the Plaintiff, and adjudged. There were always antiently *visores operationum*, and they upon Oath certified, that they saw the King's Money expended, which was demanded in the Exchequer. And for Victuals, as they were bought with the King's Money, so when they grew stale, or the Danger was passed, they were sold again to the King's Use.*

My Lords, that even in the Time of War, when the Frontier Towns and Castles were besieged, and the Borders invaded, that even then the King did bear the Charges, appears by the Allowances in the Exchequer. *Trin. 27 Ed. I. Rot. 47. pro tuitione Newcastle contra Scotos, qui hostiliter Regnum in partibus illis invaserunt. M. 31. Ed. I. Rot. 2. the Scots besieged Carlisle, 26 Ed. I. and Allowance now de exitibus Castr' which was the King's. And in the 27 Ed. I. 75. ten thousand Pounds allowed pro ingen' and Trin. 32 Ed. I. Rot. 11, 12. Visis comput. 28 Ed. I. Rot. 71. prout justum, quia Scoti contra Regem hostiliter insurgunt, therefore de thesauro Regis, Berwick is fortified; & Rot. 78. dorf. it appears that the Sheriff of Yorkshire had carried ten thousand Pounds de thesauro Regis to those Parts. Br. M. 17 Ed. II. propter frequentes egressus Scotorum in Regno, the Castle of Sandall at the King's Charge is fortified prout justum, and Allowance given. And Brevia Hil. that Year the Castle of Horney for the same Cause was fortified, the Scots having entred circa prædium Castrum & apud Lancaster. 3 & 4 Phil. & Mar. Dyer. 162. b. One in Execution for Debt in the Fleet, who, as the Book saith, was a Man very necessary for the War; and it was moved by the King's Attorney per mandatum concilii, If the Prisoner might be licensed with a Keeper by the Queen to go to Berwick for the Defence of it, or no; and it was held by all the Judges of the King's-Bench and Common Pleas, that the License*

was not good; and 4 & 5 the same Case cited accordingly to have been the Opinion of all the Judges.

My Lords, for Prisoners taken in defensive Wars, and likewise for Pledges and Hostages for securing the Peace, that the Charge and Maintenance, and the carrying them to the several Places of their Abode, have been always borne by the Kings of this Realm, the Allowances thereof in the *Exchequer* are so frequent, that I intend to cite none of them, save that for the Prisoners taken in the Conflict at *Dover* before spoken of, which is *Comm' 4 Ed. II. Rot. 22. dorf.* neither do I find it at any time stood upon, save only 8 *Ed. II.* amongst the *Br. Trin. 8 Ed. II. Rot. 88. dorf.* But the Reason is, because that after the Death of *Ed. I.* in the Commission of granting the Constableness of the Castle, no mention was made of the Prisoners, and yet even in that Case upon a *Monstravit Regi*, a Writ of Privy-Seal is awarded for Allowance *prout Justum.*

My Lords, if in all these Particulars of Soldiers, Victuals, Castles and Forts, Horses, Prisoners and Pledges in case of a Defensive War, the main Supports of them, the Kings could not tax their Subjects, but have borne the Charge thereof themselves; I shall then offer it to your Lordships to be so for the Defence in General.

My Lords, the Allowances in the *Exchequer* in all the Particulars before-mentioned are frequent. In the Case of Mines, the Profits of Silver Mines, that they upon an Accompt in the *Exchequer* were always answered unto the King, was one of the principal Arguments for the King's Right thereunto; and there *fo. 320* it is held, that in all Things that concern the Revenue of the Crown, because they are there debated, the Record of the *Exchequer* shews not only the Course of the Court, but what the Law is thro' the Kingdom.

My Lords, that in Cases of War and Embassies the *Chequer* made Allowances, and with what great Consideration, appears by the Statute 5 *Rich. II. cap. 10.* that they were not allowed by the Court, till the Party brought the Great Seal, or the Privy-Seal for it. And if a Writ of Allowance came to the *Exchequer* before the Court had examined the Accompt, yet they never made Allowance until the Court had examined it. *Hil. 25 Ed. I. Rot. 22. Licet breve de allocatione pendit de 1000 l. allocandis tamen ante allocationem factam oportet inquirend' si pecunia illa ad opus Regis devenit & quod ipsi doceant super hoc Curiam Regis.* And *Trin. 25 Ed. I. Rot. 47.* the Allowances are never in Grofs, but by Particulars.

My Lords, the next Proof that I shall humbly offer unto your Lordships, is in that of borrowing of Money by the King for the Defence of the Realm, which as they have usually done it, so it is as clear, that not only upon Petitions, their own Pleasure, and upon Grace, but likewise upon Suit they have been adjudged so to do in the ordinary Courts of Justice. *Comm' Pasch. 31. Rot. 41.* one hundred and forty nine Pounds borrowed of *Henry Tompson, pro defensione totius Regni* was sued for, and Repayment ordered. *M. 10 Ed. II. Rot. 160.* *Grandes pecunie summe* borrowed by the King for that Purpose, and order for Repayment. *Br. 3 Ed. III. Comm' princip. Rot. 664 l.* My Lords, in this Particular I shall cite but this one Case more, *Comm' Pasch. 29 Ed. I. Rot. 18.* the King

pro urgentissimis Regni negotiis & defensione totius Regni, had seized divers Sums of Money in all the Abbies and Cathedrals, and other religious Houses in the Realm, & *quo citius commode poterit* promised Payment. In the Parliament 29 *Ed. I.* at *Lincoln* the King is petitioned for Repayment of these Monies, who promiseth Repayment, *Ita quod Regis conscientia super hoc exoneret* and there, and *Rot. 19.* divers Sums are adjudged to be paid.

My Lords, I shall thus humbly offer this unto your Lordships, that if the King had conceived, that when himself wanted Money for the Defence, that he might have charged his Subjects, he would never have made this Answer of Repayment, *ad exonerandum Conscientiam*, for then in Equity and Conscience the Parliament should have taken Care for the Satisfaction of these Debts, or should at leastwise have distributed part of the Charge upon all his Subjects; neither should the Parties have had full Satisfaction for all their Debts, but should have borne part themselves. By the Statute 35 *Hen. VIII. cap. 12.* the King for the Defence of the Realm had divers great Loans made to him. Now likewise there being great Cause of new Defence against *France* in *Scotland* in Aid of the King, they release these Assurances given by the King, and likewise release to the King all Suits and Petitions concerning those Moneys.

My Lords, I am now come to the other Authorities for proof thereof, which is by Acts of Parliament. My Lords, before I come to the Acts of Parliament themselves, I shall humbly offer unto your Lordships, the Summons and Preparatives to them.

First, The *Ardua Regni negotia* for which they are called, are principally *defensionem concernentia*; that these are not the Way and Manner of Defence, and their Advice therein, but the Supplies and Aids for this Defence, I have presented clear Proofs to your Lordships before. That these Aids cannot be raised without their Consents, is strongly inferred in this, that the Knights of the Shires are to have *plenam & sufficientem auctoritatem pro se & comitate Comitatus præd' ad faciend' & consentiend'*, to the Things in *negotiis ante dictis*. If this might be done without consent of the Commons, this in the Writ would be needless. But that this cannot be done without their Consents is cleared by the Words following in the Negative, *Ita quod pro defectu potestatis hujusmodi dicta negotia infecta non remaneant quovismod.* This, my Lords, is the constant form of modern, and all the antient Writs, and shews clearly that the Commons without their Consents in Parliament, are not chargeable to a defensive War.

In the Acts of Parliament, I will begin with that of *William the Conqueror, Anno quarto* of his Reign; which besides that it is cited in the Preface of the 8th Report, and *Instit. fol. 75.* and by *Ingulphus fo. 519.* and *Mr. Selden* in his *Eadmerus, Page 171.* it's likewise upon Record, and inrolled in the Red Book in the *Exchequer*. The words are these, *Volumus & firmiter precipimus & concedimus quod omnes liberi homines totius Monarchie Regni nostri Angliæ, habeant & teneant terras suas & possessiones suas bene & in pace libere ab omni exactione injusta & ab omni tallagio. Ita quod nihil ab eis exigatur vel capiatur nisi servitium suum*

gium liberum quod de jure nobis facere debent & facere tenent & concessum jure hereditario in perpetuum per Commune concilium totius Regni nostri præd.

My Lords, the Words by reason of the Disjunctive & *ab omni tallagio* are plain, that the King shall not exact, nor take any Thing of any Freeman, but what his Tenure binds him unto. As in words by reason of the generality of them, it extends to Cases of the Defence of the Realm; that it doth so in intent, I shall endeavour thus to present it to your Lordships.

The Military Services before mentioned for the Defence of the Realm, they are by *Bracton* attributed to the Conqueror's Institution; for in his second Book *fo. 36.* speaking of them, he saith, *Secundum quod in Conquestu fuit adinventum.* *Ploewden* in the Argument of Sir *Thomas Tresham's* Case. Means the Conqueror had to do it by reason of the many Attainders of those that took part with *Harold*, and after his Death with *Edgar Atheling*. That he did it in a great part, appears by *Matth. Paris, fo. 8.* that he put all the Clergy that before held in *Franke Almogne sub servitute Militari* to do Service *tempore hostilitatis*, and by the County Palatine of *Durham* and *Chester* in those Places of Danger. In the Book of Knights Fees in *Henry III's* Time, it appears by the Certificates, they had sometimes *de veteri Feoffament* and sometimes *de novo*. And by some of them it appears, that the Tenures *de novo Feoffament* were before King *Stephen's* Time, and therefore 'tis probable that the *Vetera* might be those created by the Conqueror. The Provision for Soldiers Pay by Tenures was likewise of his Institution, as appears by that before cited out of the Black Book, *lib. 1. cap. 27.* that in *primitivo regni statu post conquestum ad stipendia & donat* militum out of the Castles and other Lands in quibus agricultura non exercebatur pecunia numerata succrescebat. The Policy and Provision of the Conqueror for the Defence being by Tenures, when in this Act of Parliament he says, *quod nihil ab iis, exigatur vel capiatur, nisi servitium suum quod de jure nobis facere tenentur*, I humbly conceive shews plainly, that the Subject was not otherwise to be charged for the Defence, nor further than by their Tenure. This, my Lords, further appears by other Parts of that Act of Parliament, where speaking of any thing of Charge that is to be done according to their Tenures, as that all *bene se teneant in equis & armis ad servitium suum integrum faciend*. But in the next Place speaking of the Defence it saith, that all within the Realm *sunt fratres conjurati pro viribus & facultatibus* to defend the Kingdom and the Peace, *& ad judicium rectum, & justitiam faciend*; the coupling of the Defence with that of the Peace, and doing Justice, shews the personal Care that all by their Oath of Allegiance ought to bear to the common Peace and Good of the Realm.

The next Statute that I shall present to your Lordships, is that of *Running Mead*, '17 *Johannis Regis*, the words are these, *Nullum Scutagium vel auxilium pona* in Regno nostro nisi per Commune Consilium Regni nostri nisi ad corpus nostrum Redimend, and to knight his eldest Son, and to marry his eldest Daughter. As in Words these extend to the Defence; because all Supplies for that Purpose from the Subject, they are only in *auxilium*, or in *subventionem expensor* of the King, who, as before is proved, is principally bound thereunto: So may the Intent likewise be further gathered, First from this, that the Word *auxilium* is joined with that of

Scutage, which is for the Defence; and likewise from this, that particular Satisfaction is made, by other parts of that Statute, to those that had been disseised by *Richard II.* and King *John*, which were things done only for the Increase of their Revenue, without shew of the Common Defence. That both before 9 *Hen. III.* and afterwards 20 *Edw. I.* this was a Statute, and so accounted, I have before proved. And in the Book 5 *Hen. III.* it is called by the Name of *Magna Charta sans addition*. So 37 *Hen. III.* in that solemn Confirmation observed by *Matth. Paris p. 115.* this of *Running Mead* is confirmed by the Name of *Mag. Char.* and 50 *Hen. III. p. 1220.* which I note only to this purpose; that of speaking of *Mag' Chari*, this of *Running Mead* is intended as well as that of 9 *Hen. III.* as part thereof, and bodied both together; yet that neither of them were observed either in King *John's* or *Hen. III's* time, our Histories are full of it. And by the Pope's Bulls of 12 and 13 *Hen. III.* the Pope absolving the King from his Oath in their Confirmation, doth it because, as the words of the Bulls are, *Juramentum peccati vinculum esse non debet*; neither till after 29 *Edw. I.* as I shall hereafter prove, were they at all observed in the things concerning the King's Prerogative.

The next that I shall cite, are the Statutes of 25 *Edw. I.* and the Statute *de tallagio non concedendo*. That of the 25 *Edw. I. cap. 5 & 6.* the Grievance is for Aids, Tasks and Prizes taken thro' the Realm, for the Wars, shall not be brought into any Custom for any thing before done, be it by Roll or any other Precedent that may be found; and further grants, that for no Business from henceforth, he will take any such Aids, Tasks and Prizes but by common Consent in the Parliament of the Realm, and for the common Profit, saving the antient Aids and Prizes due and accustomed. My Lords, tho by the Copulative it is clear enough, that there must be a Consent and common Profit concurring, and altho the saving of the antient Prizes and Aids accustomed, might well enough have been satisfied in the Aid excepted in *Running Mead*, and the prizing of Wines and Purveyance; yet to out these and all other Scruples, the Statute *de tallagio, &c.* made afterwards for that purpose is absolute and general: That no Talliage or Aid shall be taken by the King, nor that any of his Officers shall take any Corn, Leather, Cattel, or any other Goods without the consent of the Party.

My Lords, to bring these Statutes to the Thing in question, that these Things cannot be done tho for the Defence, the times of the making of them, and the Circumstances concurring thereunto, I shall present unto your Lordships.

That of the 25th of *Edw. I.* by the Date appears, was the 10th of *Octob. 25. Ed. I.* My Lords, the King, the 12th of *Aug.* before being at *Odimer* ready to go over into *Flanders*, the Parliament being then summon'd by his Letters Patents, *Rot. pat. 25 Ed. I. M. 7.* taking notice of the Constables and Marshals departure from the Court in Displeasure, and of the Rumors of the People, that the King refused to seal Articles sent him for the common Profit, for the Redress of divers Grievances done to the People. For the Grievance he saith, that without those things he could not have defended the Realm, and yet saith, that he is sorry for it, and prayeth that this may be his Excuse, as he that hath done those Things, neither to buy Lands nor Tenements, nor Castles, but to defend

defend himself and the whole Realm; and that if he returned again, he would have all know, that he had an Intent to amend all those things, to the honour of God, and Content of his People; that if he dies in this Service, his Heirs shall make amends. Hereby it appears, that the Grievances that procured this Statute, were for the Defence of the Realm; therefore from hence it follows, that the Aid and Taxes there mentioned were for the Defence. So likewise that the Exception of the antient Aids extends not to those of the Defence, that being the Thing wholly complained of. This Declaration of the King was the 12th of August; the September after the King being at *Winchelsea*, those Articles are sent unto him, to which he deferred for the present to give his assent unto them, because his Council was not there, and so sails over into *Flanders*. This Statute of the 25th of *Edw. I.* is past, the King beyond the Sea, the *Teste Edvardo Filio nostro*; at his return, as appears by *Walsingham Page 42.* the King is desired to confirm these Articles, which in *Walsingham Page 40.* are the same Word for Word as the Statute *De tallagio*, which the King then deferred. 27 *Edw. I.* they desire it again, which the King doth with a *Salvo jure Coronæ nostræ in fine adjecto, quod cum audissent Comites cum displacentia ad propria discesserunt, fæith the Author, sed revocatis ipsis ad Quind' Pasch' omnia sunt concessa.*

That the Statute *De tallagio* was after that of 25 *Edw. I.* is plain in this, by the King's going over into *Flanders* without assenting unto any Articles in *Septemb.* and 10 *Octob.* following, as appears by that Statute 25 *Edw. I.* itself, it was made; and likewise by the Statute *De tallagio* itself, the King's releasing all Rancour to the Earl-Marshall and Constable who had most offended him, and first presented these Articles to the King. My Lords, I shall add this only, as I conceive it will not be proved, that this King either before or after the making of this Statute, or any of his Successors since, ever claimed this absolute Power over their Subjects, as to lay Aids and Tallages upon them for the Supportation of their own private Estates abstracted from the common Defence or Good of the Kingdom. This King at this time we see by his own Declaration, was far from it. This last Statute fully satisfied those that desired it; for as *Walsingham* saith, *Ad eorum votum absolute omnia sunt concessa.* If therefore it extends not to that of Defence, I shall humbly offer it by what Construction of it our Ancestors Judgments and Discretions will be freed from a great deal of Censure, that were so well contented with it.

My Lords, *Mag. Char.* being confirmed at the same time when the Statute 25 *Edw. I.* was made, and both that and the Statute *De tallagio*, being only Articles upon *Mag. Char.* they were all of them, as I conceive, intended in the subsequent, and so often Confirmation of *Magna Charta.*

My Lords, the next is the Statute of the 14 *Edw. III. cap. 1.* that the People shall not be compelled to make any Aid, or to sustain any Charge but in Parliament. That this cannot be done for the Defence, will, as I conceive, be enforced from the words; for a great Subsidy having been granted as well for the War on this side the Sea, that is for Defence, as for the *French* War, It's declared, that this shall not be drawn into Example, and that out of Parliament they shall not be compelled to sustain any Charge; and then it is further enacted, that this Subsidy and all the Profits of Ward-

ships, Escheats, and other Profits of the Realm, shall be spent for Defence and Safeguard of the Realm, and the Wars in *Scotland* and *France*, and not elsewhere; so that this Statute, as I conceive, all put together, bears this Sense, That the Subsidies granted in Parliament, and the Wardships being a Fruit of the Tenures created for the Defence of the Realm, and other Profits arising to the King by way of Prerogative, are to be spent for the Defence of the Realm, and the King's other Wars; but that no Aid or Charge for any of these, can be laid upon the Commons without consent in Parliament. My Lords, that the Practice of the King, I mean *Edw. III.* was contrary to these Statutes, and that they were not kept appears by the Parliament Roll, 15 *Edw. III. M. 9.* the next Year after, where the Commons shew that their Goods were seized, and their Bodies imprisoned without any Suit commenced against them.

My Lords, the next which I shall cite are the Statutes of 25 *Edw. III.* and 1 *Rich. III.* against Loans and Benevolences, which I shall humbly offer unto your Lordships on this Ground, *Ad ea quæ frequentius acciderint adparantur leges.* As for my part I have seen general Loans and Benevolences, but they were for the Defence; so I conceive if they were otherwise, they were but few in respect of the others. The common Grievances therefore being by Loans and Benevolences of that Nature, these Statutes, I conceive, were made against them; for these not being within the words of any of the former Statutes, that therefore the Kings might with the more Colour put them in Practice, and on the other side being as equally dangerous to the Subjects, because of the Displeasure by denial, they procured the Statutes. That Loans for the Defence were after 25 *Edw. III.* counted unlawful, appears by *Walsingham Pag. 179.* that 44 *Edw. III.* the King *Sinistro Consilio magnas summas pecuniæ* of all Sorts *petiit, asserens, quod in defensionem Ecclesiæ & Regni illas expenderet,* but that the People would not lend.

My Lords, the next which I shall cite is direct in Words, which tho it be not an Act of Parliament, yet the Weight of the Authority by putting of it will appear. In the Second Part of the Parliament Roll, 2 *Rich. II. M. 3, 4, 5.* the King being beset with the Enemies of *France*, and *Spain*, and *Scotland*, who all three by Land and Sea invaded the Realm, the Privy-Council not willing in a thing so much concerning the Realm, to take the whole Charge of it upon themselves, nor desiring so soon to call a Parliament, a Parliament but a little before being dissolved; they therefore resolved to assemble a great Council of most of the Bishops, Lords, and other great Men and Sages of the Realm, who meeting and finding the absolute necessity of a Preparation for Defence, and that the King wanted Money to do it; what their full and final Resolution in this Case of Extremity for Defence was, I shall read the words of the Roll; they say, *Pur conclusion final quilz ne poient cest mischiefe remedier sans charger les Comm' del Roialme, quel charge ne poient de fait ne grant sans Parliament:* and therefore the Necessity being urgent, the great Men lend Money for the present, with advice presently to call a Parliament, as well to provide for the Repayment of this Loan, as for further Supply. It's true, my Lords, that this King was at this time within Age, and it is likely that many of his Council had been *Edw. III.* his Grand-

Grandfather's Privy-Council, who well knew his Prerogative, and extended it as far, by reason of his great Wars, to the charging of his Subjects, as any before him, or since his time. And that not only the Privy-Council, but likewise, as the Record saith, almost all the Prelates and others, Dukes, Earls, Barons, Bannerets, and other Sages of the Realm, which I conceive were the Judges, should be so far from putting this in Execution, that they declare in the Negative upon full Deliberation, that the Commons cannot be charged herein but in Parliament, themselves likewise thereby being to undergo a present Charge, by lending to supply that Necessity; the Authority must needs be weighty: And upon second Thoughts afterwards, the same was declared in full Parliament by the Lord Chancellor, and so afterwards entred upon the Roll without any Qualification at all, which adds further to the Authority thereof.

Ult. Feb. 3. Car. A Commission issued to divers great Lords, the End, as appears by the words, was for aiding the King's Allies beyond Sea, and for the Defence and Safety of the Kingdom and People. They were, by the Commission, to raise Money by Imposition or otherwise, which without extreme Danger to the King, Kingdom, and People, can admit no long delay, wherein Form and Circumstances are to be dispensed with rather than the Substance lost. This, my Lords, was a Commission to tax the Subjects in time of Necessity for Defence. The last Parliament, this Commission as against the Law was condemned by both Houses, and cancelled in his Majesty's Presence.

Philip Comines in his 5th Book, cap. 8. observing the same, above all other commends the Policy of the *English* Laws and Government; and both he and *Bodinus Reipublic. lib. 6. cap. 11.* and *Pasquerus* Advocate-General in the King of *France* his Chamber of Accompts in his second Book, cap. 6, and 7. all shew this likewise to be the antient Law of *France*; and how the Practice comes now to be otherwise there, *Pasquerus* shews at large; and that the Kings sometimes endeavouring to the contrary, found so much Difficulty, that they afterwards, especially *Charles* the Fifth, procured by the Consent of the three Estates these Aids for Defence to be granted for three or four Years together: And that this Consent of the People at the first, was afterwards that which gave the occasion to the King to take it without Consent; and therefore he concludes that *France* being *Un Roy-alme de Consequence*, that they must not easily promise any thing, tho but once, which they will not be willing to permit for ever.

My Lords, I have now done with the Proofs; in the next place I shall endeavour an answer to some few Objections that are obvious, both from Reason and Authorities.

For those of Authorities, 13 *Hen. 4.* 14, 16. *Gascoigne's* Opinion that the King may charge his People without Parliament, to a thing that is for the common Profit of the People; the thing that he applies it to is, that the King may grant Pontage and Murage, &c.

My Lords, that the King may grant both these, and Tolls upon erection of a new Fair or Market, or Paveage, I shall not deny. The Answer that I shall give to them is, *First*, That these Grants do charge *venalia* only, that is, Goods carried to those Places for Merchandize; but that any

Tax may be laid *secundum statum & facultates*, either upon the Hundred or County, I shall humbly deny it.

It is true, my Lords, by the Conqueror's Laws it appears, that Cities and walled Towns were for the Defence of the Country, and therefore by those Laws no Fair or Market might be kept but in *Civitate aut Burgo muro walliat*. Therefore in *Dooms-day-Book* in all such Cases it is found, that there are so many *Mansiones Murales*, which by their Tenure, when need was, were bound *ad murum reficiend*. That no other Land that holds not by that Service is liable, appears by the Parliament Roll, 1 *Rich. II. pars. 2. M. 76.* where all the Cities and Burroughs of *England* petition, that in this time of Danger they not being able with their Merchandize to do it, that others that had Lands within the Towns might be made Contributaries, who before were at no part of the Charge.

The Answer is, that all according to their Tenure, as they have antiently done, so shall they still; and if this might be done, there would have been no need of the Statutes of 2 & 3 *Pbil. & Mar. cap. 1. 23 Eliz. cap. 4.* for giving Power to tax Men *secundum statum & facultates*, to repair Castles and Towns within twenty Miles of *Scotland*.

For the Tolls and Pontages and Paveages, as there is a great deal of Equity that those which receive Benefit by bringing their Goods to the Market, and over the Bridge, should contribute to the Charges that make and maintain the Market-Places and the Bridges; so neither are they compulsory, but voluntary Charges: For as no Man pays, but he that receives the Benefit, so none is compellable thereunto, but is left to his Liberty. Neither is there any Colour in respect of the Town itself, to whom the Murage or Paveage is granted, why they should not be charged, because the Grant cannot be but at their own Suits; for if it be not at the Suit of *tot Burgensum*, the Grant is void, and to be revoked.

It may be further objected, that as the Law hath intrusted the Way and Manner of managing of Defence wholly and independently to his Majesty, so likewise of Aids and Means, as the *Causa sine qua non*; and therefore his Majesty should not be dependent upon the Parliament for them.

My Lords, the near Relation between his Majesty and the Parliament, that they are but one Body, hath been presented unto your Lordships, and that his Majesty did exercise the *summum Imperium* there. *Bodin lib. 1. cap. ult.* says, *quod ejusd' esset potestas tributa nova imponere cujus est legem terræ*; but that the Legislative is not in his Majesty out of Parliament, will be granted.

The Subjects Interest being as nearly concern'd in the Defence, as his Majesty's is; as there is no Cause to fear that they should not be willing to proportion the Aid to the Occasion; so neither can the Law presume otherwise, which hath so high an Opinion of the Judgment and Integrity of this Court, that as it is in the *Comm'* 398. it's unlawful for any Man to conceive any dishonourable Thing of it.

My Lords, my last Answer thereunto is, that by the Law the King hath as independent a Power to make a foreign War, as to make a defensive. It will, as I conceive, be granted, that in this Case his Majesty hath not Power to tax the Subject; for then it would follow that as well as to the conquering

quering of the next adjacent Realm, so of all *Europa*, the Subject should be at the Charge, and yet the Land conquered be only his Majesty's; and yet upon this Ground, in respect of the equality of the Powers, it might be done.

Neither, as I humbly conceive, doth this only answer the Objection, but returns upon the other side; for his Majesty has Power to make an Offensive War, which for the most part causeth a Defensive; by this means it should be in his Majesty's Power to make a Defensive War, and to tax the Subject for the Maintenance of it.

My Lords, the last Objection whereto I shall endeavour an Answer, stands thus. The Parliament is a great Body, and moves slowly; and that the Case may be such, that the Cause may be lost before the Parliamentary Supplies come.

My Lords, how Means of effecting so sudden and so great a Surprize can be so secretly carried, I shall not examine it in Reason, but shall humbly offer unto it these Answers.

That the Service whereby the Law hath provided for the Defence both for Land and Sea, they have both the same limitation of Time with the Parliamentary Supplies in the Summons of the Tenants by Knight's-Service *ad exercitum*, and of the *Cinque Ports*; forty Days warning is to be given, as is for the Parliament. And so it is probable, for that of *Mould*, 13 *Ed.* 1. it was for others that held by Sea-Service. And antiently the Summons *ad exercitum* to the Ports, and for the Parliament, went out together, or much about the same time, that the Parliament might assesse the Escuage; and in case the Tenures and other Revenues were not able to maintain the War, that the Parliament might provide for further Supplies, as appears *Hil.* 28 *Ed.* 1. *M.* 15. 31 *Ed.* 1. and 44 *Ed.* 1. *M.* 15, & 16. *Et oportet neminem legibus esse sapientiores.*

The Tonnage and Poundage when first granted for Life, was, that the Kings might always have Money ready upon such sudden Occasions. In the Parliament Roll, 4 *Ric.* 2. *M.* 42. the Commons desire payment of *Edward* the Third's Debts, that they might be encouraged to lend the King in Aid of the Realm, if a sudden Cause of Necessity should fall out. The Answer is, that it shall be done *selon le petition*. My Lords, by this it appears, that this Objection was not then taken to be of Weight, many of the Loans are in *Causa necessitatis in Articulo*. The Authorities that further answer this Objection are great, and full in the Point.

The first is that of the Parliament Roll of 2 *Ric.* 2. before cited; the Business of Defence could not stay so long as for a Parliamentary Supply, yet agreed, that the Commons without a Parliament could not be charg'd; and therefore the same Men that gave the Judgment, presently lend Money for that Purpose.

In the Statute 31 *Hen.* 8. for Proclamations, the Cause of making the Statute is expressed in these Words. Considering that sudden Causes and Occasions fortune many times, which do require speedy Remedies; and that by abiding for a Parliament, in the mean time might happen great Prejudice to insue to the Realm; therefore the King's Proclamation is by that Act made equivalent to an Act of Parliament, but with a full exception of their Lands, Goods and Chattels: which as it shews that before that, by the Com-

mon Law, the King could not, in Cases of Exigency that could not stay for a Parliament, take or seize their Goods, so they were careful still to preserve their Rights.

My Lords, after the Statute of 31 *Hen.* 8. the Maxim of *Justinian* was verified in *Hen.* VIII. as of the *Roman* Emperors after the *Lex Regia*, whereby the People transferred their Suffrage to the Emperor, *Quod Principi placet legis vim habet*; so all that time was that other as true on the Subjects part here, as there in the Digest, *Lege omnia de Regalis: quod meum est non est universitatis, Et quod nostrum est sine facto nostro ad alienos transferri non potest.* The 7 *Prædict.* of Spain, *titul.* 1. *particular.* 2. gives something more to the King, for he may take from the Subject, *pro necessitate Reipublicæ dato primum tali causa dictæ rei bonalambia ejusd' vel majoris pretii bonorum virorum arbitrio*; he may in this Case take, giving a Pawn to the Subject for the assurance of a future full Satisfaction. *Lyme* in his 6th Book, *cap.* 35. *Bodin* in his 6th Book, *fo.* 655. affirms, that when *Hannibal* had put *Italy* and *Rome* itself into so great a hazard, and that there was not Money left in the common Treasury, that yet the Senate without their Consent could not charge the People, but that *unusquisque* of the Senate *mutuo dabat aliquid in usum publicum.*

My Lords, the last Authority for the answering of this Objection, and the clearing of the whole Business, is the Commission of the Loan. 2 *Car.* *pars.* 4. *Pat. Roll*, the Words are these. 'The great and mighty Preparation both by Sea and Land, did daily threaten the Kingdom; that the Safety and Subsistence of the King and People, and the common Cause of Christendom were in apparent Danger of suffering irreparably; that the King's Treasure is exhaust, and the Coffers empty: That the Business of Supply cannot indure so long delay as the calling of a Parliament, and inquiring into all Means just in Cases of such unavoidable Danger; the King is now resolved to borrow of the Subject, to enable his Majesty for their Safeties, and provide his Repayment.'

My Lords, the borrowing of Money only is the thing required, that is for Defence, the King had no Money left; the Exigency such, that it would not stay for a Parliament. This Commission afterwards in the Parliament 3 *Car.* was question'd, and upon Debate adjudged by both the Houses of Parliament to be void in Law; by the Petition of Right presented so to the King, his Majesty denies it not.

My Lords, from this Objection of sudden Danger, I come to the next, which is the third Thing before offer'd unto your Lordships, which is an Admittance, that the Danger sometimes may be such, that the Subjects Goods sometimes without their Consent may be taken from them; for Property being both introduced and maintain'd by human Laws, all Things by the Law of Nature being common, there are therefore some times, like the *Philistines* being upon *Sampson*, wherein these Cords are too weak to hold us, *Necessitas enim* (as *Cicero* saith) *magnum humanæ imbecillitatis patrocinium omnem legem frangit*; at such times all Property ceaseth, and all Things are again resolved into the common Principles of Nature. These Times, as sometimes they are only *instanti*, and concern but some few, as in Cases of killing one other

other Mens Lands, or with their Goods upon sudden Assaults; so sometimes they are longer in Continuance, and larger in Extent, and concern the whole Kingdom, as it is in times of War, *quando agitur pro aris & focis flagrante Bello*. And as on the Particulars before mentioned, which are but for a short time, and that concern some few only, the Law hath no Power for that time, nor maintains any Property, so in the other Case it loseth this Power for a longer time, and over all. A Dissent upon Disseisin in time of War, takes not away the Entry of the Disseisee. *Littl. Sec. 412.* no Plenary after the six Months bars the Patron of his *Quare Impedit* upon a Presentation in time of War. 43 *Ed. 3. Quare Impedit. 135 Na. Br. 31.* And in a Writ of Right, where the Seisin makes the Title, the taking of Explees must be alledged to be done *tempore pacis*, the Law allowing no Estate in such times, but calls it an Occupation in time of War. *Littl. fo. 12.* And as *inter arma leges silent*, so that of *Bract. lib. 4. fo. 240.* that *tempus Guerræ est tempus Injurie*, is likewise true; for after the War is ended, the Law, as not having Cognizance of things then done, gives no Remedy for Wrongs in that time sustained, as the Case is adjudged in the Roll of *Kent. 7 Ed. I. inter placita de querelis*, one Parleton de Petro Randal quod ipse die Mercurii ante festum Sti Thomæ, 46 *Hen. III.* came to the Town of Cleve, and took of the Plaintiff's Goods three Oxen, four Cows, and three Heifers, and yet detains them; the Defendant alledgeth the Pardon of Henry III. of *Omnes transgressiones factæ ratione turbationis tunc in Regno existent*, and that it was *tempus Guerræ* when the Goods were taken; the Plaintiff replies, that the King pardons only Offences done to himself, & *non transgressiones aliis illatas*; the Defendant rejoins, that *tempus illud was tempus Guerræ, & non tempus pacis*, and upon this the Issue was joined; the Jury finds that when the Defendant took the Goods, *fuit tempus belli, & non tempus pacis*, and therefore it was adjudged for the Defendant. *Tempus belli*, when Property ceaseth, is not upon every Intestine or Defensive War, but only at such times when the Course of Justice is stop'd, and the Courts of Justice shut up; and this is *tempus belli* in the *Institutes. Sec. 412. 39 Ed. III. Banc. Regis Rot. 49.* the Attainder of Treason of Thomas Earl of Leicester reversed, Error assigned, *Quia tempora Pacis maxime cum per totum tempus prædicti Cancellarij & alij curiæ Domini Regis apertæ fuerunt, Et in quibus jus cuiusque fiebat prout fieri consuevit, Nec prædictus Dominus Rex in tempore illorum cum illis explicatis equitavit.* That there were great Armies on foot on both Sides in this Business when the Earl was taken at Barrowe-Bridge, our Histories are full, but yet it was not that *tempus Guerræ* intended by the Law, because the Courts of Justice were open, and the King with Banners display'd was not in Person in the Field.

My Lords, in these times of War I shall admit not only his Majesty, but likewise every Man that hath Power in his Hands, may take the Goods of any within the Realm, pull down their Houses, or burn their Corn, to cut off Victuals from the Enemy, and do all other things that conduce to the Safety of the Kingdom, without respect had to any Man's Property. 12 *Hen. VIII. 2 Br. transf. 406. 8 Ed. IV. 23.* that in such times a Subject may make a Bulwark in other Men's

Lands, and that the Laws already established are silent in such times. And altho in that foreseen and lingring War of Hannibal's, whereof I have before spoken, the Senate could not charge the People, yet when there was a *Tumultus Gallicus*, that is, when the *Cisalpine* their Neighbours, on the sudden, as sometimes they did, assaulted the City; by the same Author the Case was otherwise.

My Lords, besides this sudden and tumultuous War, which shuts the Courts of Justice, and brings his Majesty in Person into the Field, and wherein Property ceaseth; the Law takes notice likewise of other times of War, as when his Majesty upon just Cause known unto himself by Proclamation proclaimeth War against any foreign State, and likewise the Law taketh notice of the Effects thereof; that is, that no Subject of such Prince or State is capable to prosecute any Suit in any his Majesty's Courts; and likewise, that then it is lawful for any his Majesty's Subjects to seize and keep to their own use, the Goods of the Subjects of any such Prince or State, as in the Books are adjudged. 7 *Ed. IV. 13. 13 Hen. VIII. Br. Property, 38. 22 Ed. III. 16.* My Lords, it appears not by any thing in this Writ, that any War at all was proclaimed against any Prince or State, or that if any of his Majesty's Subjects had taken away the Goods of any Prince's Subjects in Christendom, but that the Party might have recover'd them before your Lordships in any of his Majesty's Courts. So that the Case in the first place is, whether in time of Peace his Majesty may without Consent in Parliament, alter the Property of the Subjects Goods for the Defence of the Realm. The Time that will serve the turn for the bringing in of the Supplies and Means of the Defence, as to your Lordships appears judicially by the Writ, that is seven Months within four Days. For the Writ went out *Aug. 4.* and commands the Ship to be at *Portsmouth*, the Place of Rendezvous, the first of *March* following; and thereby it appears, that the Necessity in respect of Time was not such, but that a Parliament might in that time have been called for the effecting of the Supply.

Yet in the next place it is averred, that *Salus Regni periclitabatur*, and that was the cause of issuing forth the Writ; and this by the Demurrer if it should be confessed, yet this is but in general; how, or in what manner *periclitabatur non constat*. By the Law the Defendant may have a Protection when he is in *Negotiis Regni*; but when he will make use of it, it's not allowable in that Generality, but he must shew in particular, in what Town or Castle, or other particular Service he is in, that so the Court may judge whether the Cause be sufficient, yea or no; and yet that is his Majesty's Writ too, as well as that in question. The Books for it are, 36 *Hen. VI. 39 28. Hen. VI. 1.*

Yet in the next place, if your Lordships shall give any heed to this General, as to the Particular of Pirates infesting the Coasts, and Preparations further *ad Regnum gravand* mentioned in the Writ, the Case then, as I conceive, is this.

In a time of Peace, his Majesty's Vigilancy foresees a Danger likely to ensue; the Supplies for prevention of this Danger will serve, if brought in in seven Months after within four days; yet whether in this their Case without Consents in

Parliament, his Majesty may alter the Property of the Subjects Goods?

Mr. St. John's second Day's Argument for Mr. Hampden.

My Lords, having done with the Defence in general, I shall now endeavour to prove, that this of the Sea hath no such Peculiarity in it, but that it will fall within that of the Defence in General: wherein in the first place, I will endeavour an Answer to some Objections both from Authority and Reason, that may seem to prove a Right: And secondly, to some Precedents concerning the Use and Practice.

Of the first Rank I shall begin with *Danegelt*. It may be said, that the *Danes* infesting the Realm, that *Ethelred* for the resisting of them first by his own Authority laid this upon the Subject, and made it an annual Charge. That after the Conquest they seldom infesting the Coasts, the Conqueror took it not annually as at first, but at such times only as it is in the Black Book, *lib. 1. cap. 11. when ab exteris gentibus bella vel opiniones bellorum fuerunt*. And that after *Henry the Second's* time, the Kingdom being altogether freed from the *Danish* Invasions; altho *Danegelt* lost the Name and Use, it never after his time being taken by Hides of Land as before; yet the succeeding Kings by the same Authority, did lay Taxes upon the Subjects for Defence of the Sea.

My Lords, for Answer hereunto I shall in the first place observe this only by the way, that the best and certainest Authorities agree not what it was, I mean the Laws of *Edward the Confessor*, *Cap. 11*, and the Black Book. For the Confessor's Laws say, it was one Shilling upon every Hide of Land, and the Black Book two Shillings; by which it should seem it was little in use in *Henry the Second's* time, nor much known. That *11 Cap.* in the Confessor's Laws where this is mention'd, was no part of the antient Laws themselves, but something afterwards added, appears by the words themselves. *First*, it speaks of the Freedom which the Church in the first Institution of it, had; Freedom we know was not lost till after the Conquest; and likewise of the granting of it by *William Rufus* in Parliament: and therefore it should seem to be inserted in those Laws afterwards out of the Laws of *Henry the Second*; for this *11 Cap.* and that of *Danegelt* in *Henry the Second's* Laws, are the same, *De verbo in verbum*, as appears in *Hoveden fo. 344*.

But admitting the thing, I shall endeavour Answers to each part of the Objection: As *First*, That the *Danegelt* was granted in Parliament. *Mr. Camden's Brit. p. 142.* observes, that the *Danes* first infested the Coasts *Ann. Dom. 800*, and, as his Words are, with such hurliburlies, as the like was never heard of, havock was made of all, razing of Cities, and burning of Churches; and for their continual Piracy, they had got the Nick-name of *Neccugii*, that is, Pirates. The *Danegelt* first began in *Ethelred's* time, almost 200 Years after the *Danes* first Invasion, for he began his Reign *Anno Domini 978*. That Provision was made for Sea-Defence in the interim, and before *Ethelred's* time, appears by the many Sea-Fights of *Alfred* and other Kings. That this Provision was usually in Parliament, is probable from that of *Ingulphus*, *London print. fol. 488*, where *Anno Dom. 833*, which was 33 Years after the *Danes* first Invasion,

a Deed to the Abbot of *Crowland* is dated thus, *Coram Pontificibus Proceribus & Majoribus totius Angliæ in Civitate London, ubi omnes congregati sumus pro consilio capiendo contra Danicos Piratas littora Angliæ assidue infestantes*. If King *Ethelred* by his own Authority might have imposed this, it is like some of his Predecessors, the Case so necessarily requiring it, in almost two hundred Years space would have done it before this time. That this of *Danegelt* was done in Parliament, the Words carry as much; for the Words of the Law are, *Danegeldi redditio primitus Statut' fuit*, a Word most proper for the Parliamentary Authority. But fully by the Laws of that King, I mean *Ethelred's* Laws, in *Mr. Lambert's Saxon Laws, fo. 58*, there *ex sapient' suorum consilio*, Peace is made with the *Danes*, and a certain Sum of Money granted to the Army, as our Historians observe. The *Danes* by Composition were to send away the whole Fleet, saving 45 Ships which were to remain to defend the Kingdom against other Enemies, and the King was to maintain them at his Charge. That the *Danegelt* was paid to the *Danes* for this Defence, many of our Historians observe. My Lords, that at the same Parliament this was provided for, appears by the Words of the Law; *Si quis igitur posthac Navalis assirat' in Anglia prædam fecerit, hic nobis auxilium ferat exercitus nosq; ei quamdiu in fide manserit quæ ad Comitatus suppetent' paramus omnia*. That this was a Parliament, as the Words shew it, so it is held in the Preface to the 9th Report, and *Huntingdon fo. 205*. If this was not the *Danegelt*, yet this is clear, that in that King's time then Provision *contra Navales apparatus* was made by Parliament. *Primum statuerunt Angli' infausto consilio quod ipsi Danis Censum persolverent; Regibus namq; nostris modo per servitia ex consuetudine quod Danis persolvebatur ex ineffabili terrore*. That *Danegelt* which after the Conquest was paid to the King, we see by that Author, *Primum statuerunt Angli'; statutum Angli'*, must needs be by Parliament. If the *Danegelt* in such time of great Danger, was not imposed without Parliament, it must strongly make against those that shall object it.

The *Danes* having quitted the Realm, that the *Danegelt* was released by *Edward the Confessor*, as *Ingulphus fo. 520*, and *Hoveden 253*, and all our later Historians. That of *Ingulphus*, my Lords, alone is without Exceptions, who lived in those times; he was brought up in *England* in the Confessor's days, and therefore knew what he wrote; he afterwards went over into *Normandy*, and was the Conqueror's Secretary, came over with him to the Conquest, and at his own Charge maintained twelve Horses: he was so great at the Court, that as himself writes, *fo. 514, quos voluit humiliavit, quos voluit exaltavit*; and *Pag. 518*: a Charter of the Conqueror's to the Abbey of *Crowland* was made, *ad petitionem Familiaris mei Ingulphi*; and therefore in all likelihood would not report this partially against the King.

My Lords, that we are not to put out our Fires upon ringing of the *Gur Feu Bell*, we have no other Law for it but *Disuse*; and the Testimony of Historians, that *Henry I.* released it.

For that of the Black Book, that *William the Conqueror* retained it, *Quando Bella vel opiniones Bellorum fuerint*, as that Book is mistaken in the thing, saying it was 2 s. every Hide of Land, being in truth but one; so it is possible he might mistake in the other too. That it was released in æternum is apparent. That many things were done *de facto*,

to the infringing of the Liberty of the Subject, both in his time, and the times of *Hen. I.* and *Hen. II.* too, it is clear by our Historians; and if it were not released before, yet that King *Stephen* released it, is, *Huntingdon* fo. 221. *Hoveden* fo. 276. *Hoc deo voluit*, say these Historians, *sed nihil horum tenuit*: and as all our Historians agree, that after *Hen. II.*'s time, in whose Reign the Black Book was compiled, it was never paid; so it may be collected out of the Red Book, for all or most of the Aids and Escuages in *Hen. II.*'s time, and King *John*'s time, are there mention'd. In 8 *Hen. II.* 'tis said, *quod Danegeldum assessum fuit*; but after that, neither in his time, nor in the time of King *John*, or of any other King, is any more mention of it. Sir *Henry Spelman* in his *Glossary* saith, that when it was taken in the Conqueror's time, and since, it was *Consultis magnatibus & Parlamentar' demum auctoritat' diminut' fuit*.

My Lords, in the last place, if the succeeding Kings, *mutato nomine* only, have in lieu thereof laid other Taxes upon the Subjects, they must hold Proportion with that of *Danegelt*; that is, that they have been equally set upon all the Inland Towns throughout the Kingdom, as that was, and xii d. upon every Hide of Land; and likewise in time, and that there was no Intermiſſion, but that in *Rich. I.*'s time, and King *John*'s which were active, that then it was put in Execution. *Claus. 15. Job' M. 3. dorf. & 7. and Mat. Paris Pag. 312, 313.* The Pope had granted the Crown of *England* to the *French* King, who was ready to invade the Realm; great Provision of Shipping was made, *ad illiberationes Regis & ad stipendia Regis*: so far was this King in this time of necessity, from imposing any Aid upon the Subjects for the Defence of the Sea, as that he himself bore the Charge.

My Lords, the next Authority that I shall insist upon, is, that in the Terms of the Law, fo. 114. in the Title of *Hidage*, the taxing by Hides was used much in old times, and that chiefly in King *Ethelred*'s days, who in the Year 1006, when the *Danes* landed at *Sandwich* in *Kent*, taxed all the Realm by Hides, and every 910 Hides of Land should find a Ship.

My Lords, my first Answer to this is, that this was done when there was a formidable Enemy, and which soon after conquer'd the Kingdom, was upon the Shore, as by the Book appears; and therefore 'tis likely that the Courts of Justice were shut, and that the King was then in Person in the Field.

Secondly, This was but *Aetus unicus*, and even by the Common Law that easily admits of Customs not good; it's *Aetus binus* that hath any Colour *introducendi consuetudinem*.

Thirdly, It appears not by any thing in the Book, but that this might be done by Parliament, many of the antient Acts of Parliament are *statuit Rex*; and whereas the Book saith, Taxing by Hidage was much used in old time, that these were by Parliament, appears both by the Use and Authority express in the Point in Print, *Doomsday-Book* in *Berks*, *Quando geldum dabatur*, *Matth. Paris* 780. many *Corneagia & Hidagia* recited in Parliament that had been formerly given to that King in Parliament. *Bract.* in his second Book, fol. 37. is express in the Point, that they cannot be taken but by Grant in Parliament, his Words are these; *Sunt quedam communes præstationes quæ servitia non dicuntur, nec de consuetudine veniunt nisi cum necessitas intervenerit, sicut sunt Hidagia & Corneagia de*

necessitate & consensu totius Regni introducta. Rot. Parl. 8 *Hen. III. M. 4.*

My Lords, the next Authority I shall insist on, is the Case of the Abbot of *Robert'sbridge* in *Kent*; which because *prima facie* it seems to be to the Point, I will put it at large. *M. 25. Ed. I. finient. l. Banc. Rot. 77.* The Abbot brought a Replevin against *Adam de Bridland* and others, for taking his Cattel; the Defendants avow in these Words, *Dicunt enim occasione turbationis inter Regem, & Regem Franciæ suborta, assignatus fuit Wilielmus de Leighbourne ex parte Regis ad Custodiam Maris faciend' ratione cujus custodiæ faciend' terra & tenementa hominum ejusd' Comitatus agistata fuerunt ad custod' faciend'.* And the Abbot was assessed, 22 *Ed. I.* at 7 s. the 23 *Ed. I.* at 13 s. and 24 *Ed. I.* at 15 s. *ad præd' custod' faciend'*; and because he refused to pay, that the Defendants being Collectors for the Town, distrained the Abbot. The Abbot in Bar of the Avowry, says, that for his Lands he was assessed to find a Horse and Man in *subsidium Custod' præd'*, and that he found his Horse and Man accordingly, *ad eand' Custodiam faciend'*; and therefore demands Judgment, *si una & ead' occasione custod' præd' he ought to find the Horse, & nihilominus præd' pecuniam solvere.* The Defendants maintain their Avowry, and say, that the Abbot had divers other Lands within the Town, that he was assessed for them, for the Money, and that he was not assessed for those for the Man and Horse; thereon Issue is joined and Day given, without any more thereupon that I have seen.

My Lords, Besides the Authority of it in point, these two things may be further objected from this Case. The County was agisted *ad Custodiam maris*, and likewise to find Forces. My Lords, For the last, I have before admitted, and by the Statute of *Winchester* that may be done, for the Service was to be performed in *Kent*, the same County where the Land lay.

My Lords, Because this Case *prima facie* hath some shew of Authority in Point, I shall endeavour a full and clear Answer unto it. By the Case itself it appears, that these Sesses were in time of War, the Words are, *occasione turbationis inter Regem & Regem Franciæ*; neither was the War with *France* only at that time, but likewise with *Scotland* and *Wales*, and all the Effects of War accompanied it. The *French* had landed in divers Parts of the Realm, and in particular, 23 *Ed. I.* in this County of *Kent*, and had burnt the Priory and the greatest Part of *Dover*; the Havens were shut up for a great part of that time; the Goods both of the *French* and *Scottish* Nation were seized thro' the whole Kingdom; the Lands of all Priors Aliens were seized, and those that were upon the maritime Parts removed, and Natives put into their Houses, and all Strangers whatsoever, that landed within the Kingdom, to be arrested. All these, if any of them should be denied, will be made good, not only by our Histories, but likewise by the publick Records of the Kingdom. So that my first Answer is, that these Sesses were in the time of an actual defensive War from the two next and greatest States unto the Realm.

My second Answer is, That it appears not at all, by any thing in this Case, that these Sesses were made by any Authority from the King; for the Words are only in the general, that the County was agisted, and that the Abbot himself was agisted, but says not by whom or whose Authority. That it was not by the King's Authority, appears

by Leigbborne's Commission appointed *ad custodiam præd' faciend'*, as the Words of the Case are; for by his Commission whereby he was to do this, which is *Rot. 22. Ed. I. M. 8.* he was so far from having any Power to tax the County hereunto, that he's commanded for Victuals, Arms, or other things that he shall need in this Business, that he shall pay those from whom he shall have any such thing, which likewise is enter'd in the *Communia*, 23 *Ed. I. Rot. 77.* My Lords, That there were Parliaments in every one of these Years, appears by the Summons, and those in words not usual; for the great Fleet of France being mention'd, and that the French did intend *Linguam Anglicanam omnino delere*, they were now called *ad tractand' ordinand' & faciend' nobiscum*, and the Lords, & *aliis Incolis Regni qualiter sit bujusmodi periculis obviend'*, as it is in the Close Roll, 23 *Ed. I. M. 4. dorf.* and 24 *Ed. I. M. 7. dorf.*

My Lords, That accordingly Order was taken *cum Incolis*; and that the Gentry and other Inhabitants, by way of By-law or Agreement amongst themselves, did make Provision in this Particular, I shall endeavour to prove to your Lordships: that it hath been done at other times, and that such By-Laws are good, appears, 14 *Ed. II. Banc. Regis. Rot. 60.* The Scots entering Durham, a By-Law was made by the Inhabitants for the raising of Money, and one that refused it was adjudged to pay it: besides Leigbborne, who was Admiral of all the English Fleet, there were *Custodes maris* in each maritime County; these, as appears by *Communia* 24 *Ed. I. Rot. 78. dorf.* were chosen by the Commonalty of each County; and that these together with the Sheriff and Inhabitants did make orders for those things, appears by the *Communia* 23 *Ed. I. Rot. 79.* where Writs are directed to the Sheriff of Kent, and to the Sheriff of other maritime Counties, commanding them that *circa maris custod' visis præsentibus Milites & potentiores liberos homines de Balliva tua evoces, & cum ipsis provida circumspeditione deliberes*, how he should do it. This I conceive is expressed in Point, and the Practice grounded upon that in Parliament, *ad ordinand' cum Incolis.*

My Lords, My third Answer to this Case is, that these Sesses were for Land-Service only, and not for Shipping. And this appears, First, by the Case it self; for the Abbot, in Bar of the Avowry, says, that he was sessed to find a Man and Horse in *subsidiu custod' præd'*, which must be for Land-Service; and therefore demands Judgment, *si una ead' occasione custod' præd'* he ought both to find the Horse and to pay the Sess. This is not denied by the Defendants, but they say that the Abbot had other Lands; and that this Sess was for those other Lands; so that it is admitted that the Sess for the Horse, which must be for Land-Service, and that for which they avow, were both for the same Use; all the Difference is, whether the Sess were upon the same Land or no.

My Lords, If the Sess, for which the Defendants avow, had been for Shipping, they might have admitted all that the Abbot had said, in Bar of their Avowry; that is, notwithstanding he found Arms for Land-Service, that yet he might, for the same Land have been sessed again, to the finding of Shipping. Neither do I doubt, but that the Parties, in the Action now before your Lordships, do find Arms, and yet they are sessed for Shipping; and that it will be stood upon by the

other side, that the finding of Arms for Land-Service excuseth not for the Shipping.

But it may be said that the very Words are, that the Sesses were *pro Custod' maris*. My Lords, by divers Records it appears expressly, that the Custody of the maritime Part of the Land is called *custod' maris*. *Claus. 23 Ed. I. M. 4. dorf.* A Writ directed *Collectoribus pecuniæ ad custodiam maris*, in this County of Kent, commanding them, that in respect that the Cinque Ports were at the Charge of Shipping, *quod quieti sint de custod' maris facienda*, which must needs lie at Land. *Communia* 24 *Ed. I. Rot. 79.* A Writ to William Bonell & sociis suis *ad custodiam Maris in Com' Suff' assignatis*, and yet all that they are to do in that Office is for Defence at Land. So *Trin. 31 Ed. I. M. 20. Communia*. This *Custodia Maritima*, how it is to be done appears, *Rot. Parl. 46 Ed. I. M. 49.* and by the Statute 5 *Hen. IV. cap. 3.* it is to be done as heretofore it hath been done according to the Statute of Winchester.

My fourth Answer to this Case is, That the Plaintiff was a Clergyman, and the Clergy having denied in Parliament to aid the King, as the Laity did this Year, at this time they stood in the King's Disfavour; and in *Hil. Term, 25 Ed. I. Rot. 17.* the King commanded all his Courts of Justice, that if any Clergyman was Plaintiff in any Action, *quod nullum ei fiat Remedium*. And therefore Walsingham in his *Annuatis Consiliis* of this Year of 25 *Ed. I.* says, that it was *Clero Angliæ importabilis, quia de protectione Regia est exclusus, & per Regem nihilominus depredatum*.

But, my Lords, if I should let all go that hath been said, yet under your Lordships Favours, the Case is of no Authority at all: for admitting that the Sesses were for Shipping, and that by the King's Authority; yet had the Plaintiff no Reason to put himself upon the Point of Law when the Matter of Fact would help him; for the Plaintiff says, that he had been sessed before for those Lands, the other Party says no, but that it was for other Lands, and upon this the Issue is joined.

Nay, my Lords, if there be any Authority at all in the Case, under favour it is strong the other way; for if the Sesses were for Shipping, the Abbot says, that before he had found Arms for the Land-Service, and demands the Judgment of the Court, if therefore he ought to pay this Sess too. The other Party, if the Law had been clear, might have demurred thereupon; so that the Authority sways this way, that none for the same Land are chargeable for Arms at Land, and Shipping too.

My Lords, not only for the clearing of this Case, but all other things that concern it, either in the mere Right, or Matter of Fact before the 29 *Ed. I.* that before the Parliament at Lincoln 29 *Ed. I.* all things concerning the King's Prerogative, and the Subjects Liberties were altogether upon Incertainties. The Statute of Running Mead, *Magna Charta, Charta de Foresta*, had been confirmed at least eight times, from 17 *Job.* unto 29 *Ed. I.* and yet not only the Practice, but likewise the Judges, in the Courts of Justice, went clear contrary to the plain, both Words and Meaning of them. By the second Chapter of *Magna Charta*, a Baron, *pro Baroniam integra*, was to pay but one hundred Marks for his Relief; the Practice and Process of the Exchequer till

29 Ed. I. was always for this Relief one hundred Pounds. *Michaelis* 28 Ed. I. Rot. 34. *Communia*, after the Death of John Gray, that held *per Baroniam*, the Question was, whether he should pay 100 l. as the Record says, *prout antebac onerari solebat*, or 100 Marks, *propter Confirmationem secundum Magnam Chartam*; and this the Court would not determine before they had consulted with the King; and yet the Statute of *Magna Charta* had been confirmed by 25 Ed. I. and likewise the same Year, as appears by the Statute *de Articulis super chartas. Communia M. 13 Ed. I. Rot. 26.* Philip Mermion died, and 100 l. paid for his Relief. It was now 29 Ed. I. and in question, whether 100 l. or 100 Marks admittance, *licet hactenus* they were always 100 l. because the King had confirmed *Magna Charta* 29th of his Reign, and by his Writs had commanded his Courts to inroll it, and would have it *de cetero in omnibus suis Articulis observari*. My Lords, of this kind there be many Cases. The Charter of King John, and of the Forest, cap. 10. is *Nullus de cetero amittat vitam vel membrum pro venatione nostra*; and yet against the plain Letter and Meaning, *Communia Trin. 29 Ed. I. Rot. 44.* Adam Gower of Scarborough, as appears, had in this King's Reign been beheaded *pro venatione* in the Forest of Danby; and now an Inquisition went out to find, what Lands and Goods he had, and then upon the Return, the Question was, whether his Land was forfeited and should escheat upon such an Attainder, and resolved that the Land was not forfeited. *Pasch. 22 Ed. I. Rot. 48.* The King's Shepherd had put the King's Sheep into a Man's Ground, who had distrained them; and for this Process went out of the *Exchequer* to punish the Man, who there pleads, that he knew not that they were the King's Sheep. And there *Rot. 51. dorf.* Lessee for Life of a Manor of the King's with an Advowson excepted, the Court declared, that he had forfeited the Manor itself. By these Cases it appears, that neither the Practice, nor the Proceedings in the Courts of Justice in those times, in Things between the King and the Subject, are so much to be relied upon, as the Words of the Law.

My Lords, it may further be objected, that at Common Law before the Statute of *Winchester*, the King might compel the Subject to find Arms for the Defence of the Kingdom, and therefore by the same Reason, he may charge them to find Ships for the Defence of the Sea.

My Lords, not granting the Thing, yet for the present admitting it, I shall thereunto give these Answers.

That his Majesty by Tonnage and Poundage, and the other Duties at Common Law mentioned, hath a particular Supply for that of Shipping, but hath nothing in particular for the other of Arms; and therefore that may with more Reason be laid upon the Subject than the other. And yet for one of the principal Things in that Statute of *Winchester*, that is, for Watching and Warding, the King before that Statute, had a particular and certain Farm or Sum of Money of each County for the doing of it, which after that Statute, the County was discharged of, because by that Statute the Counties took the Charge of doing of it upon themselves, as the Cases are. *Comm. Hil. 20 Ed. I. Rot. 10. and Br. Trin. 43 Ed. I. Rot. 22. dorf. 18 l. pro Com' Northumb' and 16 l. pro Cumberland.*

My second Answer is, that each Subject, and that *secundum statum & facultates*, is already chargeable for that of Shipping, as hath been before proved; and therefore if he be chargeable both in Money and Kind too, the Charge is double in the one, and but single in the other. Neither could it hold Proportion with these Cases of Watching and Warding, where the Counties were discharged of the Money, when they took the Thing in Kind upon themselves. And therefore this Objection cannot as I conceive be made, unless his Majesty first quit all the before-mentioned Duties laid upon Merchandize.

My third Answer is, that in that of Arms, there is only *Mutatio Speciei*, changing of Money into Arms, for they remain the Subject's still in Property, and are in his own Custody; he may sell them, or employ them at his Pleasure to his own Use: but in this way of Shipping there is *ablatio rei*, in respect of the Victuals and Mariners Wages.

My fourth Answer is, that that of Arms is not only for the Defence against Foreigners, but in Watching and Warding, upon Hue and Cry, and otherwise to keep the Peace within the Realm, and for the Execution of Justice, by assisting the Sheriff when he shall have occasion to use the *Posse Comitatus*, and otherwise, all which do fall in the other. And as the use of Arms is more general, so are they for the more immediate Defence of that Element, wherein we have our usual and certain Livelihood. And yet the ordering of these for three hundred Years and upwards, was by Authority of Parliament.

Lastly, my Lords, in respect of the Victuals and Mariners Wages to be found for xxvi Weeks, the Case in question, as I conceive, cannot be compared to that of Arms, but rather to that of taxing the Country for finding of Soldiers to go out of their Counties.

My Lords, the next Objection that I shall endeavour to give answer unto, is, that it is in his Majesty's Power, for the Safety of the Realm, to shut up the Ports and Havens of the Kingdom, and thereby to make a general Stoppage of all manner of foreign Trade; and therefore as his Majesty may anticipate Gain, by barring Men from the exercising of their Callings, so by the same Reason may he take something away.

My Lords, my first Answer is, that the Law therein doth trust the King only with that, which being done, is most to his own Loss, as in respect of the Customs and other Duties this of prohibiting foreign Trade would be.

My second Answer is, that this cannot be done but in time of War, and imminent Danger, and that therefore this Objection will not be seasonable till the other be put in Execution.

The last Objection is, that in divers old Charters of Liberties and Exemptions, the Patentees are freed *de Danegeldo & Navigio*, hereby is implied a Right.

My Answer is from the same Charters, it may as well be inferred, the Subject is bound to make and repair the King's Parks and Houses, and to make up new Bridges, and divers other Things, these Charters of Exemption freeing them *ab operationibus omnium Regalium Parcorum & Pontium*, and from divers other Things which by Law the Subject is bound unto.

My Lords, for the Precedents that, from Matter of Fact and Charge, may be brought for proof
of

of the Use and Matter of Fact, as I do not profess to know them all, so if I did, yet Time would not permit to give a particular Answer to each of them; I shall therefore offer these general Answers to them.

The most of them, or all of them, are for charging the Sea Towns, and Haven Towns which have Ships, and many great Privileges, and are enfranchised for that Purpose, as is declared in the Parliament-Roll of 13 Ed. III. M. 11. before cited. These that are to find Ships, besides the main Prescriptions for Wrecks and Benefit of Fishing, are discharged of Arrays and Defence at Land, as appears not only by the Parliament-Roll, but by the *Scotch Roll* 10 Ed. III. M. 28. dorf. The Town of *Shoreham* in the County of *Suffex*, time out of mind had found Ships, and therefore being by the Commissioners of Array taxed to Arms for the Land-Service, a *Superfed* for that Cause awarded. *Iter Suffex*, 7 Ed. I. Rot. 63. dorf. *William de Bruce* Lord of *Shoreham*, upon his Claim adjudged, that all the Customs of Merchants at *Shoreham* belonged to him. Rot. Pat. 26 Ed. I. M. 16. the Town of *Yarmouth*, *pro servitio Navium impenso & impendendo*, are discharged of all Subsidies granted in Parliament, *pro Corporibus Navium & attito: & Communia Trin.* 31 Ed. II. Rot. 30. The Town of *Baldsey* in the County of *Suffex*, for the same Cause discharged by Judgment of the Court. *Iter Kant.* 21 Ed. I. Rot. 44. dorf. Certain Land-holders within the *Cinque-Ports* have *Tailage de quolibet homine applicante*, upon their Lands. *Petitions* 1 Ed. III. Rot. 9. *Office de Pat.* In Consideration of the Charge of providing Ships, the Town of *Southampton* petition, that their Privileges of having Customs within their Ports be confirmed to them; that they had these, appears *Hil.* 13 Hen. IV. *Banc. Regis Rot.* 39. where they are indicted for Extortion, for taking more Custom than was due. Rot. Parl. 45 Ed. III. The Commons pray, that the Franchises of the Sea Towns and Havens may be allowed them as heretofore, and that by default thereof, the Navy of *England* is much decay'd, to the disaffurance of all the Realm if need should be. That these that are not Maritime Towns ought not to be charged, which is the very Case of the Defendant, I shall cite to your Lordships express Precedents. *Claus.* 13 Ed. III. M. 14. par. 2. The Town of *Bodmin* in *Cornwal* discharged of Ships, because in *dicta villa Portus non est & longe a Mari distat*, and hath not used before-time to find Shipping, and an Inquisition awarded to inquire of these Particulars; whereby it appears, that the Inland Counties had not so much as *de facto* been usually charged with Ships. Rot. *Fra.* 21 Ed. III. M. 17. those Towns *quæ Naves non habent, & quæ aliis Naves habentibus contributoria non existunt*, that they should be discharged; it appears thereby that some Towns that are Members of great Sea Towns, are contributory to Shipping, and other Inland Towns are not contributory. 2 *Pars Rot.* 2 *Rich. II.* M. 42. in which 51 Ed. III. is recited, whereby it is likewise recited, that the Burgesses of *Beverly* had by their Petition in Parliament complained, that their Town is in *loco arido & a mari*, that *ad sinistram procuracionem quorund machinantium ipsos indebite prægravare ad contribuend hominibus de villa de Kingston super Hull*, to the making of a Barge *per Mandatum Regis*; now they pray *de omnibus & singulis hujusmodi oneribus, insolitis*, to be discharged by their Charter, and it appears they are

discharged accordingly, and this now exemplified 2 *Rich. II.*

To those of the 48 Hen. III. both for Taxes for Soldiers and for Shipping, I shall give a particular Answer, that it was then *Tempus belli*, when the Courts of Justice were shut; for the Commission went out after *April*, and in the Red Book fo. 241. 6. it was *tempus belli* from 4 Sept. 48 Hen. III. until the 10th of Sept. 49 Hen. III. and that the Courts of Justice were shut up, appears 49 Hen. III. Rot. 4. *Comm' Scaccario non fuer' Barones residentes in Scaccario, ad Pas.* 48 Hen. III. *ad Comm' Pas.* 49 Hen. III. *propter turbationem nuper habitam*, there were no Sheriffs in *aliquibus Comitatibus*, 48 Hen. III. and those that were *non poterint sic facere quæ ad officium vic' pertinebant*.

To the Commissions 30 Ed. I. M. 9. in the Patent Roll, *de puniendo homines* that refused, it is *quia ad Rogatum mittere non concesserint* so many Ships. And if a By-Law were good to bind them, as is before proved, as well as their own Promise, it may be so; but I have never seen any legal Proceedings against any of those that refused at that time, save only against the *Cinque-Ports* that are summon'd by their Service. P. 33 Ed. I. *Banc. Regis Rot.* 82. against *Seaford* as a Member of the Ports, and the Charge is, that *per servitium tenentur invenire unam Navem*.

For those of Ed. the Third's time, his Reign for the most part was a time of War; and that the Offensive brought a Defensive upon the Kingdom, is plain. *Walsingham* saith, Page 119, 131, that 10 Ed. 3. the French burnt *Southampton*. And *Stowe* Page 234. says, that 12 Ed. 3. they assaulted *Southampton*, and burnt part of *Plymouth*. 13 Ed. 3. they assaulted the Isle of *Wight*; Rot. Parl. 13 Ed. 3. pars 1. M. 9. that they had done much Mischief in the West Coasts, and conquer'd the Isle of *Guernsey*. Rot. *Scot.* 10 Ed. 3. M. 5. dorf. and M. 2. and all the Ports of *England* were shut up.

My Lords, in these Years wherein most of these Writs issued, the great Danger appears; and yet that the Charge laid upon the County was by By-Law and Agreement, I shall cite to your Lordship the *Scotish Roll*, 10 Ed. 3. M. 3. The French riding at Anchor at the Isle of *Wight*, the King sends divers Privy-Counsellors to *Dover*, and commanded all the Officers, Masters of Ships, Mariners and Inhabitants from the *Thames* Mouth to the *West*, to come thither, *ad tractand'* with those Lords of the Council for the Defence of the Sea by Ships; and in the Record it is cited, that notwithstanding the King's former Command, *hactenus quicquid non facer' impress'*, the Writs for Shipping issued before, and were not executed; and therefore now a Commission, if so it might be done with Consent. 20 Ed. 3. other Writs went out, Rot. *Franc.* pars 2. M. 24. 20 Ed. 3. a Writ to *Yarmouth* *propter pericula Maris* to stop up their Haven, and Rot. *Franc.* pars 1. M. 19. that no Fishermen go out to Sea.

I shall endeavour a particular Answer to this. *Claus.* 10 Ed. 3. M. 23. the Writ says, that *vadia defensionis super Mare solvi non solebant temporibus Progenitorum* of the King. To this I shall give this Answer, that these Wages were demanded before their time of going to the Service; and the Record is, *hujusmodi vadia* have not been paid.

My Lords, if this Answer be not sufficient, my Second is by denying the Thing; for besides that of 15 *Johan.* in that Time of Necessity, the Ships were to serve *ad liberationes & ad stipendia Regis*; and 46 *Hen. 3. M. 4.* both in *Ed. 1. Ed. 2.* and this King's time before the tenth Year of his Reign, Wages for Defence were frequently paid.

My Lords, because I know not how far this will be stood upon, I shall spare the citing of any of them, and to this purpose shall cite to your Lordships only this Case. It is amongst the Parliament Petitions 1 *Ed. 3.* and transmitted into the *Exchequer*, *Hil. 2 Ed. 2. dorf.* the Fishermen upon the Coasts of *Yarmouth*, 20 *Ed. 2.* were daily robbed and killed, and for rescous of them, those of *Yarmouth* were commanded to set out some Ships to Sea; and *Adam Bridlington* the King's Clerk sent with 300 *l.* to set out this Fleet, which the Men of *Yarmouth* intended they should have as Wages for the Voyage; but the Clerk would not let them have above 230 *l.* and that as Money borrowed of the King, and for this they gave their Bond of Repayment thereof. 1 *Ed. 3.* they complain in Parliament, and pray that they may be discharged of the 230 *l.* and that the Bond may be cancelled; which is adjudged accordingly, and transmitted into the *Exchequer* for a Trial, whether the Service was done or not.

My last Answer to these Precedents is, that the Matters of Fact in these Years, to the Violation of the Subjects Rights, procured upon fresh Suits, not only the before-mentioned Statute of 14 *Ed. 3. cap. 1.* against any Charge to be laid upon the Subject without Assent in Parliament, but afterwards they complain in Parliament, 15 *Ed. 3. M. 9.* that their Goods were seized, and their Bodies taken without any Suit commenced against them, contrary to *Magna Charta*, and the Statutes and Ordinances made thereupon with so much Discretion of their Ancestors; and in particular in the Parliament Roll of 22 *Ed. 3. M. 4.* for the guarding of the Sea, and in 36 *Ed. 3. M. 9.* and 37 *Ed. 3. M. 2.* as before in 15 *Ed. 3.*

My Lords, I now come to the last Thing, which is the Proofs in the Point, which I shall humbly offer to your Lordships. The first Authority that I shall offer unto your Lordships, is the Patent-Roll, 26 *Ed. 1. M. 21.* whereby I shall endeavour to prove to your Lordships these two Things.

The Confession of that King and his Council, that he was so far from having Power to tax the People for the Custody of the Sea, as that he is bound to make Satisfaction for any Thing taken from the People for this Purpose. The Second, that the Charges laid upon the People for the Custody of the Sea, were the principal Grievances that occasioned the making of the Statute of 25 *Ed. 1.* and the Statute of *de tallagio non concedendo*.

For the First, that the King declares that he had a desire to redress the Grievances made to the People in his Name, and instanceth what they were, *veluti de rebus captis in Ecclesiis, & de aliis rebus captis & asportatis tam de Clericis quam de Laicis, sive pro custodia Maris vel alio modo quocunque*; whereby, my Lords, there's an Acknowledgment that it is a Grievance, and to be redressed, to lay any Tax upon the Subject for the Defence of the Sea.

Commissioners are there named thro'out all *England* to inquire of these Grievances; herein they

are to proceed according to certain Instructions from the King and the Council, which are these three.

First, Whether the Things were taken without Warrant, and if so, then the Party that took the Goods is to make Satisfaction, and further to be punished for the Trespass. Secondly, If there were no Warrant allowed, then the Officer was to make Satisfaction. Thirdly, If all were done according to, and in pursuance of the Warrant and no more; then what upon Certificate thereof is, the Words are *& enferra tant que il se fienere appais pur raison*: The King hereby promiseth, that whatsoever Things were taken from the People by any Command of his for the Custody of the Sea, that he will make reasonable Satisfaction to the Party for such Things.

My Lords, for the second Thing, that is, that these Grievances occasioned the making of these Statutes, is clear from the Words of the Patent; for they were made *post guerram inter Regnum & Regem Franciæ*, which, as appears by the Case of the Abbot of *Robertsbriidge*, were from the 22d to the 25th of *Edward the First*, and by all our Historians, and many Records. It appears likewise by those other Words, that the King, before his going into *Flanders*, intended to have remedied those Grievances; he went over in *September*, 25 *Ed. 1.* and the Statute 25 *Ed. 1.* was made the 10th of *October* after. Hence likewise it follows, That the Exception of the King's antient Aids and Prizes, mentioned in the Statute of 25 *Ed. 1.* extends not to this of charging the People to the Custody of the Sea, that being one of the principal Grievances that occasioned the making of it. That the same Grievances caused the making of the Statute *de tallagio, &c.* I have before offered to your Lordships.

My Lords, the next Authority which I shall present, is the *Communia Hil. 23 Ed. 1. Rot. 77.* there the King commanded thirty Gallies to be made by several great Towns, every Galley was to have sixscore Men a Piece, these were *pro defensione Regni & securitate maris*. My Lords, the Cases are many in the *Exchequer*, where the Money for making these Gallies was recovered against the King. I confess, my Lords, that the King had promised Payment to those that made them, which I shall thus submit to your Lordships. That in case the King might have commanded the making of them, at the Charge of the Towns, that then the King's Promise was but *nudum pactum*, for promising of Payment for that which by Law they might have been forced to do, and so the Payment rested only in the King's Grace and good Pleasure. But, my Lords, upon Suits in his own Time, and in the Times of *Ed. 2.* and *Ed. 3.* the Monies for making these Gallies was received by several Towns, *M. 29 Ed. 1. Rot. 29. dorf.* for *York*, *M. 31 Ed. 1. Rot. 77.* *Ipswich* and *Dunwich*. *P. 5 Ed. 3. Rot. 31.* for him *prout justum fuer'* nothing having been paid before. *Braet. M. 16 Ed. 2. Rot. 14.* both for the Galley made at *Southampton*, and the bringing her to *Winchelsea*, at their own Charge, *Præcept. P. 1 Ed. 3.* all the Money from *Southampton* not being paid, now order'd that it should be paid.

My Lords, The next Authority that I shall present to your Lordships, is, the Parliament Roll, 13 *Ed. 3. pars 1. M. 9, & 11.* The Causes of calling the Parliament are declared to be these, First, The keeping of the Peace. Secondly, The Defence of the Marches. Thirdly, The Safeguard of

of the Sea, that the Enemy might not enter the Realm to destroy it: these were the three Points for the Commons to advise on, which are put into Writing, and entered upon the Roll. My Lords, By the Articles themselves propounded on the King's Part, it appears, That the Commons are not chargeable to the guarding of the Sea; and they pray, that this Advice of theirs may not be prejudicial to them to bind them thereunto, and that there are Ships enough in *England* to do it, if the People were willing. *M. 11.* The Commons afterwards in debating of these Articles, when they came to this of the Sea, notwithstanding the Caution before, they are afraid, that if they should debate it, it might imply, that they are chargeable to do it; and therefore they protest against giving any Advice therein, as a Thing whereof they have no Cognizance: and do further declare, that the *Cinque Ports*, and other great Towns, that have Franchises, are bound thereunto, that they should do it. And therefore the Merchants, Masters of Ships, and Mariners, throughout *England*, are summoned to be at the next Parliament for Advice about Shipping.

My Lords, The next Authority is the Parliament Roll, 22 *Ed. III. M. 21.* The Commons petition in these Words, *que le guard de la mere se face desres Res soit le guard fit man ad refait amant vis senvois ut semble que melliur guard ne poit estre fait que le Roy ne fait ne qu'il demeritissent de la sur la guer & par de fair de cest ter.* The Commons having formerly granted the King divers Aids and Subsidies upon Wool, Wool-fells, and Leather and otherwise, for the guarding of the Seas, they now grew weary of it, and desire, that the King himself from thenceforth should bear the whole Burden, and charge him with his Promise to that purpose.

My Lords, This Petition, tho in the Name of the Commons, yet the Lords joined in it; for otherwise all Acts of Parliament of those Times being made upon Petition and Answer, should be without the Lords Assent. Hence it appears, that the whole Kingdom, at this time, was so far from thinking, that the King could charge them, without their Consents, to the guarding of the Sea, as that they alledg, the King himself ought to bear the whole Charge. Neither doth the King deny his Promise, nor wholly deny the thing; for tho he saith, it should be done as it hath been done before, yet it is with a Qualification, because the Sea cannot be better kept than he hath kept it, by reason of his being so often at Sea in Person, in going and returning from *France*, and diverting the Enemy by his Wars in *France*. If the King had given his absolute Denial, yet here is the Judgment of both Houses of Parliament express in the Point.

Rot. Franciæ 21 Ed. III. pars 2. M. 9 & 11. The Merchants had granted 2 s. 8 d. upon their Goods till *Michaelmas*, for providing 120 great Ships *pro secura Conduetione Navium & Marchandizarum, & pro defensione cæterarum maritimarum partium Regni, & aliis periculis his guerrinis temporibus regno imminentibus.* This Grant being made, the King alledging that this was not sufficient for the Service, and to remove the Causes of the stopping of the Trade by reason of the Wars; the King now lengthens out the same from *Michaelmas* to *Easter* following, and to satisfy the People, the King by his Proclamation declares

that the 2 s. 8 d. shall cease at *Easter*, according to the Grant; which, as it should seem, not satisfying the People, or the King continuing the taking thereof, the Commons in Parliament, 22 *Ed. III. M. 16.* pray that it may cease, and that by procurement of no Merchant, *pluis l'argent soit continue.* An Imposition but for half a Year, and that upon Merchandize, and by consent of the Merchants for the Defence, yet taken off upon Complaint. The Answer is, that it should cease.

My next Authority is the Parliament-Roll, 2 *Rich. II. pars 2. M. 5.* before cited, where the great Council and Sages of the Kingdom resolve, that the Commons are not chargeable to the Defence of the Realm without Parliament; which extends to this Particular of the Sea, for the present Preparation whereunto the Commons are not chargeable, was for Defence at Sea; and therefore the Money lent, was to provide an Army for the Sea, *en defence & salvation del dit Royalme & de la Navy & des costiers del mere.*

My Lords, the next Authority is the Parliament-Roll 2 *Hen. IV. M. 22.* Commissions to charge the People to make Ships for the Defence of the Realm without consent of Parliament, repealed by the King and the whole Parliament for that very Cause.

Item pur ceo quere tarde divers Commissions fueront foist an divers Cities Burroughs & Villages du Royalme pur faire certaines Rarges & Ballingers sans assent du Parliam' & ont m' pr' nad estre fait devant ces hents' n'r les Commons pray n'r sur le Roy que les Ditz Commissions soient repeals & que ils ne soient forces ne fait a quore loir fuit respons' que le Roy vest que in les Commissions soient repeals in tout points mes pur le grand necessity que ad des tiels vessels pur defence du Royalme in case que les Quens sint priment le Roy vost communer de rest matter ouesque les Snrs' & puis apres le mre' al' dits Commons pur intifuner loir Councel & advise tiel party. The first Commissions repealed, because the Commons were not chargeable without a Parliament. And now the King will put it in a Parliamentary Way, by doing it with the Assent of the Lords and Commons.

My Lords, my next Authority is the Parliament-Roll 9 *Hen. IV.* The Cause of the calling the Parliament is for the Safeguard of the Sea, and of the *North Marches*; and *M. 17.* great Mischief shewn for Default of keeping the Sea; and *M. 21.* it is there inrolled by the King's Command, that there was Communication had between the King and the Lords for the Defence of the Realm, and for resisting of the Enemies, who made Preparation on all sides; whereunto sufficient Resistance cannot be provided, unless the King have in his Parliament some notable Aid granted unto him. My Lords, the King hereby acknowledgeth, that he cannot without the Parliament charge the People for the safe keeping of the Sea, that being the principal Part for the Defence there intended, the same with the Summons, that without the Consent of the Commons *negotia præd' infecta remanerent*, and with the Summons in the Close Roll 23 *Ed. 1.* before-mentioned, *Quod omnes tangit per omnes debet supportari.*

My Lords, the next Authority is the Parliament-Roll 4 *Hen. 4. M. 28.* The Lords Spiritual and Temporal, and the Commons, grant the King a Subsidy upon the Staple Commodities, and Tonnage

nage and Poundage, and likewise a Tenth and Fifteenth, with this Protestation, *Protestant que cest grant in temps avener ne soit poit en exemple de charger les dits Surs' ne Commons du Royaume de nul maner del Subsidy ne xth ne xvth a les guerris descoregates, ou safeguard del Mere sans soit per les volents des Seig' & les Commons de Realme & ceo a novel grant faire in pleine Parliament. Rot. Parl' 6 Hen. 4. M. 12, and Rot. Parl' 1 Hen. 5. M. 17. the same Protestation as before.*

My Lords, that the Charge of the Defence at Sea, and that in a large Proportion, by reason of the before-mentioned Duties, is to be borne by his Majesty, I conceive that it will not be deny'd; that in *Subsidium* and Aid of his Majesty therein, the Commons are not chargeable without their Consent in full Parliament. In these three Records there are not only these Protestations of the whole Realm being made by the Lords and Commons, but likewise the King's Consent by accepting the Things granted, and that without any Qualification of the Protestations. Those Protestations, that they are not chargeable to the guarding of the Sea in a certain Way, as are *10ths* and *15ths*, do much more fail in a way uncertain as here.

My Lords, my next Proof is from the Practice of former Kings in their frequent Demands of Aids from Parliaments for the Defence of the Sea, as well before the Statutes of Tonnage and Poundage, as then and since; Moneys borrowed by former Kings for Ships and Defence at Sea, and Indentures of Retainer for that purpose at the King's Charge; and not only so, but upon Suit allowance in the *Exchequer* for Victuals, Mariners Wages, Anchors, Prisoners taken in Fights *pro defensione*, and also other Things necessary for Shipping when for Defence of the Realm. Whereupon the same Argument may be made in this Particular for the Sea, as was before for the Defence in general.

The First Thing that I shall press, is that of the *Cinque Ports*. Their Service is certain in respect of the Time, but fifteen Days in a Year; and in respect of the Charge, but twenty Men and a Master; and the Number of Ships certain: besides, that they are discharged of Arms for the Land-Service, they have likewise divers other Privileges for the doing hereof; they were free from all Aids and Subsidies granted in Parliament, and are by Privy-Seals discharged thereof. *Hil. 2. Ed. 3. Comm'* about the end of the Roll; they are freed from all Tolls, Murage and Pontage throughout the Realm, which bringeth a greater Charge upon the rest of the Subjects.

My Lords, I shall thus offer it unto your Lordships: If they that have these Privileges shall serve but fifteen Days in a Year, how the others that have no Privilege at all, shall do it for twenty six Weeks, as in the Writ?

Secondly, Their Charge is certain in the Number of Men and Ships; how the rest of the Commons that are so far from having any Privileges or Recompence for it, as that they do contribute to this Charge of the *Cinque Ports*, shall, as by the way in the Writ, be altogether uncertain in the Matter of Charge, both in the Number of Men and Ships, and of every other Thing?

My Lords, I shall press this further, that when the Ports exceed their Charge in the Number of Men or Ships, Allowance by the King is to be made unto them, as appears by the Quire of *Dover*, and *Pat. Roll'* of 7 Hen. 7. before cited,

that after the fifteen Days they were to be at the King's Charge; so in the *Pat. Roll'* 19 Hen. 3. M. 14. because they found forty Men in the Ship, the King promiseth payment for all over and above the Number of twenty. *Banc. Regis Trin. 33. Ed. 1. Rot. 22.* allowance to Service in Scotland. The Scots, as appears by *Walsingham*, Pag. 53. and other where, having about that time burnt divers English Towns and Ships, and a School-House, with 200 Scholars in it, *Vifus Comp. P. 33. Ed. 1. pro ingenti Ro. Scotland P. 34. Ed. 1. Rot. 37. Comm' la Composition.*

My Lords, if the Ports who are bound to the Defence at Sea, when they have performed their Service, be not compellable to any further Charge, I shall humbly offer it to your Lordships, whether those that be not bound at all, from the same Reason, are chargeable at all.

My Lords, I have now done, and shall not further press upon the Patience of your Lordships; I know that *Nullum tempus occurrit Regi*; the disuse thereof, I shall press it no otherwise than that it is an Interpretation of the Statute made against all Aids and Taillages in general; and of the Complaints of the Parliament of 15 Ed. 1. M. 9. 36 Ed. 3. M. 19, and 37 Ed. 3. M. 9. that those Statutes had not been kept; and further, as it is an Interpretation likewise of the before-mentioned Declarations, Petitions and Protestations against this in particular; and as it is an Execution of them, and putting them into Practice: *Praxis Sanctorum*, as the Divines say, *est interpres præceptorum*.

The Claims which antiently the Subjects have made upon the Crown, that none of the great Officers of the Kingdom could be chosen but in Parliament, nor that the King had Power to sell any of the antient Crown-Lands, the Disuse shews, that those Claims of theirs were not legal. *Br.* in his fourth Book fol. 209. saith, that *longa patientia trahitur ad consensum*. The Non-Claims therefore of so many Kings and Queens I shall present unto your Lordships, as so many *Le voëts* and Declarations of their general Consents, that without Assent in Parliament they could not have laid the like Sefs upon any of their Subjects, as is now laid upon my Client.

The First Day's Argument of Sir Edward Littleton, Kt. His Majesty's Solicitor-General, in the Exchequer-Chamber, before all the Judges, on the Behalf of his Majesty, in the Great Case of Ship-Money.

May it please your Lordships,

MAT the 22d last, issued a *Sciri facias* out of the *Exchequer* to the Sheriff of the County of *Bucks*, to warn Mr. Hampden to shew Cause why the 20s. should not be charged on him toward the finding of a Ship of War, with Men, Munition, and Victuals, expressed in a Writ dated 4 Aug. 11 Car. And the Sums and the Names of the Defaulters were certified into the *Exchequer* by a *Mittimus*, dated 5 May 13 Car. to be there proceeded upon for the Levying of the 20s. according to the Law and Custom of England: Mr. Hampden appear'd, and desired that all the Writs might be read unto him; they being read, he demurred, and Mr. Attorney joined with him in Demurrer, and adjourned out of the *Exchequer*

into this Court, to have the Advice of all the Judges of England.

Before I enter into my Argument, because the true stating of the Question in this and all other things doth exceedingly conduce to the clearing of the thing in Question; I shall, in the first place, observe the Writ, dated 4 Aug. 11 Car. the Ground of this Assess, which was directed into Bucks, and others into all the Counties of England, and this was for raising Aids for Ships, for the Defence of the Kingdom, with a notable Circumstance, *quia salus Regni periclitabatur*; which being expressed in the Record, is confessed by the Demurrer, and not only so, but testified by the King himself under the Great Seal in the *Mittimus*: and in all Matters, especially in Matters concerning the publick Safety, the King is *Recordum superlativum* & *præexcellens*, as in the great Case of the Earls of Gloucester and Hereford, 20 Ed. 1. so that the Question is only this,

Whether the King, in his Judgment, finding the Safety and Preservation of the Kingdom and People, necessarily and unavoidably to require the Aid commanded by the Writ, may not command such Aid by the Writ, for saving and preserving the Kingdom and People?

Having stated the Question, I shall now discard many Things as impertinent to the Question; not that I that am sworn Council for the King do agree in those things against the King, but that they are not now in Question.

It is not now in Question, What may be imposed by the King upon the Subject for Defence, at their Charge, for Conquest or Conservation of foreign Countries or Territories beyond the Seas.

Neither is it in Question, what may be laid by the King upon his Subjects, for vindicating Injuries done by foreign Princes or States.

Neither is it in Question, whether arbitrary Impositions or Taxes may be laid at pleasure upon the Subject for the mere Increase of the Revenue of the King's Treasure.

Neither, whether in ordinary and common Defence, for Preservation of the Kingdom, tho necessary, it may be thus imposed.

But the Question is, *Quando Salus Regni periclitabatur*; in truth, the Question is, whether we can be charged *pro Salvatione nostrâ* & *nostrorû*.

Again, it is not in Question, whether the Subject hath a Property in his Goods, or can lose them without Consent in Parliament. I shall shew that his Property shall remain unto him notwithstanding this Assess; and the Argument on the contrary favours more of Malignity than Reason, to say that by this the Subject shall lose his Property in his Goods.

It was rightly admitted, that the Law of Property must give place to the Law of Nature, for common Defence; the levying of a Debt or Duty publick or private, upon any Subject, is so far from destroying the Property, that it doth confirm it. He hath as good Property that payeth Debts to the King, as he that doth not.

We are agreed *de Re*, the Kingdom is to be defended; no Man in his five Senses will deny that *de personis*, according to the equitable Rule in the Writ, *quod omnes tangit per omnes debet supportari*: we are in this as in the Conqueror's Laws, *sumus fratres conjurati ad Regnum defendendum*. *De persona* whom the Law hath intrusted with the Defence of the Kingdom, viz. the King,

we are likewise agreed. The only difference is *De modo*, whether the right *Media* be observed by the King? And whilst we are disputing whether he may do it, I am told he may do it in Parliament; true, he that may do it every where, may do it in Parliament. And I shall be sorry to hear there shall be no Salvation for the People but in Parliament.

And whilst this was the Question, tho a great deal of Care was had, and tho it was done with Advantage and Policy, yet the Bulk and Mass of what was said, shall appear to fall quite off as nothing to the purpose. There were Multiplicity of Particulars, and a pretty Survey of the King's Revenues, no ways concerning the Case, and as much mistaken in it, as he that reckoned without his Host. He hath done like a discreet Gentleman, and went as near the Question as his Client would let him; he hath agreed Cases more prejudicial than this, as thus: It was admitted, that if there be any actual War, tho there be but light Skirmishes, the King may do it; nay, if there be but a War denounced, tho there be never a Blow struck, surely then can it not be done when *Salus Regni periclitabatur*? This is the true State of the Question.

Before I go further, I am not ignorant, and therefore cannot but be sensible with what Disadvantage I come to argue this Case, every Man being a Party interested that hears me; but I fear not but that I shall satisfy all Parties, I have Truth to conduct me, *Et magna est veritas & prævalēbit*.

The Method whereby I may maintain the Right of my Master, and the Crown, is this; I shall first ground it upon Reason; every human Proposition is of equal Authority, only Reason makes the Difference.

I shall ground my Reasons, *First*, upon the Law of Nature: *Secondly*, of State; and *Thirdly*, of publick Safety, Necessity and Conveniency. Neither shall it be against the Statute Law, Common Law, or any of the Hereditary Rights and Liberties of the Subjects of England, but consonant to, and warranted by all. I shall not only prove it *ex rationibus cogentibus*, or as Lawyers say, *ex visceribus causæ*, but *de similibus ad similia*. I shall confirm it by a Beadroll of Examples and Precedents of former Ages, and compare them with this, and see if the Case be altered.

First, I shall shew it from the Foundation of the Kingdom, to that which they call the Norman Conquest; from the Norman Conquest to the time of *Magna Charta*, made 9 Hen. 3. from *Magna Charta* to the Statute *De tallagio non concedendo*, made 25 Ed. 1. from the Statute *De tallagio non concedendo* to the first granting of Tonnage and Poundage; from Tonnage and Poundage to this very Day, and that the Petition of Right doth no ways concern the Dispute. I shall confute all Precedents, Objections, Reasons, Inconveniencies, Authorities or Records, of which a great Number were cited, that there shall not be a Syllable left; and in that, *First*, I will either shew that the Record is mistaken, or impertinent and not to the Question: Or *Secondly*, Those that are pertinent, I will either agree them, or take the Force of them away, that none of them shall be able to stand in the way of the King in this way of Defence.

The fundamental Reason is the exact Rule of the Law in the 10th Report cited by that learned Gentleman Mr. St. John, *Salus populi suprema lex*. All other Laws positive are subordinate to this Law, and are to be regulated by it. We are not to talk of positive Laws, till we have a Kingdom to use them. *Glanville* saith, *Regiam Majestatem non solum Armis oportet esse decoratam sed & legibus*; Arms to defend us, Laws to protect us. *Bracton* fo. 1. In *Regibus duo sunt necessaria, Arma & leges*; and gives the Reason; If no Arms, the Kingdom would be left as a Prey to the Enemies. And truly it is a strange Imposture, that the Law should so provide, that the King by his Writ can give us a Remedy for White-Acre and Black-Acre for a Clod of Earth, and not be able to give a Writ to defend the Kingdom when it is in imminent Danger. Nay, positive Laws are abrogated by Reason, when the Safety of the Kingdom and People are in Danger. As in *Rome*, in the Night a Man might not come over the Walls, but if an Enemy did approach the City, then it was lawful for him to do it.

In the next place, I take that Ground which is taken in all Laws; the Common-wealth is to be prefer'd before all private Estates. 13 *Hen. III.* fo. 15. the Opinion of *Shelley*. Rather than this shall suffer, the Law will turn some Prejudice to particular Persons, who are but a part of the Common-wealth. 21 *Hen. VII.* fo. 28. 8 *Ed. IV.* fo. 23. 29 *Hen. VIII.* *Dyer* 36. If the Enemy doth approach, for the Defence of the Kingdom one Man may make Bulwarks and Forts on another Man's Soil; and shall not the King keep the Outworks at Sea, lest the Enemy should land at our Doors?

Again, by the King's Command, Suburbs may be razed: In 88, when three great Land-Armies, 20000 Foot and 1000 Horse, 30000 Foot and 1000 Horse, and 20000 Foot and 1000 Horse were raised. Now lest any Army should land in other Places, Directions were given to keep them from landing; but if they could not keep them from landing, then that they should burn down Houses, and come and destroy all whatsoever, that they might not have Food and Provision to stay there. Where is the Law of Property in this Case, which is so much talked of? The Publick and Private are so nearly connext, that they can hardly be separated; the publick Loss falls immediately, and by Consequence upon particular Persons. Be a Man in what Condition he would be, if a publick Loss comes to the State, tho it falls on his Wedding-Day he shall suffer in it. It is impossible to save private Fortunes if the publick be lost, *unaquaque amat Comm' bona totius*, &c. And another says very well, no Man repines at that which is done for the good of the Common-wealth. If a Subject then can be inabled without Parliament to make Bulwarks and Forts in another Man's Ground, shall not the King that is *Pater Patriæ*, do the like for the Defence of the whole?

My third Reason is to confirm, or rather mind your Lordships, that the Crown hath many Powers and Prerogatives over the Estates of private Persons. May not the King enter into another Man's House, or at least Out-Houses, and dig for Salt-Peter, because it is for the Defence? 11 *Report* fo. 81. *Bowles* Case, and enter into his Lands and dig Royal Mines?

There is *Proprietas Domini* belongs to the Subject, but he hath not the Power over all, without the Property *Ratione Protectionis, Jurisdictionis, &c.*

Private Interest must give place to a common Good; the private Prejudice that any Man hath, is very well repaired by the publick Utility that comes to the Kingdom. Fishermen may justify their going into the Lands of others to fish, because it is *pro bono publico*. 8 *Ed. IV.* 18, 19. 29 *Hen. VIII.* *Dyer* 36. 21 *Hen. VII.* 28. A Man may pull down the House of another Man, when the next House to it is on Fire; *Jam tua res agitur paries cum proximus ardet*, the private must suffer for the publick Cause. 22 *Ed. IV.* fo. 2. b. 26 *Ed. I.* fo. 45. If two Men are fighting, a Man may part them, and put them into several Houses, because it is for the good of the Common-wealth. If a Madman be abroad, he may be taken, whipp'd and imprison'd, lest he do Violence to himself and others. 22 *Ed. IV.* fo. 45. A Chirurgeon may cut off one Member to save the rest, 22 *Aff' Plowden* 56. Necessity is the Law of the Time and Action, and Things are lawful by Necessity, which otherwise are not; *Quicquid necessitas cogit, defendit*: and the Law of the Time must regulate the Law of the Place in such publick Things. If a Storm arise at Sea, to cast out Goods into the Sea is lawful for the Safety of the other Goods; and they whose Goods are not lost, shall be Sharers with the others. If it be for safety of Lives, all must be cast out, *Duffield's* and *Mowse's* Case; but if the Party hath taken more in than is fitting, and that be the Cause of casting away the Goods, and not the Tempest, there the Party hath his Remedy. 48 *Hen. III.* there was a sudden Summons to be in Arms both at Sea and Land; they plead, that there was not a just time of Summons; the King tells them, that no Man shall excuse himself for want of convenient time of Summons; nay, they shall not alledge the time of Harvest, &c. it being safer to be somewhat diminish'd in Estate, than the publick to suffer: *Necessitas est Lex temporis*, whatsoever is done for publick Safety is best; other Laws are Tributary, and must give way to the Law of Necessity: What talk we of Formalities, when we are like to lose the Kingdom, when the keeping of the Laws would end the Common-wealth.

But this needs not, for I shall shew that his Majesty hath trod in the Steps of all those Kings who have worn the Diadem, and sway'd the Scepter of this Kingdom.

In the next place, I shall shew divers Exemptions à *Custodia Maritima*, not only antient but late: I will put you one, that is, *King's College* in *Cambridge*, 21 *Hen. VI.* When these Grants are made, it extends to the ordinary Defence of the People, and not extraordinary; no more than if the King grants an Exemption to a Man that he shall not be of a Jury, yet if there be no other, that shall not excuse him. *Matth. Paris* 838, he speaks of Privileges granted to the Archbishop of *Canterbury*, *London*, &c. All are granted in *liberam Eleemosynam*; they are bound to do nothing but to pray, and yet are not exempted from publick Defence, *Nec adeo libertates & propter publicam utilitatem Regni & per ea resisteret hostem*. I shall give Mr. St. John's Argument an Answer by and by; yet by the way, if *Tenures feud' Militar'* did begin as was alledged out of *Britton* in the Conqueror's Time, how was the Kingdom defended before? If Wards and Marriages, and Accidents thereupon did not go to the Foundation of the Kingdom, what was before?

The King is as much Lord of the Sea as Land, *æque Dominus Maris & Telluris*. *Selden Mare Clausum*,

Clausum, 6 Ric. II. *Doctor and Student* lib. 2. fo. 51. 5 *Report* fo. 108. It is observ'd by a great Lawyer of what Consequence it is to have Power at Sea. The Naval Dominion of *England* is of great Consequence and Use; for it is called *Dotem Regni*. If therefore the Kingdom of *England* consists of Land and Sea, I hope we shall not stand at half Defence, to defend the Land and leave the Sea. *Rot. Parl.* 2 Ric. 2 M. 25. It is a great Advantage to have Defence at Sea, else we should have hot War at our Thresholds; while the Sea is open, Men may go to plow, and have the Courts of Justice open.

The Kings of *England* of themselves, by their Prerogative Royal, in Times of War, denounced, intended or suspected, for the preservation of the publick Safety, may seize the Lands of Prior Aliens, 48 Ed. III. fo. 10. 22 Ed. IV. 43, 44. 14 H. IV. 36. And can a King of *England* take the Possessions of Aliens, and cannot he enforce his natural-born Subjects to defend the Land and Sea? God forbid; nay, if we would *parva componere magnis*, we should find in Cases of lesser Consequence, if they have relation to the Defence, he may do it. As the King may lay a Charge upon the Subject for walling a Town, the Reason is, because they have Benefit by it in time of Danger; and hath not all the Kingdom Safety by the Navy at Sea? 3 Ed. III. *Aff.* 445. *Westm.* 1. cap. 3. 13 Hen. IV. fo. 14, 15. Sir *John Davies* Reports fo. 13. *Littl.* fo. 58. 33 Ed. I. 105. *Parl. Book*, *Walsingham*, 14 Ed. I. 60. 7 Ed. III. *Pat. M.* 2. And the King did not only command it, but took an Account of it, if it was not done, and took it into his own Hands, *Trin.* 27. Ed. I. M. 14. *ex thesaur'* Murage of *Carlisle* taken into the King's Hands. *Pat.* 14. Ed. I. *pars* 1. M. 14. and the Surplusage paid into the *Exchequer*. And this agrees with the Reason of all Laws, where they have a Benefit they must contribute to the Charge, 10 *Report* fo. 141. out of 44 Ed. III. nay for lesser things, as for Paveage and Pontage, the King may impose that for a publick Good, and the King may distrain all the *terr' tenants*, and Land-Owners, to make Contribution *secundum statum & Facultates*.

The King may dispose of the Preparation for Defence, he may compel Men to be Knighted, because it was for Defence. *Rot. Claus.* 19 Ed. II. M. 16. *Mat. Paris* fo. 12. 37 *Westm.* 465. no Man is exempted from Defence, Judges are not exempted, yet Judges are not to fight; yet when it comes to necessity, they are not exempted. *Trin.* 5 Ed. IV. *Moyle*, 13 Hen. IV. fo. 23. Clergymen compelled; nay a Serjeant at Common-Law sworn at Common-Pleas, is compellable. Sir *John Hulbert* in Hen. VII. Time was compelled to be a Knight: 9 or 29. Hen. VI. *Rolfe* a stout Serjeant pleaded that he was a Serjeant at Common-Law, and not bound to be a Knight, but he is forced to it. But why talk we of these? there ought to be a Commonwealth before there are Laws, and Private ought to give way to Publick.

Again, imminent Dangers and Perils to a State do dispense with ordinary Proceedings in Law; *inter Arma silent leges*. Nay, if there be but Rumours of Wars, Laws are silent; we must look then to the Kingdom, upon Rumours and Opinions of Wars. *Pasch.* 15 Ed. I. *Banc. Regis Rot.* 70. *dors.* the Scotch Army they besieged *Rippon*, the People they promise a Sum of Money to them to depart, and give them in Hostages, and that Money should be levied among themselves; when the

War was over they would not do it, but were compelled to it. In 14 Ed. II. *Banc. Regis. Rot.* 60. The Scots besiege *Durham*, but they must have ready Money, they would not take Hostages to depart; while this Peril was on them, they met together and swore, that what should be agreed amongst themselves every Man would stand to. It was order'd they should go into the Houses of others, and take what Money they could find for that Purpose; they took from one Man 60*l.* oh, he was not satisfied, he had a Property in his Goods, he brought an Action, and at *Durham* it was adjudged for him; but when by a Writ of Error it was brought to *Westminster-hall* into the *King's-Bench*, Judgment was reversed. And in the time of Queen *Elizabeth*, greater things were done upon lesser Occasions.

The next thing is the Ships taken from time to time, and the Command of Persons, Watches, Beacons, shutting up of the Ports, which are the Gates of the Kingdom. 14 or 10 Ed. IV. *Pasch.* M. 12. *dors.* 3 Hen. V. 18. *dors.* A number of other things commanded by the King for Safety; when the Law considers what may happen, it is not material what doth happen; nay, if there be but a *vulgaris opinio*, it is enough; much more when the King, by his own Judgment, foresees it. 6 *Report* fo. 64. *Clark's Case*, there they are compelled to build a Hall at *St. Albans* for the Judges to sit in, much more in this Case. See *Clegate's Case* for Triumphs; and if for State, shall not the King command for safety of the Kingdom? *Hil.* 12 Jac. *Hawks's Case*, for paving of the Way, he may take Corn out of the Sacks of those that come by.

Again, it is a *Droit Royal* to meddle with War and Peace, Subjects have nothing to do with it. *Rot. Parl.* 13 Ed. III. M. 5. 19 Ed. IV. fo. 160. or 6. *Brian*, Chief Justice, saith, That if all the Subjects of *England* do war with the Subjects of another Kingdom, this is no War; but if the King denounce it, it is War. 22 Ed. 1. *Rot. Vasscon.* M. 16 or 10. they must have a Power from the King: True, Hen. VII. brought Military Discipline to the Parliament to advance his own Ends. Sometimes Dangers are fit to be communicated to the People, and sometimes not. The King should best know what is done abroad, who hath his close Council of War; he knows what is done abroad, what can the People tell of these things? and it is very fit that Preparation be made before-hand. It is not good to find the Kingdom without a Navy, especially when such Combustion is abroad. 18 *Eliz.* cap. 23. It is as much to prevent Danger, as to remove it when it is in being. 1 Ed. VI. & 1 Mar. A desired Provision to be made before-hand, and this hath been the Practice of all Times. *Gervasius Tilburiens.* Black Book Hen. 2d's Time: *Danegelt* before the Conquest paid annually; but afterwards, when there was *Bellum* or *Opiniones bellorum*, *Datum est nobis intelligere, audito rumore, &c.* are frequent in the Records; nay, if there be but *vulgaris opinio*. Ay, but perhaps Dangers will not come; but if they come unawares, where are we then? In the Case between the Earls of *Glocester* and *Hereford*, there was a great Tumult between them about the Marches of *Wales*; and this was contrary to the King's Command, and Exception was then taken, that there was no Record to warrant the *Sciri Facias*; the King did affirm it, *Et Dominus Rex in multis casibus est su-*

*Na' que suis per
Salvatione del
Royalme.*

pra legem, &c. Dominus Rex est Recordum superlativum & præexcellens. It is Treason for any Subject to raise an Army, unless a Town be besieged. Henry the Seventh was a wise King, and he had his Spies abroad in times of Peace to see how things went, and his Army prepared; and the Preparation of a Navy does much more good than the spilling of Blood. And so hath our Navy these two Years done a great deal of good to the Kingdom, and Honour to the King.

Now I come to the Authorities; but first we shall observe what an Authority shall be in this Case. First, I conceive there may be, and are direct and full Examples in Point, for compelling the Subjects at their own Charge to guard the Sea and Land, tho they are not ruled in particular Courts of Justice; nay, under favour, they are stronger than any Judgment: there were then no need of Suits in the Courts of Justice; if Men would pay, what need Judgments?

Secondly, I conceive, that tho I find not direct Authority in printed Books, yet Records are as good Testimonies, and greater than Reports, that are but Extracts, and second Authorities drawn out of them; and those that concern *Jus Publicum*, come not into ordinary Debate, but remain *inter arcana Imperii*, and those will speak fully.

Thirdly, I shall observe that our Precedents are not only in open War and Hostility, but upon Opinions, Rumours, Relations, and Informations of Wars.

I shall shew this in all Ages to Queen Elizabeth's time; and if it be not so full in the Years of King Stephen and Henry IV. who were Usurpers, it's no wonder. If they had had Right to the Crown, as his Majesty hath, they would not have used Compliments, but *Fide & legiantia quibus nobis tene-mini*.

Before the Conquest, I find that King Edgar had his Tenants, who swore to co-operate with him, *per terram & per mare*. King Ethelred he did command, that he that had 310 Hides of Land should find a Ship, and those that had lesser, should find other Arms, and at their own Charge, for every Ship eight Oars, *ut tempore Patris*, that was *Canutus*; and it was *Tributum Classiale*.

My Lords, for *Danegelt*, if those Kings that were called in by the People, did lay this on the People, much more our natural-born King, which shews it to be an undoubted Right; for it is not likely they would put that in practice which was not an undoubted Right. In the Laws of the Confessor by Mr. Lambert, and the Black Book in the Exchequer, it was sometimes one, sometimes 2 s. annually, *in usus Maritim*; and still the Charge lies on the Subject: this shews an inherent Right in the Crown, and it was paid for several Purposes, but still at the Subjects Charge. And to say it should not be so, because of the Word *Statutum* (*De Regibus Angliæ statutum*) cannot be, for in those times *statutum*, as in *Cicero*, was a Constitution, there was no Parliament then; and if it now doth alter from that way, truly petty Circumstances, when the Substance is observed, alter not the Case. There must be a Defence, and it was not certain; doth not the Danger *suscipere majus & minus*? and the King may say as Edward the First said, nay, I have heard him say, that he hath bought neither Manors, Lands nor Castles with it.

After the Conquest, *Danegelt* is supposed to be released by the Conqueror, because he dreamed he saw the Devil dancing upon the *Danegelt*; but the

Black Book saith it was paid in the Conqueror's time. It was then quitted, till there was *Bellum* or *opinionem Bellorum*; neither was it released by William Rufus, or Henry the First. King Stephen swore that he would release it at his Coronation; but *nihil horum tenuit*; nay, it was paid in Henry the Second's time, 4 Hen. II. Pipe Roll: and tho the Name be alter'd; yet other things came in the room of it.

And now I will begin with *Doomsday-Book*; which began in the 14th of the Conqueror, and ended the twentieth Year. There were divers Towns and Shires charged, and there we see what Assistance they did give both for Sea and Land. In the Black Book fo. 56. he that waited on the King's Revenue; *liber non erit* for publick things. And in King John's time, which was a troublesome time, 5 Johannis Pat. M. 17, and Johannis Claus. M. 9. they gave a fourth part of their Revenues for Defence; and there was a Command for staying of all Ships, and to repair to a certain place appointed.

And to come to those great things when King John was deposed by the Pope; the King of France made Preparation, and the King of England made Preparation, and all Ships were imbreved, because he would not put all upon Land-Forces: and so in 88. Mat. Paris fo. 312. it is said, the People were *ad liberationes nostras*; but that Voyage was to *Poitou*; if it were *ad liberationes nostras*, yet the Command of the Persons and Ships were the King's; and true, all Mariners were to be paid, and no question immediately at the King's Hand, but it was first raised and levied of the People.

Whereas for Escuage and Knight's-Service, the Summons was *quod interstitis cum equis & armis, &c. exinde proficiscend' nobiscum*; but this was only to come with their Horses and Arms, by reason of their Tenures. And it further appears, that Earls, Barons, Knights and Freemen, and all that had Arms, were to come *ad defendendum caput suum & Regis, & quod nullus remaneat qui arma portare possit*; nay, those that had neither Lands nor Arms, yet all must come, and if they had nothing to maintain themselves withal, they were to be *ad solidatos nostros*, which shews all the rest were not at the King's Charge. 5 Johannis Claus. M. 1. *Quia ad arma jurat vel qui honorem poss'*: if the King could command for Land, he may for Sea, for both are one Kingdom. In Henry the Third's time there are divers Arrays. 14 Hen. III. Claus. 7. dorf. When the King went into France, there went a Command to all the Sheriffs of England to swear those that staid behind, as they were sworn in King John's time; all this shews they were bound to Arms.

In the Statute of the Conqueror, which they stiled a Statute, that there should be no Taillage, Taillage must not be understood of those kind of Aids. That famous Year of 48 Hen. 3. (and observe when) that Year is not only after *Magna Charta*, but after it was confirmed by him, 20 Hen. 3. when he was of full Age. 48 Ed. 3. Claus. M. dorf. Divers Captains and others not able to maintain themselves, the King commands they should be paid, *de Comm' Comitatus*. 48 Ed. 3. M. 2. *de pecunia levand' circa tuitionem maris*, the King commands there, that they should come out of their Counties: the Summons is twofold; First, of Escuage, which is *secundum debitum*. Secondly, General for Defence, *Cum necesse fuerit*. 48 Hen. 3. Claus. M. 3. *pro Militib' Sancti Johannis & M. 6. dorf. quod omnes qui nobis & Co-*

ronæ nostræ jure astringant, &c. all Freemen must do this Service. 48 Hen. 3. Claus. M. 3. dorf. *Nullus excludatur sexus vel ordo*. 48 Hen. 3. Claus. M. 7. the Citizens of London, and the Men of Greenwich, were commanded to keep the *Thames* that none should enter *per ora eorund*; the Men of Greenwich plead, that they were distrained upon common Summons for their Service in Kent; and the King commanded that they should be freed in Kent, and join in Defence of the *Thames*. Claus. 48 Hen. 3. M. 11. dorf. to excuse one who pretended he did attend at another Place with all his Strength; this shews that he ought to attend the Defence: nay, 48 Hen. 3. M. 4. when they refused to come, the King commanded to seize their Lands, and take the Profits, and answer them in to the Exchequer. 48 Hen. 3. Pat. M. 5. he commands them to attend, setting all things apart. 48 Hen. 3. Pat. M. 10. or 5. like Writ to Ipswich, Dover and *per Costera Maris*; nay, when some went away when their 40 Days were expired, the King tells them, that *propter inopinatos casus*, they should stay. Pat. 48 Hen. 3. M. 4. one hundred Marks by the Abbot of St. Austin's for Stipends for those at Sea, for Defence of the Sea. M. 3. dorf. when they would have gone away, they were commanded upon pain of Forfeiture of all they had to stay. Braff. lib. 5. fo. 336. *Cum fuer in exercitu cum Domino Rege*, &c. speaking there of Law-Suits, what may be a good Excuse for Absence, faith, *ex causa necessitatis Reipublicæ causa*, aut *cum Rege in Armis*. In the Time of Edward the First, Statute of Winchester, finding of Arms began not upon that Statute; but how, and in what manner they ought to be rated, was there appointed. 23 Ed. 1. Claus. M. 4. *de contributione faciend* to Yarmouth, a Command to the Collectors of Money *ad custod* Maris; and he that was in Gascoigne was discharged of Grace, but not of Right. Pat. 23 Ed. 1. M. 4. *Ita quod omnes compellere possitis ad custod* Maris *cum necesse fuerit*. Pat. 23 Ed. 1. M. 6. *pro Willielmo de Stoaks fuer* custodes *Maritimæ* & M. 5, & 7. Custodes *Maris de Fernemouth*, and divers Men taken both Archers and Slingers. Pat. M. 5. *de hominibus eligendis ad arma*, M. 7. *omnibus* & *singulis Marinettis*, between London and the Mouth of the *Thames*. M. 6. *de Navibus capiendis*, Claus. 23 Ed. 1. M. 5. *Maritt* faciend in diversis Civitatibus. Pat. 24 Ed. 1. M. 16. *de partibus Maritimis inveniend* & *custodiend*. M. 6. & 17. *de Navibus* & *Galleis inter villam de Lyn* & *Barwicke*. Trin. 24 Ed. 1. Rot. 62. *Inter B. pro Rege*; there a Writ issued to such and such Men to find ten Horsemen; one affirmed, that he had some in Scotland, and some at Cobham in Kent; the King makes Inquiry whether it were so or no, and finding he had not so many as he said, commanded that he should be distrained, not only for the Contempt to the King, but for the Danger the Kingdom might lie in for want thereof. 24 Ed. 1. Rot. 78. Power to compel Men to make Defence *juxta facultates*; and the County of Berks, which is an Inland County, upon refusal a *Capias in manus* was awarded to answer it in the Exchequer, and the form of Wages to be set down. 24 Ed. 1. Lord Treasurer's Remembrancer. A Writ from the Barons to assess all the People without the King, News being of 10000 Men coming. Claus. 25 Ed. 1. M. 26. dorf. *William de*

Ripo. It was recited, that the People have been at a great Charge; and because Winter came on, the King willing to spare them, Watches and Beacons were commanded to be set up and kept, and the People to depart, but to return again upon notice. Rot. Pat. 25 Ed. 1. M. 5. Custody of the *Maritime* was with six Ships; by which it appears, that *Custodia Maris*, and *Custodia Maritima*, are Terms convertible. The Abbot of Robertsbridge's Case, 25 Ed. 1. Rot. 70. the Abbot brought a Replevin against one in — that lies in the Confiners of Kent and Suffex. The Officers did own, by reason of the War between France and England, the Abbot was assessed three several Years, at several Sums, nay, the fourth time, and no hurt done; but now if the Writ goes out but two Years together, (*ob inauditum*) but what doth he plead, doth he deny the Writ? no, he pleads he was assessed for other Lands; he found a Horse *ad custodiam prædictam*, so that the Horse was for the Land Service, and the Money for the Sea. I conclude as Selden, *aut ad ipsum Mare, aut ad tam litus quam Mare*.

After the Statute *de tallagio non concedendo*, Pat. 27 Ed. 1. M. 3. *de Navibus congregandis*. Pat. 31 Ed. 1. M. 20. *Malefacientibus in Marchiis Angliæ*, a Commission went out that all shall be in Arms against Scotland. In antient Times there was such a Connection between France and Scotland, that we had always a double War, and therefore could not expect all Forces in one Place. In the Time of Ed. 2. Pat. 2 Ed. 2. pars 9. M. 26. *pro Rege de Navigio providendo vestris sumptibus faciend*. I see with what Policy Mr. St. John went, and what multiplicity of Records he cited, and opened them with as much Skill as ever I knew any Man; but I desire to go in the Path of naked Truth. I shall make it appear to all the World, that the King hath done nothing but what his Predecessors have done; and that there is not more Testimony to prove Littleton's first Case, that the Heir at Law shall have his Patrimony, than there is to prove this the King's Right. Pat. 15 Ed. 2. M. 15. dorf. all between sixteen and sixty to be ready. Parl. Rot. 5 Ed. 2. M. 4. Ordinance that the King without the Assent of the Barons could not make War, but that was repealed and damned. Rot. Parl. 15 Ed. 2. M. 31. It's said it was prejudicial to the Royal Power of the King, and a Blemish of his Royal Sovereignty. Rot. Claus. 17 Ed. 2. M. 10. when they were warned to be ready. 19 Ed. 2. Rot. Pat. pars 2. M. 6. to all Bishops in England to be ready for the Defence. Claus. 20 Ed. 2. M. 2, & 7. *de hominibus qui domi remanserunt*, &c. should contribute to those that went, it was to forty or fifty Counties; *Nos considerantes, quod justum* & *consonum rationi non est*, that those should expose both Body and Purse for the Utility of the Kingdom. In the Time of Edward the Third, Rot. Claus. 2 Ed. 3. *de Navibus irveniend*, a Command that all Ships of 40 Tuns and upwards, with Men, Munition and Victuals, should be in readiness at their own Charge. M. 2. Mariners are warned to come *per duos menses*, at their own Charge. 7 Ed. 3. Scotch Roll M. 19. *de Portubus contra adventum*, &c. & *datum est nobis intelligi*, &c. it appears it was done *tam per mare quam per terram*; and a Direction to all Archbishops to be attending, and the *Posse Comitatus* to be array'd, *secundum statum* & *facultates*. Claus. 9 Ed. 3. M. 13. dorf.

dorf. all from 16 to 60, to be array'd *armis competentibus*.

And now I come to that famous Year of 10 Ed. 3. Rot. Sco. M. 31, or 23. Men for Land and Sea. Rot. Sco. 10 Ed. 3. M. 21. dorf. *omnes ex debito ad defensionem astringuntur*. Rot. Sco. 10 Ed. 3. M. 23. De proclamatione faciend', to all Inland and other Counties. M. 20 to Lynne. M. 14. dorf. to all, prout fieri consuevit to all Counties, *nos considerantes quod ratione legiantie sue astringuntur*. M. 1. dorf. thro' all Counties the like observed, especially *nequimus resistere Correctiones, &c. sine auxiliis vestris*. M. 2. de Navibus supervidendis, and in that are the very Words of the Writ. M. 25. de portibus custodiend' Inland Counties as well as others, Berks, Wilts, Leicest. Northam. &c. M. 16. Navibus supervidendis *nos advertentes circumquaque aut hæc tempora*. Rot. Alman. 10 Ed. 3. pars 1. M. 13 Rot. Claus. 12 Ed. 3. pars 1. M. 13. dorf. Rot. Alman. 12 Ed. 3. M. 33. pars 2. *versus bo-reales duplici esquipamento*; and to contribute, and those that refuse, to assess them *juxta statum*. Rot. Claus. 12 Ed. 3. M. 14. Archers. Rot. Alman. 12 Ed. 3. pars 2. M. 6. Order that but one Bell should be rung. Rot. Alm. 12 Ed. 3. pars 2. M. 3. supervidend' *quod omnes arial' considerantes quod omnes, &c. se & sua exponere astringuntur pro salvatione*. Alman. 12 Ed. 3. pars 2. M. 10. because *hostes nostri in multitudine non modica, &c.* All that have Redditus, &c. were to attend. Alman. 13 Ed. 3. M. 1. de supervidend' vill' Southamp. Claus. 13 Ed. 3. M. 38. dorf. A Writ directed *Custodibus terræ maritimæ*. The Abbot of Ramsey lived at Huntingdon, yet distrained for Sea-Service in Norfolk. Rot. Claus. 13 Ed. 3. M. 14. the County of Oxon an Inland County, and yet commanded *Custod' terræ maritimæ*. M. 17 Ed. 3. Banco Regis Rot. 15. a Supersedeas granted one. 17 Ed. 3. M. 24. Wages recovered of a Town for forty Days. Scot. 20 Ed. 3. M. 14. *versus Scotos*. M. 21 Ed. 3. Rot. 4. Banco Regis quam, *deteine Soldiers Pay, ergo, complain*, M. 31. Payment of Wages. Rot. Parl. 22 Ed. 3. M. 4. there the Commons were at great Charge for guarding the Sea, and pray Remedy, but not for the Right but for the Excess. Rot. Franc. 21 Ed. 3. M. 24. dorf. 22 Ed. 3. Rot. Pat. pars 2. M. 1. Rot. Franc. 22 Ed. 3. M. 5. dorf. pro Johanne Coke. Rot. Franc. 26 Ed. 3. M. 5 & 4. *quia est vulgaris opinio*; and this recited, *nos considerantes, &c. quod omnes per juramentum, &c.* and this was for the Sea, and goes to all Inland Counties. And as they talk of Kings in the Field, Kings use not to go into the Field in Person. Rot. Franc. 34 Ed. 3. M. 34. pro Clero arriando. Rot. Claus. 33 Ed. 3. M. 89. dorf. Rot. Claus. 43 Ed. 3. M. 1. de Navibus arrestand'. Rot. Claus. 43 Ed. 3. M. 14 or 13. de hominibus arriandis. Rot. Claus. 45 Ed. 3. M. 8. ut intelleximus. Rot. Parl. 46 Ed. 3. M. 20. the Commons complain of their Charge, and say, that the Sea was so noble, that all the World called the King, the King of the Sea, &c. they pray as of Grace, &c. Rot. Franc. 47 Ed. 3. M. 20. for guarding of the Sea-shore. 50 Ed. 3. pars 1. M. 105. 31 Ed. 3. pars 5. M. 25. the Charge is not put upon the People without common Consent. The King is not to do it but for the grand Necessity and Defence of the Realm. In Richard the Second's Time, Rot. Claus. 1 Ric. 2. pars 1. M. 7. Scarborough. Rot. pat. 1 Ric. 2. paes 1. M. 12. Rot. pat. 1 Ric. 2. pars 1. M. 42. dorf. Beacons. Rot. pat. 1 Ric. 2. M. 13. dorf. Rot. Franc. 2 Ric. 2. M. 15. Rot. Scot.

4 Ric. 2. M. 9. King of Castile; *pro compellendo homines pro custod' maritim'*. 7 Ric. 2. M. 9. *Totus Clerus apponere manus adjutrices*, Archbishop of York. 8 Ric. 2. M. 5. Archers.

The second Day's Argument of Sir Edward Littleton Kt. his Majesty's Solicitor-General, before all the Judges in the Exchequer-Chamber, on the behalf of his Majesty.

May it please your Lordships,

THE last Day I left off at the End of Richard the Second: I do not love to repeat, yet in regard the Records that are of weightiest Evidence for the King to Men of Understanding, are perhaps not so clearly understood by every one that hears them, I shall sum up what hath been read. It hath appeared by the Records that have been read, that the Sea and the Land have been guarded by the Commons, when Danger did appear to the King: If the Danger was great, all the Commons, no Age, no Sex, no Order to be spared, all Ecclesiastical Persons bound to defend. If the Danger were less, those Parts nearest unto it to defend, no Reason to trouble the whole Kingdom, when a few will serve the turn: Those that refused were compelled by Imprisonment, seizure of Goods and Lands. The Writs have expressed fully and significantly, that no Wages ought to be paid by the King; that when there was apparent Danger, it appeareth by some Records, that one Man should not serve for another; Care taken by Commission, that all Equality should be used in making of Contribution; and when Complaint, as 25 Ed. 1. was made against it, it was remedied; yet it was not *Ratione Contributionis*, but *violentiæ extortionis*.

This constant Usage of former Kings is of much more Authority and Weight, than scatter'd Judgments here and there, or judicial Proceedings in any Court, and these are not wanting. Notwithstanding, I shall now proceed and come to the Time, wherein so many great Lords did die, and so much noble Blood was spilt in Civil War, from Henry the Fourth to Henry the Seventh; *Henricus Rosas, Regna Jacobus*. There was not then such great Cause to look to Preparation for Sea; for the War was then in the Bowels of the Land; and the Sea and the Land makes but one Kingdom, and the Reasons are the same for both. And for Henry the Fourth, when he was newly come to the Crown, it appears Rot. Claus. 1 Hen. 4. pars 1. M. 12. dorf. Writs are directed to the Archbishops of Canterbury and York, and other Bishops; and it recites, that the French had prepared a great Navy which was seen on the Coasts, and intended to invade the Kingdom; and that Abbots and Priors should be array'd, *sine deliberatione, &c. & juxta statum & possessionem, &c. & triand' Millenis centenis*. Rot. viagij begins 1 Hen. 4. to 11 Hen. 4. M. 20. de Proclamatione faciend' to go against the Rebels of Wales, de arraiaione faciend' in the same, and Barons assigned to the Custody of the Marches called *Battelfield*; less Reason for this Place of any, for they say there were Lords Marches to defend it. M. 14, 23. de proclam' faciend', to go with the King in Person against Henry Percy a Rebel; and there was an Array of Men by the Sea Coasts to resist the Enemies, &c. and

and in the same Roll, *De hominibus congregandis*, divers other Proclamations, *de hominibus defensibilis*. In the same Roll, *De Militibus infra Comit' Lancastrie arriand'*, upon the Insurrection of the Earl of Northumberland, to bring them to *Pomfret*. *M. 10, & 27.* again to go to the Prince Henry the Fifth. And in 1 Hen. 4. this goes to Northumberland, Derby, Lancaster, by Robert Duke of . . . to invade the Kingdom. My Lords, Noblemen, Valets, &c. & omnes homines defensibiles, between 16 and 60, that was *juxta statum*, upon warning of two Days, which was in *defensione Regni nostri*, to go with the King. *M. 20. de hominibus levandis & congregandis*; and of this Nature 4 Hen. 4. *M. 11. dorf. & 10. 5 Hen. 4. pat. M. 28. dorf. pars 2.* Principal Men joined together to array and muster all over England. This hath appeared by the constant Common Law of the Kingdom.

Before Parl' 5 Hen. 4. 24. the Commons pray that the Commissions of Array should be considered, and the Judges advised with, and a Commission made for the future, *ad arriand' & triand' qui de Corpore sunt habiles*, &c. *juxta statum & facultates*, &c. & *ad assidend' & proportionand'*, with Power to distrain. 7 Hen. Fitz. Her. Thorney Title Protection, the Subjects of England not to go out of England with their King. This was upon the King's going to aid the Duke of Flanders. Report 7. fol. 7. Calvin's Case, not to go without Wages when they were to follow the King. In Henry the Fifth's time there were great Wars with France; but when the King went, he took great care that England should be provided for. *Pat. 3. Hen. 5. M. 17. dorf. pars 2. de araiatione faciend'*, Care is taken that all should be arrayed, and being arrayed, should continue so arrayed. *Stat. 1 Ed. 1.* it provides that they shall not go out of their Counties but upon the sudden coming of strange Enemies; and upon Warning, they were not only to array them, but to lead them to the Sea-Coasts out of their Countries, when and where it should be necessary, *cum aliquid periculum eveniat*, notwithstanding the Statute, which is our Case; nay, our Case is much stronger: And 3 Hen. 6. is verbatim with the other. 6 Hen. 5. *Pat. M. 8. dorf. pars 101. 3 Hen. 5. 16. dorf.* this was upon the Threatning of the King of Castile, to all the Counties of England. 7 Hen. 5. *Vaga Regis*, divers Privy-Seals to all the Counties of England, to inform the King what able Men of Ancestry there were, *ad defensionem nos in propriis personis suis ad defensionem Regni*, and the return is *pur defence de son Roalme*. In the time of Hen. 6. *Rot. Pat. M. 37. dorf. pars 2. de Araiatione faciend'*. 7 Hen. 6. *pars 1. M. 7. dorf. Rot. Pat.* there is *quia datum est nobis intelligi*, for the Isle of Wight. *Rot. Pat. 7 Hen. 6. M. 5. dorf. pars 1. 13 Hen. 6. M. 3. dorf. de Militibus congregandis & ducendis versus Scotland. Pat. 13 Hen. 6. pars 1. M. 13. dorf. Contra Militiam Inimicorum*, a full Command to array all, and to bring them *ad Costeram Maris* and other Places, & *juxta gradus suos*. 14 Hen. 6. *pars 1. M. 20. 21 Hen. 6. M. 40. dorf. Rot. Pat. 28 Hen. 6. M. 11. dorf. Rot. Pat. 29 Hen. 6. pars 1. M. 45 dorf. Rot. Pat. 37 Hen. 6. M. 6. pars 1. dorf.* all Arrays. A Book-Case 28 Hen. 6. 11. b. pl' 22. Divers of the Clergy had Churches to be freed from the payment of Tenths for the Defence of the Kingdom, and the Clergy did grant ii s. in the Pound without Act of Parliament, and this sent by *Mittimus* into the Exchequer. *P. 26 Hen. 6. Rot. 10. & Trin. 11.* for levying of Money upon *Sciri Facias*. 36 Hen. 6.

M. 2. dorf. Regis 1. Part. Array in the Isle of Thanet, and compel them by Distress, *pro defensione Regni*. 37 Hen. 6. *Pat. M. 1 & 6. dorf.* A Writ to many Counties, because of the great Hurt done to the People by the Sea-Coasts, and the great Preparation to do more Hurt; thereupon Command to train and array all Parts of England, *pro defensione*. And the 39 Hen. 6. *Pat. de potestate* to array the Isle of Wight, being invaded *juxta gradus & conditiones*, &c. 39 Hen. 6. *M. 9. & 11. dorf.* A Commission to Edward Duke of York, who claimed the Crown, and it was adjudged him. 31 Hen. 6. *Pro araiatione faciend' quod' person' fli' iniquitatis dissentientes*, &c. therefore is a Command *pro securitate personæ nostræ & populi nostri ad invocandum omnes homines defensibiles* to destroy them. *Pat. M. 9. dorf. de villa de Stamford ad custodiend'*. *M. 1. dorf.* a Commission and Command given to Edward Duke of York, *Ed. 4.* which gave Power to raise Men and Money at Bristol, Hereford, and other Places; which was cancelled, and other Commissions given in the Room. In the time of Edward IV. *Rot. Pat. 1 Ed. 4. M. 8. dorf.* for reducing Henry the Sixth's Power, Congregare all the People. 1 Ed. 4. *M. 8. Southwales* on the Marches. 1 Ed. 4. *Scot. Rich. Duke of York, Custos West-Marchiæ ad omnes homines defensibiles*, in Cumberland and Westmerland between 16 and 60; *sint prompti in defensionem Marchiarum*, &c. against Percy Earl of Northumberland. *Rot. Scot. 10 Ed. 4.* there are *Custodes generales vers. Scot.* for arraying all Men as there should be Cause. *Pat. 3 Ed. 4. M. 3. dorf.* continue *parati ad defensionem personæ nostræ & Regni*. 8 Ed. 4. fol. 23. a Book-Case, a Subject hath Power to make a Bulwark in another Man's Ground; the King hath as much Power over all the Kingdom, as any particular Man to make Defence. 9 Ed. 4. *Pat. M. 11. Arrays*. 10 Ed. 4. *Pat. M. 13. Arrays in salvationem Regni*, when he was like to lose his Kingdom. A Commission to raise Power against his great Adversary and Rebel Henry VI. who did lately enjoy the Crown by Usurpation. 22 Ed. 4. *Rot. Pat. pars 1. M. 2. pro Conduetoribus & Waffatoribus Piscatorum*, and at the Subjects Charge. *Pat. 1 Rich. 3. pars 1. dorf.* against the Duke of Buckingham *quocunque' Comitatus* and this *juxta statum & facultates*. In Henry the Seventh's time. Henry VII. was a wise Prince, his Majesty's Progenitor as well as his Predecessor; he staid not till he saw the Tops of the Ships, or the Drums beat; he provided for the Safety of the Kingdom betimes; when the War was denounced between Charles King of France and the King of the Romans, tho he was allied to both, he prepared to defend his Kingdom. *Rot. Pat. 1 Hen. 7. dorf.* a Command to the Sheriffs to make Proclamation thro'out all England, That because we are informed of the War between Charles King of France and the King of the Romans, and great hurt may happen to this Realm, and the Subjects thereof; commanding all Subjects to keep Watch and Ward upon the Sea-Coasts, and all Beacons to be made ready to be set on Fire, as in old Times, and this after Tonnage and Poundage was granted to him for Safety: and I am sure there are greater Wars about us now, than there were at that time. *Rot. Pat. 7 Hen. 7. Intus de potestate commissa* to the Earl of Surrey to go to conquer France. 7 Hen. 7. *Cap. 1.* a Statute in Print. 8 Hen. 7. *Rot. Pat. pars 1.* a Command to Richard Fitz-Hugh and others, to keep all in Array for Defence against Scotland, which intend to invade the Realm,

ut informamur. Stat. 1 Hen. 7. Cap. 16. every Subject is bound by his Allegiance, to assist when need requires. In the time of Hen. 8. Rot. Pat. 4 Hen. 8. a Proclamation to the Maritime Counties to be in a readiness, considering the French King had in readiness a great Navy to enter this Kingdom the next Month ensuing, &c. and certain Captains deputed to lead them; and they were all to be in a readiness at an Hour's Warning upon their Allegiance. Rot. Pat. 4 Hen. 8. the same Commission to Bouchiers, &c. in Latin. 14th of Hen. 8. which is not in this Roll, but a Book of Proclamations; for before Edward the Fourth's time, all between sixteen and sixty were to be ready at an hour's warning. 15 Hen. 8. the Inhabitants of Stamford, Nottingham and Salop, &c. to attend the Earl of Surrey upon an hour's warning. 30 Hen. 8. *Pallace treasur' omnes homines ad arma*, to be ready *ad serviend' nobis* in Scotland, as need shall be. Stat. 35 Hen. 8. cap. 13. Remission of Loans, reciting and considering, *est Duty & honor del People*, to assist their King in Body, Goods, Lands and Substance in his Wars; and there it was only for offensive Wars. Rot. Pat. 36 Hen. 8. pars 2. 37 Hen. 8. in Mr. Moyle's Book. 4 & 5 Phil. & Mar. Commissions of Array to go to all Gentlemen, but now but one Lieutenant of a County; and that Power which the Lieutenant now hath in England, was the same with the antient Commissions of Array in Substance, for it is no new thing. These are in force by 5 Hen. 4. and Common-Law in Queen Mary and Queen Elizabeth's time; and they did not go by the legal Array, but by the Power of the Council-Board. 3 & 4 Phil. & Mar. 1557. Council-Board. Calais was besieged on the sudden, the Enemy making Pretence of going into the Low-Countries, there went presently a Command to the Lord Warden of the Cinque Ports 5 Jan. to make Proclamation in Kent, that all from 16 to 60 should repair to Dover to save Calais, upon pain of Death. 8th of Feb. 1557. Letter of Thanks given to Sir John Edgecombe for diligently mustering 1000 Men. 19 Sept. 1558. Northumberland served without Wages. 1 Sept. To continue Watch. 8 April 1558. Whittypool for not finding Demy-lance, is called to the Council-Table. These are to shew what Proceedings there have been in former times. Rot. Pat. 7. Eliz. pars 5. A Commission to muster all Men against Scotland. 11 Eliz. Rot. Pat. tho not on Record, yet in a Book in the Crown-Office in the Chancery with Mr. Willis: A Commission to array Men, and to provide all things necessary, *prout Necessitas*, &c. and to inform themselves what Armour they had, and this to be done for our better Service: but with those Commissions there went Instructions, amongst which, observe this one; 'We require you to consider how necessary this Service committed to you is at this time, for the Benefit and Safety of our Realm, wherein we think the more Earnestness is the more requisite, because of our Subjects long continuance in Peace, and the notorious being in Arms of our Neighbours about our Realm.' If these Times be not worse, I leave it to any indifferent Man's Consideration. 27 Eliz. Watson Roll. A Warrant to the Lord Chancellor to make Lieutenants and Deputy-Lieutenants, which are the old Commissioners of Array, turned into English. And in 1588, when that great Armada came, all the Realm was in Arms, and at the Subjects Charge. 31 Eliz. cap. 14, 15. the Subjects granted a Subsi-

dy, in consideration of the Queen's Charge. And the Subjects were then at great Charge, both for Land and Sea, and she took it by the Power of her Council-Table. The City of London was desired to find ten Ships, and of themselves they desired to find twenty; this was the Affection of those Times, they did not dispute but were ready to obey. 28 April 1558, a Letter to Sir Robert Wingfield, whereas divers Towns in Suffolk were charged to set out a Ship, and that divers were poor and could not, a Command that the richer should do it. A Letter to the Earl of Huntington, that York should contribute to a Ship charged on Hull. A Letter to other Towns to contribute to Colechester; they refused, yet were compelled to do it for advancement of so necessary a Service. The Clergy in eighty eight joined, and the Archbishop was Captain. And there were Letters for demolishing of Suburbs. Statute 3 Jac. cap. 6. where the Charge of the People in Queen Elizabeth's Time was remember'd, London was charged, and Foreigners and Strangers were charged also to contribute, for that the Charge was common. In 1588, 3000 l. Conduct-Money levied for the Earl of Bath; they did not stay here till the Tops of the Ships were seen, but they made Preparation in 87. In 1599, great Troops were assembled at London, for Defence of the Queen, when the Tumult was about the Earl of Essex; and in 1598, the Charge being common, the Charge ought to be borne in common: Nay, the Inns of Court were charged with Arms; upon the apprehending the Earl of Essex, a Letter went to the Benchers of the Inner-Temple for that purpose, and all the Gentlemen found Arms. Amongst these Letters great Levies of Horse and Foot at the Country's Charge. And where she would not have their Persons, she had their Purfes and Power to extend accordingly. 1595, Amongst the Papers of the Lord Nottingham, the People set forth a Ship at their Charge; we have the Letter only to shew they did it, and how much each Man did contribute. In King James's Time there was not much; the Times were not only peaceable but pacificous, his Motto was *Beati Pacifici*. 10th of July, 2 Car. A Proclamation issued, that all People should make speedy repair to several Places, and should continue during the Danger. And for a binding Authority, 12 Car. the Resolution of all the Judges under their Hands, and inrolled in every Court at Westminster: a Man should have thought that that should have given Satisfaction, it would have done so in former Times. And truly, that the King hath done nothing more, but what the Kings of this Realm have done before, is most apparent to all those who will read our Law-Books. How often have the Judges been assembled by the King's Command, both in the outward and inward Star-Chamber, and there asked Questions? 2 Ric. III. fo. 10. 8 Hen. VIII. 190. b. 101. the King was there, and reasoned there. Is this a new Thing for Judges to deliver their Opinions? But his Majesty hath been pleased likewise to give way, that it might be brought to a publick Debate in a judicial Way; he hopes there are very few that oppose it, do it out of any averfeness from the publick Service, but to satisfy themselves, and so to submit.

To answer Mr. *St. John's* Argument ; before I come to answer in particular to what was objected by this learned Gentleman, who hath taken a great deal of Pains, and made as much use of it as was possible for a Cause of this Nature to bear ; I shall in the first place give a general Answer.

I say, that the Testimony by Records given on the other side, whereof many are vouched, which I am glad to hear of ; and that Men look into a Business of this Nature. To make such a Search is for the Honour of the King, that there is according to Law the freest Access to the Re-

* *The Lord of Holland.*

records, that ever was in *England* ; and that great * Lord doth know that the King commanded with his own Mouth, that free Access should be to the Records in this Business ; and I appeal to the Officers that keep the Records, whether I did not only deliver that Command from the King unto them, but desired them my self to shew to the other Party whatever I had.

I say, these Records, take them at the best, they are not of such Weight in point of Right, as the other are which are for the King ; for if a King shall voluntarily, and in ease of his Subjects, or especial Grace do any thing, yet I conceive that is not of such Weight, as when he produces a constant use of compulsive Power from the Crown, and obey'd by the People : for if any of the Kings have spoken in gentle Language, as King *John* when he was deposed from his Crown ; I conceive that will not be so much as gentle Words used in the Writs.

I shall answer particularly to all the Records that have been cited : it doth much concern the King, that this Argument be answered fully.

The first Thing that was said, was, that to seize Goods without Suit or Cause, is void in Law ; but this was not used as an Argument, but an Introduction. But in the next place, he comes to a high Objection, that in his Majesty there is *voluntas interna*, and *externa* ; his inward Will which he doth declare in his Chamber, and his legal Will, and withal, that the King cannot judge himself, 2 *Rich. 2. fo. 10, 11*, which was grounded upon that Book-Case.

The King cannot judge in his own Person, but hath left it to your Lordships, that are sworn to do equal Justice between him and his People ; but to say, that the King cannot judge himself, I question. Can that be wanting in the Fountain, that issues in the Stream ? that I utterly deny. Is it not said, *Coram Rege* in the *King's-Bench*, and in the *Star-Chamber*, *Coram Conciliis nostris* ? this is a new Doctrine ; and shall not the King judge ? Did not *Ed. 4.* sit in Person in the *King's-Bench*, in a Trial of Rape ? and that famous Justice *Popham* sat at the King's Feet, and other Judges at the King's Side, and therefore called *Justiciarii a latere Regis* ? Sure he forgot King *James*, who adjudged two Cases in the *Star-Chamber*, that of *Bellingham's* and Sir *Tho. Lake's* Case. The Book doth no way warrant his Inference ; the Book doth say the King shall not judge, but saith, that if a Man be convicted before the Judges, the King shall not set the Fine, because he heareth not the Case. This no way concerns our Case.

That no Law can be changed but by Act of Parliament, as a Naturalization, and a Legitimation ; nay, no Writ of Error but in Parlia-

ment, till by the Statute of 27 *Eliz.* and that the Parliament is *Curia Regis*, and cited 34 *Hen. 8th Crompton's* Jurisdiction ; the King is at no time in such State-Royal as in Parliament : All that was made out of this, was, that this was a change of the Law, *viz.* the Writ for Shipping.

We believe it is so far from being a Change of the Law, as that it was the Custom of all Ages in former times. Now he says the Parliament is the highest Court, and the King is there at highest both for Magnificence and Power ; but yet out of the Parliament, the King is King of *England*. It doth not follow, because he may do it in Parliament, that therefore he can do it no where else ; and it is to prove a Comparison, to say, that the King should have the ordering of War as a Generalissimo over his Subjects and Vassals ; all the Generals have their Power from him.

Oh ! but the King hath Provision for War.

This is but a cunning Insinuation, to make a Survey of the King's Revenue, and to insinuate with the People ; and he begins with Knight's-Service, Tenures, and these in dangerous Places, as *Dover, Durham, Chester. 35 Hen. 6. Britt.* that the King should not only have his Wards Lands to breed them up, but to maintain the Wars in the mean time ; and that Knights-Service 37 *Hen. 6.* were instituted for ordinary Defence as Horsemen. And because the Kings of *England*, out of their Care to have Men trained up, had Horsemen to follow them, that therefore they shall have no Aid when the Kingdom is in Danger, is a strange Inference ; shall we have no Footmen, no Archers, no Slingers to be used in War, no Guard at Sea, because he hath some Tenures of Horsemen ? This doth not discharge the Subject ; this is but for forty Days, and was instituted to suppress the sudden Incurfion from *Scotland. 19 Rich. 2. Guard. 165. pl* Tenure ; they do restrain particularly Escuage and Knights-Service to *Scotland* and *Wales. 22 Ed. 1.* for *Gascoigne* afterwards discharged, but not for Mr. *St. John's* Reason. *Rot. Claus. 5 Ed. 2. M. 27.* these were discharged of Escuage, because the King was not there in Person, and because it was extraordinary. *Rot. Scot. 5 Ed. 1. M. 27.* that Record doth shew the Kings of *England* did conceive that they were somewhat less than Enemies that refused it ; for foreign Service I never meant to object it.

Then he saith, that Escuage is to be assessed in Parliament, tho for the Defence of the Kingdom.

If that were the proper Question, I could shew when Escuage was not by Parliament, for it was by another Reason. It was altered by an Act of Parliament, 17 *Johannis Statute de Running Mead, Nullum Scutagium* ; for it was not so before.

Also it concerneth the Subject as well as the King. 9 *Hen. 3. cap. 37.* The true Reason of assessing in Parliament is this, other Men were to have Escuage as well as the King ; now it is true that Rule, No Man shall be Judge in his own Case, but therefore not the King ; that holds no Proportion : and Kings are said to do no Wrong. The true Reason why it was assessed in Parliament, was, because the Lords would take too much. This is from the Business, I pass it over.

Then he alledged, that the King is in actual Possession of the Wards.

That

That they should go towards the Maintenance of the War, he cannot shew any Authority worth the valuing, neither *Bratton* nor *Britton* hath any such Thing; for 35 *Hen. 6.* the Words are *purceo, &c.* The Argument will be but thus; because the King out of his especial Care, out of his own Land provided some Tenures for that Purpose, therefore he shall have nothing from the Subject. The King did never give, nor could give other Mens Lands for those Tenures; for it is most apparent, the *Normans* came not in by Conquest. *William* was no Conqueror; for after he came in, Men did recover the Lands which were their Ancestors. That was the Wisdom when *Henry* the Fourth took the Crown by Conquest, when he would have alter'd the Laws; No! take our Laws, and take our Lives. This is an Argument no way conducing to the Purpose, because he hath some Horse by Tenure, therefore neither Foot, nor Provision for Sea-fight, nor Trained Bands, because Provision is made by Tenure. This is contrary to all Reason and Experience: What Obligation hath the Soakman and the Plowman's Tenures, what do they pay to defend them? no Consideration for it; these are rather Insinuations than Arguments.

Then it was said, there were like Tenures for Sea, and he cited two or three; one to hold the King's Head at Sea, and some such like, as if two or three Tenures were like to defend the Sea.

It was also said of the *Cinque Ports*, that they have many Privileges allowed them for that Purpose, 13 *Ed. 3. Par' Roll.* 11.

Is the *Cinque Ports* Service a competent Provision to defend a Kingdom against Hostility? I know no Reason but the whole Body should defend itself. 13 *Ed. 3. M. 9.* it appears expressly, that the Commons made Defence at their own Charge. No Man can be discharged of keeping a Thing, that he did not keep; so because the Subject is said to be discharged, is an Argument that he was charged. That of the *Cinque Ports* is not for the Defence of the Kingdom, but for Intercourse of Merchants, not *Quando Salus Regni periclitabatur.*

Then they object, that Tenures in antient Demefn were talliable without Consent, and their Service for the King's Provisions in their House.

No Reason that should excuse them from the General Service; for tho it be true, that the King's House employs such Tenants, yet the Kingdom must be supported by them and the rest of the Subjects together.

Then he did object, there was another way of Supply of extraordinary Means, as Mines in other Mens Lands; and here he remembred *M. 3 Ric. 2. Prerogative Comm'*, difference taken between annual and casual Revenues for Defence.

Then he objected, *Rot. Parl'* 6 *Ric. 2.* 11, 42. that the King would live of his own Revenues, and that the Mines, &c. should be for the Defence of the Kingdom.

Onslowe, who argued the Case, said that the King was the most excellent Person both at Sea and Land; therefore the Royal Fish at Sea, and the Gold and Silver Mines at Land, were given to him, because he was able to give a Stamp on Money. And so 2 *Ric. 2.* they of *London* pray'd that the King would not put them to Charge, but live on his own, and so your Authority vanisheth into Smoak.

VOL. V.

The King must live forsooth of his ordinary Revenues. *M. 3. Ric. 2.* which expresseth, that the King at that time would do so; that the King by Advice for Salvation of the Kingdom, would use these things given unto him; that indeed was a reasonable thing for that time, but must it be now turned for a Necessity?

6 *Ric. 2. M. 42. pars 42.* that good Government be about the King; then they petition that he would live upon the Revenues of the Crown, and that all Wardships, Releases, Marriages, &c. should be for the Defence.

The King is very willing to do and ordain in this Case, as by the Lords of his Realm may be thought best for his Honour and Profit; this is not a granting of the thing, but a referring it to his Lords, at best it is but a temporary Desire!

But oh! he hath the old Customs, and Petty Customs, Tonnage and Poundage; of the Legality of taking of it he will not speak. If the King doth impose it on the Merchants, he needeth not to take it of his other Subjects. Duties to the King in this Year, came to 300000 *l.* and that Tonnage and Poundage was granted for ordinary and extraordinary Defence. 3 *Ric. 2. 5 Ric. 2. 1 Mar.* granted on Condition, that by the Statute of *Winchester*, they were bound to have Arms, and no such Statute for the Sea.

I shall answer all this; but for Tonnage and Poundage, I shall refer it for a particular place. They say, the Courts of Justice are maintained by the King, the King hath a Profit thereby, but the Maintenance of them cometh out of the Subjects Purse; and the First-Fruits were for the Defence of the Faith, that no Heresy should creep into the Church. Therefore, because the King is Lord of the *English* Sea, he must defend it at his own Charge, and not command the Body nor Purse of his Subjects towards it. A pretty Argument! He saith, the King hath the old Customs, which are the antient Inheritance of the Crown, and so for Petty Customs, and that these must go for the Defence of the Sea. See a Judgment in the *Exchequer*, in *Edward* the First's time; search into the *Fine Roll* 3 *Ed. 1.* and see for what Causes these old Customs were. It was never said till he spake it, the old Customs or lesser were for this purpose. And for his saying that the Statute of *Winchester*, 13 *Ed. 1.* doth enjoin keeping of Arms, and thereupon all Defence comes, that Statute was repealed by *Philip* and *Mary*, and set a-foot by King *James*, and again by him repealed. I shall shew before the 13 *Ed. 1.* many Records for Land-Service long before; for that Statute doth only set a Form of Arms, and is not the Beginning of Arms. So for the Objection of the King's Revenues, be it more or less.

Now I shall come to Tonnage and Poundage, the darling Argument; which I affirm was never given nor taken, of itself simply, on extraordinary Defence; I have seen all the Grants of it: it may be when there have been Wars abroad, and then the Subjects in Parliament have given Tonnage and Poundage with Tenths and Fifteenths, they have been all said to have been for the Defence. Tonnage and Poundage hath been given and taken merely for an Intercourse of Merchants; and in that Sense the King said we do and must pursue those Ends for which it was granted to the Crown. I shall make that appear by Reason, and out of the Grants themselves and other Authorities.

If Tonnage and Poundage were merely for the Defence of the Sea, how was the Kingdom to be defended before in the time of the Saxons? At the first it was 6 *d.* a Year, then to 2 *s.* and 3 *s.* for Tonnage and Poundage; then 3 *s.* upon a Tun of Wine, and 8 *d.* a Pack on Merchandize, that was all for Tonnage and Poundage, the rest was for old Customs. If this was for extraordinary, how was the Kingdom defended when this was given for half a Year? Truth, it was for Defence of the Kingdom, that is, with relation to the Intercourse of Merchandize; the Recital 1 *Jac.* saith it hath been taken time out of mind. Hath Tonnage and Poundage been given time out of mind? then it was before Richard the First's time: *H. VI.* he had it for Life, the Statute doth express it as plain as may be; time out of mind is beyond the Memory of any Man living. The very Interpretation of the Statute explains it to be for the Safety of the Sea, and Intercourse of Merchants. In all Ages before the granting of Tonnage and Poundage, the Kings, upon a general Defence, have had other Aids than this by their own Power. Ordinary Charge for an ordinary Defence.

I could have given a Legal Answer, that it was not given unto the King; no Act of Parliament for it.

Yea, but it is taken *de facto*. Shew your Instruments then by which it was taken; that had been a general Answer.

But I shall carry the King's Honour along with his Power and Practice: *Rot. Franc. 2 Ric. 2. 7 Hen. 4. M. 23. Rot. 11.* Tonnage and Poundage granted to Merchants to guard the Sea for Intercourse of Merchandize; which sheweth plainly it was for that purpose. To put it without all manner of Question, 6 *Ric. 2. M. 8. Franc. Roll. pars 2.* Merchants and Mariners had *Custodia maris*, and the King granted them 6 *d.* a Pound: Doth any Man think that he would trust the Safety of his Kingdom with Merchants and Mariners? It was merely for the Guard of the Sea for Merchandize; express Exception in the very Grant, that they should not be bound by this to help against Invasion of Enemies, unless a Royal Power come, *regali potestate excepta*; therefore this was no extraordinary Service. 7 *Hen. 4. Rot. Parl.* is in the same manner. And in the *Close Roll*, that the *Custodes maris* should put there a lawful Power for the Safeguard of the Sea against the Enemies of the King, except a Royal Power; then Notice to the King, so it must be understood merely for Intercourse of Merchants. I can shew you a Book-Case for this, 9 *Hen. 6. 12. Quer. Case Title Custom. Braff. 26.* he saith, That Aids and Subsidies are granted to the King, to the intent that the King, by his Admiral, should guard the Sea, to the end that Merchandize may pass and repass; not a Word of the Defence of the Kingdom. And in *Anno 11.* the King was at great Charge with his Navy; cast up the Accounts of the Sea-Duties, and then it will appear there is not left to him a Penny for the Defence of the Sea. Impositions and Prizage of Wine was to furnish his House, and not for Defence of the Sea. Not only upon this, but there was an ancient Writer that wrote the *Doctor and Student*, whose Name was *St. Jermaine*, who wrote in Henry the Eighth's Time; he tells you, *lib. 2. cap. 15. fo. 153.* The King out of the old Customs of the Realm, as Lord of the narrow Seas, is bound twice in the Year to scour the Seas, but not against all outward Enemies, but only to

put away Pirates and Petty-Robbers. History of Tonnage and Poundage. 25 *Ed. 3. Parl. Roll. M. 11.* the Commons did pray, that 6 *d.* of the 2 *s.* a Sack of Wool, and of a Tun of Wine granted, that the Merchants might have safe Conduct over the Sea, if it would please the King; the Merchants for that would make their own Conduct. All the Rolls go in that manner. 3 *Ric. 2. 2 Hen. 4.* and they cannot shew that Tonnage and Poundage was ever granted for extraordinary Defence, unless for some great Defence.

Next he alledged that Sea-Duties were born by every Man in the Kingdom, and that *secundum statum*. 22 *Ed. 3. M. 4. Parl. Roll*, which says it was in Charge of the People, & *nemy des Merchants*.

All Men must bear proportionably their Share in the Charge of Defence; what Consequence is this? because the first or second Year out of the Subjects Purse for their Commodities, therefore their Lands shall be discharged in Cases of extraordinary Defence.

Oh! say they, but this *may be* done by Parliament.

By a *May be* a Man may answer any Argument; but a *May be* will never answer a Bill. 23 *Ed. 1. Rot. 3. dorf.* the Writs were in *October*, the Parliament at *St. Martin's* in Winter. In that to the Archbishop of *Canterbury*, the King doth but a little compliment with the Clergy, and telleth them he knoweth what Dangers were abroad; the Business of Shipping was done before the Parliament, so the Parliament might consider of it afterwards. That it was done afore appears; this Parliament was not held at the Day, but the King doth prorogue it till after *St. Andrew's Day*, because he was busy in preparing his Shipping; so they came about Shipping when it was gone to Sea before, for the Writ of Summons was the 1st of *October*, the Day of Meeting after *St. Martin's*; that to the Archbishop was the 31st of *September*; the Ship-Writs *Aug. 28.* and *Sept. 31.* then the rest, the 3d and 6th of *October*; but all long before the Meeting of the Parliament, and so all grounded upon [it may be.] And to say that the King, because he did a thing voluntarily, therefore he must be necessitated to it, I know not what Argument it is. *Henry VII.* indeed did bring things to Parliament for the Advancement of his own Ends; did *Queen Elizabeth* send any of her Commands out of Parliament? and yet the Subjects gave her Subsidies.

24 *Ed. 1.* Summons there for the Clergy to come if the Truce did not hold with *France*.

I think it not fit at all times, when it standeth upon Intelligence, to communicate it to the whole People. 26 *Aug.* Summons to Parliament, divers Writs in *February* and *April* before, no Money granted in these Parliaments; therefore to tell us it might be by Parliament, is a poor Argument.

Walsingham saith, Allegiance bindeth the King to Protection; as well as it doth the Subject to Tribute.

The Subject hath a double Protection from Injury and Wrong, in Times of Peace by his Laws, and in Times of War by his Power: Must this be done by the King's single Person? No, it must be done by the Bodies of his Subjects at their Charges. Indeed it is fit that particular Soldiers should be paid.

Oh! but they tell us, that *Fortescue* Chief Justice of the *King's-Bench*, to shew the Law of *England* to be better than the Law of *France*, saith, that

that nothing could be taken from the Subjects but by Parliament.

That is in the ordinary Way; doth he say, that no Man shall contribute to defend himself in imminent Danger? *Neverbumquidem.* 27 *Ed.* 1. *M.* 7. *Pat.* there the King saith he did not buy Lands, Manors, or Castles with it, but did it to defend the whole Realm; no more doth our King, but only to defend himself and the Kingdom.

In 33 *Ed.* 1. *Rot.* 10. It is objected that a Clerk sued for his Salary, and had it allowed him: And the King supports his Courts by the Fines.

But they came from the Subject. And may not the King give a Salary when he pleaseth?

14 *Ed.* 3. *cap.* 1. and this were prest to prove; that Aids, tho granted in Parliament for Defence, should not be brought into Example.

These were not to be spent for the Safeguard of England, but Scotland and France; and so it comes not to our Case.

48 *Hen.* 3. When the Tenants came with greater Charge than their Service required, *non trabatur in exemplum.*

True if Tenants by Knights-Service at that time did do greater Service than they were bound in time of Danger, it is but reason that it should not be drawn to be yearly, to make their Tenures higher.

Plowden fo. 315. *Wiseman's Case.* A Covenant to stand seized to the Use of the Queen, in consideration she is Head of the Commonwealth, held no good Consideration to raise an Use, because there wanteth *quid pro quo*; and the King, *ex officio*, is bound to do that.

Under my Lord *Coke's* Favour it was not in the Case. The Case was upon divers good Considerations, and he put this in by way of Admittance. I can shew when this was declared to be no Law.

Next they alledge, the King is in possession of the Service of the *Cinque Ports*, and of Tonnage and Poundage, and this appears not to be expended; and of other Duties for the Defence of the Sea, and *Lex non facit saltum.*

Tempus belli, I reserve for another Place, for that is one of the three things considerable in this Argument. That learned Gentleman, Mr. *St. John*, did confess that (as Necessity requires) when the Safety of the Kingdom is in danger, the Subject is bound. If it were material to make it appear whether any thing were spent or not, it should have been pleaded at the *Exchequer*, if he would have taken any Advantage upon it.

But admitting they had been all expended, yet the Property of the Subjects Goods, saith he, cannot be altered out of Parliament. He did agree the Kingdom must be defended, and did yield, that for the Manner of it, it did not belong to the People. 6 *Ric.* II. 2 *Ed.* I. Men and Money belong to the Wars; the Commons did acknowledge it belonged to the King for ordering in all times; the Caution of former Ages was to demand it in Parliament.

We shall shew in all Ages, the King did it without Parliament. This is a pretty thing, that the King is to direct the War, and yet shall have neither Men nor Money without asking his Subjects leave. And for that of Property being taken away, in the opening of my Argument I cleared it, I shall not trouble you with Repetition of it.

Oh! but they tell us, the King hath borrowed Money to spend in the Wars, and promised to repay it, and that without a *Salvo* of his Right;

this is an Argument they think worth Consideration. 48 *Hen.* 3. 16. *Pat.*

I know no Law that barreth the King from borrowing of Money, as he hath Ocasion. Is it not of Necessity that the King must borrow, notwithstanding both ordinary and extraordinary? Must the King carry Millions about him? his Occasions may be such as he must borrow, and also fit it is that it should be paid again. Doth any Man think, that if the King doth borrow 10000 *l.* of any particular Man, he must not be repaid again? 48 *H.* 3. *M.* 15 or 16. Power is given to the Earl of *Leicester* to resort to the City to borrow Money. Great Reason, because it is the Chamber of the King.

But the King's Money not coming in, he desireth to borrow so much of the City, and it shall be paid when the other Money cometh in; the End was for the Defence of the Kingdom.

But that therefore the King cannot command Aid from his Subjects, because he borrows of his Subjects, is no good Argument.

Then he saith, the Law delights in Certainties, as in the Aids *pur file marier*, and to make his eldest Son a Knight; these are certain, 25 *Ed.* 3.

All Defence is uncertain, till we know the Offence; certainly he must be a wise Man that can do it. How shall a Man know how to defend, and not know what the Defence will require? whether ten or twenty Thousand? and must it not be proportionable to the Offence? Is not this *suscipere majus & minus*? where is the Argument, that because Aids which were uncertain at Common Law, are made certain by Act of Parliament, therefore must this be certain, for which there is no Act of Parliament?

Oh! but the *Taillage* in antient *Demefn* and *Burgage*, they are certain; and Mr. *Hampden* he was assessed at xx *s.* it might have been as well xx *l.* this is uncertain, it doth rest only in the King's Mercy.

The Writ taketh care they shall not assess unequally: If Mr. *Hampden* be too high assessed, Mr. *Hampden* might call the Sheriff in question; but the Sheriff of *Bucks* is rather to be fined for setting him at so low a rate as xx *s.* We know what House Mr. *Hampden* is of, and his Estate too; for any thing I know it might have been 20 *l.* well enough.

But to the legal Part, some must be trusted with it, and who should be but the Sheriff? and the Party's not without Remedy if over-rated.

Then they come to Authority by Jurisdiction, and that they that have Privileges are not *Tal-liable*, *nisi pur grand Cause*, and that *Escuage* must be set by Parliament, which is by Act of Parliament; 17 *Johannis*, that it was called *Magna Charta*; and so it was in *Matth. Paris*, and confirmed by *Hen.* 3.

He speaketh of it as a Thing of Story, and these were for foreign Wars, as so not to our Case.

Oh! but it was admitted every Man was to keep Arms. 13 *Ed.* 3. 11 *H.* 7. *cap.* 18, and whilst they are in their own Counties, to be drawn out of their own Charge; but not to be drawn out of their own Counties without Wages.

Henry the Seventh, afraid of his own Title, makes a Law, that no Man should be questioned for being with the King in Arms: this was to take away the occasion of the People's talking, whether they went upon just Ground.

That

That many Armies have been paid by the King. 2 *Ed. 6. cap. 2.* 28 *Hen. 8.* the Rebels in the North the King promiseth Satisfaction. 11 *Hen. 7. cap. 1.* the Duty of the Subject is recited in it.

What Argument is this? we shew in all Ages where the King commanded his People to attend him or his Lieutenant, and you tell us that he paid other Armies. 19 *Hen. 7.* doth extend to Wars without the Kingdom, as well as within. 11 *Hen. 7.* this last did expire with his Death, this doth appear plainly, this was by especial Gift by the King. 4 *Eliz. Dyer* 211. Expressly it did not extend to the Service of any other King but him.

25 *Ed. 3. cap. 8.* None constrained to find Men at Arms, but those that held by such Service.

This must be understood with relation to the Tenure, they were not to come upon common Summons for Escuage; but when the whole Kingdom was in Danger, that they should not come, was no Excuse.

Oh! 26 *Ed. 1. Reynod de Gray* durst not levy Men without Pay*. The Marginal Note clears this, and so no part of our Question; and it appears by *Walsingham, fo. 74, 75.* that the King was actually then in Scotland, where he fell from his Horse, and lost two of his Ribs.

In the next place they say, *Trin. 31 Ed. 1.* there is a refusal to go without Pay. The Wardens of the Marches of Cumberland and Westmerland writ to the Barons, that whereas the Scots lay near the Marches with a great Army, that the People would not march out of their Counties without Pay.

This is easily answered; there were the East Marches, and the West Marches of Scotland, several Counties belonging to each: What reason had they to go out of their own Marches, unless they had Money for the keeping of them in their absence? *Rot. Pat. 10, or 11 Ed. 2. pars 2. M. 26.* for War of Scotland. 9 *Ed. 2.* the same discharged in the County of Norfolk. 13 *Ed. 3. M. 38.* the Abbot of Ramsey, because he remained in his own County, discharged; it was no absolute Discharge, but *dum sic intendit.* 21 *Ed. 3. Rot. Franc.* Some are discharged from the Custody of the Sea, because they were *prompti* at home; some for finding Hobellers and Archers, and this was by reason of a Grant in Parliament; some were discharged, because of their stay at Home to guard the Coasts. This proveth the Right of the personal Service, and of the Contribution.

Another Objection is that of 21 *Ed. 3. Rot. Franc.* that they should not be kept continually in Array, but suffer them to stay in their own Counties; but they were to go as soon as there was any notice of an Enemy.

This was for the Wars of France, and not for the Defence of the Kingdom.

Oh! but 20 *Ed. 3. M. 6. Rot. Scot.* there were *Exploratores & vigiles*, which were *Incolarum*; but how *de assensu & voluntate*? But this was nothing, for it was with assent in the Northern Parts, and had been done in former times against Scotland. Then the 100 Roll of *Feverham*, which I conceive rather maketh for us, than against us; for the Castle of Tunbridge is to levy 15 *l.* for the King, *pro salvacione* of the Castle, and to levy it by Distress. 14 *Ed. 4. cap. 19.*

the King could not compel the Subject to sell Victuals for Wars, nor to provide for the Castle in the Town, 29 *Ed. 1.*

That was for Scotland for payment of Victuals, and who can command a Purveyance but the King? and that of the Castle, it was the Victualling of his own Castle, and Subjects were bound to victual their Castles. 8 *Ed. 2. Rot. 99.* the Marches provided for Victuals, and particular Men paid for Victuals, but they do not shew from whence that Money came.

The next is Horses for the King's Service marked, that if they were lost they might be satisfied for. 24 *Ed. 1. Robert . . .* lost a Horse worth xx Marks, and received Satisfaction in the *Exchequer*, somewhat also for Wages; *M. 26 Ed. 1. Rot. 105, 106.*

That is only a Concordat how Men should be paid, what the Horsemen should have, and what the Footmen; for Yorkshire, Northumberland, and Cumberland were to have no Wages from the King, but to go against Scotland: yea, that is another thing, *Si contra Scotos*; and that Distinction upon stating of the Case, will go through. 14 *Ed. 3. 34.* for Castles. 24 *Ed. 2. 72, 78.* *dors. John de Sandall.* Berwick was taken from the Scots, and for furnishing of Berwick Castle, the People are compelled to trust him.

Oh! but the Prisoners taken in the War, and Hostages, were at the King's Charge. 8 *Ed. 3.* Allowances in the *Exchequer* for it. 5 *Ric. 2. cap. 11.* examined in the *Exchequer*.

The King, if he hath a Prisoner taken in the War, he is to have his Ransom; shall not the King pay for his Charge? 4 *Ed. 2. Rot. 12.* *Roger de Salvage* a Scottish Prisoner, the King bore his Charges; so because the King payeth the Charges of a Prisoner for which he hath Benefit by his Ransom, therefore he is to defend the Kingdom.

Dyer 162. A Man in Execution cannot be forced to go to War.

Our Writ doth not desire to send Men in Execution to go to War, for there are enough besides them.

Then they object the borrowing of Money, and the King paid again for it, *pro negotiis urgentissimis.*

The King may have occasion to borrow Money, and reason he should pay it; nothing to the Question.

But the Case is, whether all the People for their Wives, and for their Families Safety, and for the Safety of the whole Kingdom, may not be compelled to contribute to it? The Abbot of Gloucester gave Money to maintain a Damsel, the King took this Money for the present, and paid it back again. This was *ad exonerand' conscientiam*: that for things taken away without Warrant, the Ministers should answer for it, not pay and repay, but shall hold themselves satisfied with Reason.

But they object, that 26 *Ed. 1.* a Commission went out to inquire, *de Rebus captis, sive pro custodia Maris, &c.* and the King saith, that *il fera taunt que se tenderont a payse pur Reason.*

True, *se tenderont a payse, &c.* which is not to be understood, that the King will pay or repay; but that they should hold themselves satisfied *pur Reason*, that is, he would give them Reason why they should be satisfied.

* *Baronibus elegendis pro hominibus Scot.*

The Third Day's Argument of Sir Edward Littleton Kt. his Majesty's Solicitor General, in the Exchequer Chamber, before all the Judges, in the behalf of his Majesty.

May it please your Lordships,

I shall go on where I left; only inform you of one Record, 1 Hen. 4. The Writ that went for the Array of the Bishop of Canterbury which doth recite, that whereas there was Danger upon the Sea, he and all his Clergy should *Manus apponere adjutrices*. I speak of this, because it was at so low a time as Hen. 4. and it was *pro salut' Populi*.

Coia' Pl^r 14 Jac. Between Weaver and Ward, Command came from the King and Council, that the Train-Bands in London should be muster'd for the training and making of them ready to defend the Kingdom. One in the training hurt his Companion, and he thereupon brought his Action against him: And this was pleaded in Bar, that he was muster'd by special Command; and this was adjudged a good Justification, because it was for the Preservation of the Land. 28 Hen. 8. which recited that the King did pay them in *Lincolnshire*; but for the other, he saith, that he shall remember their Pains.

I shall now go on. It was objected, that by the Statute of William 1. the People should enjoy their Lands freely, *sine omni injusta exactione sive tallagio*.

This was for Money to be received for a general thing; but that it was not for this thing appeareth in one Chapter, that Knights-Service Tenures should do what belonged to it. The rest sunt *Fratres Conjurati ad Monarchiam Angliæ defendend.* 14 Ed. 3. Chap. 1. 25 Ed. 3. 1 Ed. 1. *Walsingham* 184. All these are set aside by the Statute, and concern not our Question. Ours is rateable and proportionable, according to old practice. And it is one thing to compel a particular Man, and another thing to set an equal Rate upon the whole Kingdom.

Ult. Febr. 3 Car. A Commission of Loans for the Defence of the Kingdom.

They mean the Commission, which was a Consideration to levy Monies, by reason of the Necessity of the Times.

It appeareth in the Journal Book to be for Impositions, or otherwise to raise Monies not concerning this Question. It appears by that, that the King gave a gracious Answer unto it; and that it was done for the present time only, a Warrant for Advice only. It was done to raise Money in general; but no Determination of Right, and said, at your desires it shall be cancelled.

Then there was a Commission for Loans, 5 Feb. 2 Car. and this they say was for the Defence of the Kingdom.

It appears it was for the Defence of the *Palatinate* and *Denmark*, and for that a Bishop was sentenced for his mistaking; Mr. Pym brought up the Articles against him.

I shall now come to an Objection, worthy the making by Mr. St. John; and because it is a thing not truly understood, but taken at random, I shall crave your Lordships Patience: and that is the Statute *de tallagio non concedendo*, 25 Edw. 1. made after

the King went into *Flanders*, and agreed upon here by the Prince as Vice-Roy, and afterwards sent into *Flanders* to be sealed by the King, as it is put in some Books. The Words are general: No Talliage to be taken without the consent of the Lords in Parliaments.

For this I desire the Liberty to inform you of the Story of the Times, to make a better Answer. This is not all, in some Statute-Books it is not mentioned; in others, no King's Reign mentioned. And in Ed. 1. no Year of it, and now they would apply it to the 25 Ed. 1. and this they would ground upon the compelling of Aid, 23 and 24 Ed. 1. And the Commission in 24 Ed. 1. did issue upon that, and consequently that this Aid was the Aid complained of, and then redressed.

Walsingham, a Monk of St. *Albans*, they rely upon for this, that wrote some seven score Years after the thing was done. Sir *Edward Coke* saith, Chronicle Law is not much to be regarded. True he saith, Chronicle Histories may shew us the Times, but if it tell us what the Law is, we are not to believe them. No Historian, that I ever knew yet, ever read the Records, and therefore no true History; for the most part they are taken up in *Paul's*, or the Street.

To take something in Consideration, by way of stating the Case, upon the Statute *Confirm. Char.* and the other *de Tallagio non concedendo*, that is, that no Aid shall be levied but by Consent in Parliament.

The first Statute is, that no such Aid shall be levied, the Nature of it, and the Acts themselves rightly compared, there remains no scruple against the Case.

Three things for the true understanding thereof must be consider'd. First, what kind of Aids had been in use before 25 Ed. 1. and for what they are taken.

Secondly, how and what Remedy was given by that Statute.

And Thirdly, how far that Statute *de Tallagio non concedendo* is in Force and Authority in this Case.

For the First, it appeareth in the common Story, that in 21 Ed. 1. the King of *France* had seized all the Duchy of *Gascoigne*, upon pretence that he did not appear at his Parliament at *Paris* upon a Summons. Thereupon the first took a course for the regaining of his Duchy; and the War continued with various Success, till 25 Ed. 1. And he had also War with *Scotland* and *Wales*. For the *Wales* was taken 12 Ed. 1. yet there was one *Madox* who pretended himself to be of the Blood of the Prince, till 23 Ed. 1. and till that Year they were not quieted. And he having all these Wars against *Flanders*, *Gascoigne*, *Scotland* and *Wales*, some at one time, some at another, and most altogether, divers Aids and Supplies were taken upon these Occasions of several Natures; some were by voluntary Grants of the People, some were by Impositions and Levies by the Names of Talliages or Taxes to be paid to the King, some by Assessment of Lands, as the Abbot of *Robertsbridge*, 25 Ed. 1. All this appeareth by the Commission to enquire of Extortion.

And besides all these, some by Prizes of Goods and Money taken from the Possessors without any Payment, Rates or Taxes. Nay, there was then ransacking of the Monasteries, and taking of the Monies found there; Mr. St. John's Case for Money taken out of their Treasury: and besides all these

these, there were some by way of Ransom, as Mr. *St. John* rightly observ'd, and shewed his Learning and Industry, that the Clergy upon their denial were put out of the King's Protection: And they did ransom themselves by giving a fifth part of their Goods. *Pat. 25. Ed. 1. M. 11. pars 2.* The People being thus grieved with such Aid and Prizes so extraordinarily taken for the maintenance of Foreign War, obtained that it might be enacted, that such Aid in a relative Term may not be granted nor taken without their Consent, by the Statute of 25 *Ed. 1.* and *Confirm' Cbar.* Observe this one thing, the Markets of *England* three Years before had granted the King *Subsidium pro guerra*, upon every Sack of Wool five Marks; three Marks upon Woolfells; upon every Pack of Skins five Marks: and this was granted of their own Free-Will, and this was to continue for two or three Years. 22 *Ed. 1. M. 2. Sine Roll.* where it is there relicited. Next Year before *Confirm' Cbar'ta*, all the Laity, except Cities, Burroughs, and antient Demefn, had granted to the King in *Subsidium pro guerra*, the 11th Part of their Goods, 24 *Ed. 1. M. 2. pat. Pars 2.* And the Summer before *Confirm' Cbar't* an 8th granted by all the Laity, except the Cities and Burroughs; and they granted a Fifth, and this was still for the War, 25 *Ed. 1. M. 11. Pat.* The Application is this: Those many Aids of these several kinds having been granted for the War, divers Men of that time did doubt and fear, that however they meant it but for a certain time, yet being not so clearly expressed, it might bind them for the future; and that they so doubted, appeareth by *Confirm' Cbar'*. And for as much as divers of our Realm are in fear, that the Aid and Taxes which they have given us before time towards our War and other Businefs, of their own Gifts and Good Wills, might turn to a Bondage to them and their Heirs; and likewise for the Prizes taken, we do grant for us and our Heirs, that we shall draw no such Aid, Taxes, nor Prizes into a Custom, for any thing done heretofore, be it by Rule or any other Precedent that may be found.

Then, my Lords, for no occasion such manner of Aids, Taxes, or Prizes shall be taken, but by common Consent; but it endeth not so, saving the antient Aids and Prizes due and accustomed. This being the state of the Case, be pleased to observe the Complaint of the People; this kind of Aid, it is plain, was never meant there, when *salus Populi periclitabatur*, and may be levied notwithstanding the Statute: for the Act is only against such kind of Aids as had been voluntarily granted by the People, some by Merchants, and some by others, that they should not be taken against their Wills hereafter, but by Consent in Parliament. Such is a Relative, it is not general no Aids, but no such Aids.

Secondly, It refers to those that were voluntarily granted to the King for *Scotland* and *Wales*, and his other Wars.

And another Reason why these Aids that had been for the Custody of the Sea, could not be said to have come of their good Wills: for observe the Abbot of *Robertsbridge's* Case, it appears plainly it was done against their Wills, for the Custody of the Sea, by virtue of the King's Writ.

August before *Confirm' Cbar'* those that had given an 8th Part, they did obtain expressly Letters Patents, that such their free Gifts hereafter might not be in *servitutem*, 25 *Ed. 1.* that is the very

thing doubted in *Confirm' Cbar'*. Now those that had granted an 8th, had no Reason to do it, for they had a Charter to free them, but the other had not: And therefore the Statute might well say, some did fear. So upon the whole matter, there are no other Aids but these voluntarily granted at that time, none in the Body of the Act but those granted with a Good Will, for those Foreign Wars; and the Forty Shillings receiv'd by the King upon every Sack of Wool, with three Marks granted 22 *Ed. 1.* was by the Merchants only for the War in *Gascoigne*; and thereupon it was enacted, that the King should not take such things but by Consent.

There is also in the Statute *Confirm' Cbar.* an exception, that all antient Aids due and accustomed were excepted; and therefore what kind was meant in the body of the Act, the Exception makes clear, antient Aids excepted; this was an antient Aid; and therefore never meant there to introduce a new Law, that no Aid should be taken, but no such Aid. No Imposition should be taken; but the Practice of all Ages shews this hath been levied ever since, from time to time, which is an Interpretation of the Words of the Law. This I do open, to make way to the Statute *de Tallagio non concedendo*. Thrice in the Statute is this Word (such) but that they should make use of that Statute *de Tallagio non concedendo*, of itself, without relation to that, whereas it will appear it is a mere Extract out of this, and no Statute itself: for Debate of that; this *de Tallagio* is the same with that *Confirm' Cbar'* it is a plain Extract of it, or some other thing at some other time. Sometime in some printed Book, *nullum Tallagium*, no Aids shall be taken by the King; sometimes without Notes of Time when made, and at the best it is no more, but it is said it was made in the time of *Ed. 1.*

If we shall compare *Confirm' Cbar.* and the Articles that were in this, we shall find it to be nothing but an Extract out of that Statute, and that it was no Act of Parliament. And to make it appear it was an Extract taken out of it, observe the general Heads *de Tallagio non concedendo*.

First, The Charter against Prizes. Secondly, Another against Wool. Thirdly, A general Confirmation of the Laws and Liberties. Fourthly, A Pardon to divers Lords there.

These are the things in which they would make it a Statute of itself, all expressed in *Confirm' Cbar.* they do not differ in Substance. A sixth Head is the very Year of the 25 *Ed. 1.* for the Pardon of those Lords was made 5 *Nov. 25. Ed. 1.* this same was sealed by the King Word by Word, proved by the Statute-Roll, the very same Roll that hath *Confirm' Cbar.* the next *Fol.* The Monk did mistake this Statute. No Man will believe a Monk, that wrote seven score Years after, against a Record.

I shall shew what was sent over into *Flanders*, and that was *Confirm' Cbar.* and did bear Date the 10th of *October*, the King being then in *Flanders*, and was there sealed by the King himself. That it may appear there is no manner of question of it, here is the very Copy of the Statute-Roll; and the whole *Confirm' Cbar.* is recited *verbatim*, in Witness, 10 *October 25.* of our Reign: Whereas *Walsingham* saith, that this very Charter, Word for Word, was sealed in *Flanders*, under the Great Seal of *England*, 5 *Nov. 25.* of our Reign, and sent back into *England*. For this Statute-Roll against that time, doth expressly say, that this was the Charter that was sent over into *Flanders*, and hath the same Teste, Word for Word; and this

was sent back into *England* to confirm it further. The next thing that followeth upon the same Date and Roll, is the Pardon of the Earls; this was dated 5 Nov. after this *Confirm' Char.* was sealed.

They have not yet shewed that this Statute *De Tallagio non concedendo* was ever entred upon the Roll; nay, it could not be entred: Who would think that an Extract of an Act of Parliament should be enter'd upon the Roll? If they can quit Mr. *Walsingham*, they are wise Men; they must carry the Practice of all Times. Where did any Man see that this Act of Parliament was ever shewed to discharge Men of the Defence of the Kingdom since 25 *Edw. 1*? Did no body know this Mystery to plead, not to defend the Sea and their Land? Did no Man hear of this till now? Shall this, against all the Practice of the Times ever since, take away such a Flower of the Crown, as to compel People to grant Aid for the Defence of themselves? A harsh Construction!

If this should be true, it would destroy even Acts of Parliament: To what Purpose is that Statute made of the 25 *Ed. 3.* if that were totally taken away before? And if no Aid, those Aids *Pur Fil-le Marrier*, &c. are taken away also.

Nay, if this be an Act of Parliament, when was it made, before the 25 *Ed. 1.* or since? It appears not when: It is *individuum Vagum*, I know not what, but in Truth an Extract. Nay, if this be an Act of Parliament under these Words, no Taillage is equivocal as well as Aid; that is proper Taillage that is laid upon Villages. 25 *Ed. 3.* 100 *Avowry*. Entries 406. b. 8 *Ed. 2.* Execution. 15 *Ed. 3.* 106 *Avowry*. A Rent may be released by the Name of Taillage: No Mention of this in all Ages.

Then it was objected, that 25 *Ed. 1.* M. 7. pars 2. expressed in the King's Proclamation 12 *Aug.* before ever he was going into *Flanders*, that he was sorry for the Aid demanded of his People.

Let him remember for what Reason he did demand those Aids which he was sorry for; they were Aids granted not for the Defence of the Kingdom alone, but for the Defence of the Kingdom mixed with foreign Defence, by reason of Wars with *Gascoigne*, *Wales*, *Scotland*, and elsewhere; for that it was for foreign Wars. Upon this followed the Commission, 26 *Ed. 1.* Pat. that went to all the Kingdom, which makes for us.

There are three Parts in that Commission: First, To observe if the Officer did any thing without Warrant, they should return it. Secondly, If done wrong, the King would answer it. And, Thirdly, They should be satisfied with Reason if the King did warrant it. The Answer thereunto given was upon another Construction made of the Words of the Record in the Parliament 2 *Ric. 2.* The Cause was this: the Chancellor declaring the Cause of Calling the Parliament, he doth shew, that the King, in the End of the last Parliament, had assigned some Lords to be of his continual Council for the Year following; the Number was seven that were assigned, and they were sworn to give good Counsel for the Aid of the Kingdom. These Counsellors treating of the Peril of Enemies from all Parts, and the Matter requiring Dispatch, they durst not undertake the ordering of so perilous a Thing, therefore ordered a Grand Council to be assembled. The Grand Council was assembled, to whom was shewn the great Peril and Mischief of the Kingdom apart, by War,

by Land and Sea; and that nothing was remaining in the Treasury for the Maintenance of War: For a final Conclusion, that they might remedy this Mischief, they say, that it cannot be done without Parliament; this was the *Englisb* of it, and in the mean time an Army might be landed: And for the present Supply of the Charge of such an Army, they lent the King great Sums, which by great Security and other Things, he did engage himself to pay: Upon this the Lords did advise how it might be done with the least Charge to them all, and how the King's Right of his Crown, and other Inheritance beyond the Seas might be safe, and the King, Kingdom, and themselves defended, to the Confusion of all their Enemies: To this Purpose the Treasurer was directed to be ready to shew what was expended the next Parliament, to be bestowed for the Marches of *Scotland*, *Wales* and *Ireland*; and said in that great Council, they could not remedy that Mischief without charging of the Commons, which cannot be done, say they, without Parliament.

It is plain, by the Story of that Time, and the Words of the Chancellor, that it was for the Maintenance of the War in *France*, *Scotland* and *Ireland*. And tho the Defence of the Kingdom be mentioned with these Wars, yet the main Supply was for these foreign Wars.

In the next Place, a little before in the Parliament, the like Aid for the like Occasion was desired by the King, 2 *Ric. 2.* M. 24, 25. *Parl. Roll*. What did the Commons say now? They ought not to bear such foreign Charges. The King gave them a fair Answer, admonished them, for *Gascoigne* concerned the Kingdom of *England*, for that is as a Bulwark to the Kingdom of *England*: *Burbacon* is an old *Fort de Hors*; for the Aid demanded in that Parliament was with this Relation as consonant; both together concerned the Defence of the Kingdom, that they might be Bulwarks for the Kingdom of *England*.

In the next Place, who spake these Words? The Lords said they could not remedy the Mischief without a Parliament. The Lords assigned by the Parliament, they must not do it; it is dependent upon the other Part, the Lords could not do it that Way.

But shall we come home, and speak plain *Englisb*? We know this was 2 *Rich. 2.* a young Prince. It doth appear expressly, that these things were brought into the Parliament for Advice, which were fit for Royal Authority, for Expence for Wars, and for Counsel, and for governing of his Realm. It appears further, by the very Chancellor's Speech, that the Council had been heretofore ordained for the guarding of the Kingdom, 2 *Rich. 2.* Rot. *Parl.* This Parliament taking notice of the King's tender Age, they took much Power unto themselves. There was to be a Council for the governing of the Kingdom in general; but the Counsellors should be chosen to govern the State for two Years, and these Counsellors not to be removed from the King without the Parliament: and more than that, his Treasurer was to be governed by the Parliament, and his Counsellors chosen in Parliament.

At the End of the Petition of Right, neither Lords nor Commons, jointly nor severally, can make a new Law without his Consent; and that your Lordships, and none but you, are the Interpreters of the Law, wise King *James* did declare.

The next Thing considerable is, *Tempus Belli*, to defend it. It is when the Condition of the Time is such, that the Current of Justice and Law is by such Violence stopp'd, as Judges do not sit, nor Sheriffs dare execute their Office, nor any Court is open, especially the *Chancery*, which is *Officina Justitiæ*.

It was said there was a Time when the King might command this Levy, to which they did agree: They did agree the King might command this Levy when he hath proclaimed a War, tho no Stroke stricken, no Danger, nor Armies, nor Opinion of any Force coming; this doth put it into the King's Power by their own Consent. And by all Reason, 19 *Ed.* 4. 6. *Brian's* Opinion. How many Wars have been proclaimed in this latter Age? No War denounced in 88. tho consulted of in *Spain*; and they did not think fit to denounce a War, saith Sir *Walter Raleigh*; those Days are past. Now they begin by the Sword, not by the Trumpet or Herald.

In the next place they say, if the King be in the Field with his Banners display'd; this they say was *Tempus Belli*. Cannot the Course of Justice sit then, but there must be a Peace? 39 *Ed.* 3. *Rot.* 10. Did not the Court of Justice sit then? Our ordinary printed Books shew what Causes of Law then were. And in *Henry* the Sixth's Time, in all our Civil Wars, and in *Henry* the Seventh's Time, they sat then. But the true Time, to make it *Tempus Belli*, is to make a War against the King.

In the *North*, towards *Scotland*, when the Enemy approaches, is it necessary that it must be a Time of Peace, because the Court of Justice sits at *Westminster-hall*? There may be then a strong War in the *North* and *West*, as ever was in *England*, when the Court of Justice sits here. That *Tempus Belli* may be in some Places of the Kingdom, and in some Places not, appeareth 33 *Ed.* 3. and who shall discern if there be any Danger?

They agreed in general, the King may do it; and that the Power of Discerning is in his Majesty: I shall leave it in the King, till Mr. *St. John* finds a Third Person to do it.

13 *Hen.* 4. for the Murage, they say that this doth only charge those Things that are *venalia*, for Men are not compelled to go to Market.

How shall they then live? True, it is not compulsory to go thither, but it is compulsory to pay the Money.

1 *Ric.* 2. *M.* 176. *pars* 2. A Petition from the City of *London*, to have all Owners of Lands to be rated with them in the Danger of Wars, not having Lands in Tenure to do it.

This doth make for us; that not only Merchants, but every Man in the lieu of Tenure to do it. The Lord *St. Albans* saith of *Hen.* the Seventh, that Kings may fall from their absolute Power when they see Cause, but not be compelled to do it.

They say Supplies are called those things, *sine qua non* the Kingdom may not be defended: And because there is a Way by Parliament, therefore no other Way.

They say it will not be affirmed, that the King hath the same Power for an Offensive, as Defensive War: I affirm, nor defend nothing; the Parliament is a great Body, and the Kingdom may be lost in the Interim.

Then they alledge there is forty Days for Escoinage, and the like for Parliament. Many times Things are impossible, and inconvenient to be done by Parliament.

First, Impossible; the Necessity may be such that it will not brook the Delay of a Parliament. 48 *Hen.* 3. Summons to the Cinque-Ports. They come Day and Night to the King when any Danger is.

It hath been said, that there are seven Months between the Teste of the Writ and the Ships being at *Portsmouth*; in that Time a Parliament might have been summoned.

The great one, and the true Answer is, that this resteth still in the King's Judgment. If the King hath Intelligence that foreign States will set out the next Spring a Fleet, and for Conveniency of his People sendeth seven Months before-hand to raise this Aid; hath the People any Cause to complain of this? Mr. *Hampden* hath not paid the Money yet, being two Years after.

If they should have gone by Parliament, see what Rubs in this Case might be. Forty Days are spent before the Parliament sits: Then when they meet in Parliament, there is a Ceremony in chusing of a Speaker, Solemnities in these take up Time: Then the Lords take Things into Consideration, then they must have Conferences and Disputes with both Houses; before they agree, the Kingdom may be lost: In the mean time, suppose this comes in some reasonable time, to make Assessments first in the Cities, then in the Burroughs, then particular Assemblies, then Divisions; and after all this, there must be Collectors appointed to levy the Money; what a great deal of time is spent in all this, every Man may see.

Our County, say they, is an Inland County, and they cannot find a Ship suddenly; and therefore the greater the King's Mercy and Favour to lend them his Ships instead thereof. When all this is done, and Ships provided, reasonable Time must be allowed to sail from the *North* to *Portsmouth*; but this doth solely rest in the Judgment of the King.

31 *Hen.* VIII. *cap.* 8. An Act of Parliament not to take away any of their Inheritance or Lands.

Here is no Lands or Goods taken away; only let them contribute to the Defence of themselves, and all is done. Mr. *Hampden* hath had none of his Goods touched.

They say, for Shipping it was done in King *John's* Time at the Subjects Charge; but they do not meddle with Land-Service at that time. 15 *Johan.* 13. *dors.* *Rot. Claus.* King *John* had Business beyond the Sea. That this was rather for beyond Sea, than the Kingdom, appeareth thus. The Writ saith, to have such Ships as would carry eight or six Horses, and that must needs be for some foreign Service, and not for Land-Service at Home. And it appeareth, *Rot. Claus.* *M.* 1. *dors.* the King was well landed at *Roche*.

For the Terms of the Law, which concerns Hideage and other Things, *Bract.* 37. and some Services introduced by common Consent, I will not trouble you with it.

To come to the Case of the Abbot of *Robertsh-bridge*, that Arms was laid on by the Statute of *Winchester*. That will not serve, Arms was long before that Time. They say the Assess was in time of War; the *French* had burnt *Dover*, 23 *Ed.* 1. and that the Assessment was not made by the King's Authority; but it appears it was by the King's Authority, by Virtue of his Writ. 25 *Ed.* 1. *Lo. Treas. Rememb.* *Leybourne* was Admiral of all the Kingdom; and was *Custos Maris &*

Mari-

Maritim' for some Parts : but that it was for Land-Service, and not for Sea-Service.

Custos Maris & Maritim' are Terms convertible; he that doth one, defends the other.

They have left no Stone unturn'd to take away the Force of this Case. They tell us now, the Clergy was put out of the King's Protection this Year, and so it appears in the *Exchequer*; but they have not shewed any such Writ delivered into the *Common-Pleas*, only *Spencer's* Word of Mouth, that they should have no Privilege there. Suppose it were so in other Courts : 25 *Ed. 1.* it appears plainly, that the Clergy came all to be in the King's Protection, and gave Ransoms; and this Cause was not till *Michaelmas* after. And whereas it is said, this Abbot's Case did only concern the Land-Service, it proveth both the one and the other; Money for the Sea-Service, Horse and Man for the Land-Service.

Oh! they say, 29 *Ed. 1. Mag. Char.* was not observed; and instanc'd *John de Gray*, and *Philip's* Case.

Whatsoever was the Practice of that Time, is not material. And for that of the Charter of the Forest, they say, tho it be there said, *Nullus amittat vitam vel membrum pro venatione nostra*, yet one was beheaded.

But what is all this to the safe Custody of the Sea? Nay, they have not shewed your Lordships, that there was any thing in that great Charter for the Custody of the Sea. 51 *Hen. 3. fol. 84. Britt. 117. Flet. & Fitz Her. Lord Coke on Littleton.* Perhaps question might be about this in the *Exchequer* at this time; the Case of *Shoreham* discharg'd of Land-Service, because they found Shipping.

They that were nearest Danger, most fit for that Defence; as the King in the tenth Year of his Reign, sent only to Maritime Towns.

2 *Ric. 2. M. 42.* They say *Beverly* was discharg'd, because it was an Inland Town, therefore no Inland Town ought to pay. A Writ directed to *William Russel*, Admiral, commandeth only the Sea-Coasts.

13 *Ed. 3. M. 35. Rot. Claus. Part 1.* afterwards discharged, because of other Service. And for that of *Beverly*, a Complaint that they were to contribute to such a Town to find a Ship; they say they have Privileges, but the special Reason why it was freed, was for Reverence the King did bear to *St. John de Beverly*.

Mr. *St. John* knows it; 120 Ships granted to the two Admirals, *North* and *West*, for Service beyond the Sea. 31 *Ed. 1. de inveniendis* Horses, because of great Business in his Wars abroad, he bound them to make Gallies for foreign Service. True, the King at this time was in *Scotland*, and kept his *Christmas* there. Then come to 31 *Ed. 1.* as tho he should do it by Service of the Cinque-Ports : *Newcastle* upon *Tyne* at their own Charges; but when into *Scotland* at the King's Pay, then they came to this. 10 *Ed. 3. M. 6. Rot. Claus.* sent for Ships into *North-Wales*, and *South-Wales*; the Writ did say, that Wages used not to be paid for such Service; and did express in his Writ, Satisfaction should be given unto them, not of Right, but *de Gratia*; and reciteth that Clause, that the People were bound unto it. 2 *Ed. 3. 16. dorf.* That there should be three hundred Pounds to relieve the Fishermen, the King should not have it of the People of that Town. They say all these Records being Matter of Fact, did occasion the

making of many Statutes of Redress. 14 *Ed. 3. cap. 1.* great Aid for *Scotland*, *France* and *Gascogne*; 15 *Ed. 3. M. 9.* contrary to *Mag. Char.* 22 *Ed. 3. M. 4. 36 Ed. 3. M. 9.* no Goods to be taken without Consent: These are Things comprehended within the Petition of Right. 37 *Ed. 3. M. 2.* speaketh only of the great Aids. 23 *Ed. 3.* Gallies made: they say the King paid for them; that is, upon the King's own Promise; but they say that is *nudum pactum*. Then they say, is the King's Word nothing? 13 *Ed. 3. M. 9.* called a Parliament, propounded as on the King's Part; they are not liable to the Defence of the Sea. If the Commons have nothing to do with the Guard of the Sea, why is it propounded unto them?

20 *Ed. 3. M. ---.* That the Guard of the Sea henceforward be made at the Charge of the King, as hath been promised, and there the People discharged. They do not affirm in their own Case there was any Right. 21 *Ed. 1. Rot. Franc. M. 9. 2 s.* on Merchants Wools, and 6 *d.* Poundage for a certain Time, and to cease *tamquam*, &c. 22 *Ed. 3. 2 s.* upon a Sack of Wool may cease.

All these Things were granted for foreign Wars; and if the Cause should cease, then the Thing should cease. 2 *Hen. 4.* Commission for Building of Gallies, the King would confer with the Lords about it: Then 19 *Hen. 4. 17. 21.* touching the Guard of the Sea, not bound unto it.

4 *Hen. 4. 28 M.* Tonnage and Poundage not to be taken without common Consent. A Protestation of the Commons doth not bind the King; and concluded with *nullum tempus occurrit Regi*.

The First Day's Argument of Mr. Holborne, on the Behalf of Mr. Hampden, before the Judges in the Exchequer-Chamber, in the great Case of Ship-Money.

May it please your Lordships,

I N Obedience to your Lordships Commands, I am ready, tho not as I desire, nor as the Cause deserveth to argue it; it being impossible for one in so short a Time to be fitted to make a Reply to the Life of the Cause of an Argument, so long, so learned, and so full of Records, wherein neither Labour nor Learning was wanting. I may say of him, as one said once, *Etiā hac defēsa fuisset.*

I shall now rather shew your Lordships what I should do, than what I shall for the present. I shall proceed well, hoping the Subject will excuse, and your Lordships greater Care supply my Defects, which have been without any Default.

My Lords, the Case upon the Records stands thus: In *May* last there issued out of the *Exchequer* a Writ of *Scire Fac.* to the Sheriff of *Bucks*, to warn my Client to shew Cause, why he should not pay xx *s.* assessed upon him by the late Sheriff of that County, for the finding of a Ship of War mention'd in the Writ, 4 *Aug. 11. Car.* sent into that Inland Country, and the xx *s.* certified into the *Chancery* to be unpaid, and sent over into the *Exchequer* by *Mittimus*, to be levied there. Mr. *Hampden* hath appeared, and demanded Oyer of the Writ 4 *Aug.* of the *Mittimus*, &c. and upon the Reading of them all, hath demurred in Law generally; and the King's Counsel have joined in

Demurrer: and I humbly conceive Judgment ought to be given for my Client.

My Lords, I shall proceed to the stating of the Questions, which are three: the First, which is a chief one, is this; Whether upon the whole Record the Case do appear for the King; that 4 Aug. 11 Car. being the Day of the Date of the Writ, the King could charge the County of *Bucks* to find a Ship at their Costs and Charges? By way of Admittance, if he could, yet whether the King can give Power to the Sheriff to assess the County as in this Case? By a further Admittance, admit that the King have Power to charge and assess, whether he can levy the Money unpaid by this Course of *Certiorari* and *Mittimus*, as he might do if it were his own proper Debt? Of these three Questions, whereof the two last remain untouched, and not argued by us, I chiefly intend to insist.

For the first Question, tho argued fully, yet I doubt, as yet, whether it standeth rightly stated; not but that I conceive Mr. Solicitor had good Colour to state it, as he made it, partly by the Record, yet somewhat out of our Admittance; yet by Admittance only, and so expressed.

Again, another Reason which I conceive, there was a Necessity on the King's Part, so to make it as Mr. Solicitor stated it, or else to wave the Debate.

The first Question is, whether or no upon the whole Record, the Case so appeareth for the King, that 4 Aug. 11 Car. being the Date of the Writ, the King could by his Writ charge the County of *Bucks* for the finding of a Ship of War?

This on his Majesty's Part hath been stated in these Records, whether the King finding in his Judgment the Safety and Preservation of the Kingdom and People, necessarily and unavoidably to require this Aid commanded by this Writ, might not command such an Aid by the Writ, for saving and preserving of the Kingdom and People; wherein, I confess, there is not one Word but hath its Weight.

As to this Question, thus made, I shall take three Exceptions, which are things taken in to be granted, which I shall not argue if I can avoid them.

That at least in the King's Judgment, the Safety and Preservation of the Kingdom was in danger'd 4 Aug. that is, that the Kingdom was in danger to be lost. If it be so that the Kingdom was in such Danger, and that the Danger was so instant and unavoidable, that it necessarily required this Aid by this Writ; that is, it required a present Charge of Shipping presently, 4 Aug. 11 Car. to be forthwith commanded, and that Occasion could not expect a Parliamentary Consideration and Supply; these be Things wherein we differ. And, lastly, for the Truth of it, the Certificate was sufficient in a legal Way.

My Lords, to find out whether the Record doth warrant these three Things of great Importance. First, I shall seek for them in the Writ 4 Aug. and next in the *Mittimus*; there is no Colour elsewhere to look for them.

To open the Writ rightly will clear these Differences, as I humbly conceive, without any great Argument. And first, for the Writ dated 4 Aug. 11 Car. I shall read the Words, wherein the Danger of the Kingdom is expressed, and then explain what Words give that Sense that is taken out of them.

Quia datum est nobis intelligi quod prædones quidam Pirati & Maris Grassatores tam Nominis Christiani hostes Mabumetani quam alij congregati, naves & bona & mercimonia, non solum subditorum nostrorum verum etiam subditorum Amicorum nostrorum in Mari quod per Gentem Anglicanam ab olim defendi consuevit nefarie diripientes, & spoliantes: ac ad libitum suum deportare hominesque, in eisdem in captivitatem miserrimam mancipantes. Cumque ipsos conspiciamus Navigantes indies præparantes ad Mercatores nostrorum ulterius molestandum & ad Regni gravandum nisi citius remedium apponatur, eorumque conatui viriliter obviatur. Et consideratis etiam periculis quæ undique his guerrinis temporibus imminet, ita quod nobis & subditis nostris defensionem Maris & Regni omni festinatione quam poterimus accelerare convenit, nos volentes defensione Regni tuitione Maris securitate subditorum nostrorum salva Conduccione Navium, &c. Here are the Causes and Occasions; all that comes after is not material to the stating of the Question.

My Lords, in the opening of this Writ, it is true, there was mention of loss by Merchants of some particular Members of the Kingdom. And this loss by *prædones Pirati quam Mabumetani & alij*; and tho *alii*, yet Pirates still and no more; then it saith *ipsi*, still those Pirates daily prepared Ships, but not armed with Men. What to do? To molest the Merchants, and *ad gravandum Regni* as Pirates still hitherto. I conceive there is not a Word of Danger from any Empire, but from Pirates; not a Word of Danger to the Kingdom, but to Merchants: however, all this is *quod intelleximus*. The Record goes on thus, *Consideratis etiam periculis, &c. imminet*. This part, as I conceive, is not so positive, the Dangers are but *Consideratis*, nor the Danger to the Body of the Kingdom. No Word of that; or if to the Kingdom, yet nothing in point of Safety, only but in point of Molestation: none of all these appears. And besides, the Clause is too general, not expressing any particular Danger, from whom or how. However, be the Danger to the one or to the other, be it to the Kingdom or to the Merchants, be it for Trouble or for Safety, hitherto I may say there is no mention of any such instant Danger, as necessarily did require this instant Command in the Writ, not so much as in the King's Judgment. For ought that appears, a Parliament, even in the King's Judgment, might have been called, and consideration taken for a Defence. Here be all the Premises upon which the Conclusion must arise; and hitherto nothing material to make a Danger to the safety of the Kingdom, and so instant, that a Supply *nunc aut nunquam* must come in.

Altho the Premises, I conceive, are only considerable, yet the Conclusion will be but this, *convenit accelerare*; but it is fitting to hasten: but no such Necessity, tho it be *convenit accelerare pro defensione Regni*. If that were material, it cannot be construed, but with relation to the Premises on which it is built. And whether in fear of Trouble, or Danger, or Loss, *non constat*: and tho it be *cum omni festinatione*, yet it is *qua poterimus*; and that is *possimus quod jure poterimus*; that is, with all the haste that by Law you can make: which way this is, your Lordships have heard.

Now, my Lords, it appears on the Record, that there was no such instant Necessity, but that a Parliament might have been time enough; for that it was observed between the Teste of the Writ and the

the Rendezvous, there were two hundred and odd Days, whereas a Parliament requireth but Forty; in the remainder of these two hundred Days, the Parliament might have considered of the Means of Defence. But I leave it to your Lordships to judge, notwithstanding those Expenses of Time cunningly reckoned up to your Lordships by Mr. Solicitor; and tho it be true, that Things are oftentimes long in deliberation, yet Nature tells us they can be sooner. If there be a Necessity, we know that will force.

I have but opened this Writ 4 Aug. I am now come to the *Mittimus*: The only doubt which I conceive in the *Mittimus* is, that where the Case stands but thus, in this Writ is recited the Tenor of the Writ 4 Aug. And then the Writ goes on and saith, *Quia salus Reg' periclitabatur*, and that is all the Clause in the Record that gives colour to the Case so to be made. And to the whole Record we have demurred.

Here it hath been said, we have confessed all by the Demurrer; and if that hold not, the King, who is the Judge of the Danger, hath said so, he hath certified so under the great Seal: and on these depends the weight of both these Proceffes.

To this I have many Answers, but I shall select a few from many others, on which I shall rely. My first Answer is this; Here the Words are, that *Salus Reg' periclitabatur*. These Words in shew seem to be positive, but in substance but relative; and are rather but a Comment on the Writ, or an Abstract in point of those Dangers mentioned in the Writ, for the Clause was brought in on the return of the Writ; and if we have the Writ it self, the Comment thereupon or further Explanation thereof is not material.

My second Answer is; I doubt, I say no more, if the King put particular Reasons into the Writ 4 Aug. whether the Law (I speak of legal Course) doth permit any after Writ to put in further Clauses of the same Nature with the former to the same End.

If the Case be thus, then our Demurrer will be no Confession of any such Danger.

In the next place, admit the Words in the Writ had been positive, and materially expressed; yet according to our Rules of Law, it cannot make use of that Sense they are now applied unto: For the best, the Word *Salus* being only proper to a physical and natural Body, is applied here to a Body Politick. It is but a Metaphor which the Law will not indure in Writs, for it would bring in great Mischiefs. In Writs and in Pleadings, Metaphors are dangerous: we know not how to take Issue upon it, and therefore is not regularly allowed; but I leave it to your Lordships Judgments.

There are no Words of the Danger of the loss of the Kingdom, that is, such instant Danger: for apply the Words to a natural Body, as *Salus J. S.* is in Danger, it doth not presently imply, that he is in such instant Danger of Death. A Doctor will say a Patient hath not his Health, yet no danger of Death, it is the common Speech; the same Sense it must have in a Body Politick. If the Words were good, and did imply a Danger, yet not such a Danger as may hazard the loss of the Kingdom; for the Words are only *Salus Reg' periclitabatur*, and the thing may be never in Action which twenty Years hence may lose the Kingdom. A Man may say, that the Safety of

the Kingdom is in Danger. At the best, the Words will not make the Case as it is put.

Mr. Solicitor, out of his great Care searching into every Hole, where he thought we might peep out, doubting our Demurrer would not be a Confession sufficient, he takes in another help, which is this, that if this be so declared by the King's Opinion, and under the great Seal, that this alone had been sufficient. For this there hath been urged, the legal Weight of the King's Affirmation, and of a Certificate under the great Seal; and both be concluded in this Case.

My Lords, before I answer to this Matter, I profess for my Client and my self, that we make no doubt of the King's Word, and believe there was Danger, tho not so apparent to us; but only loth to allow it as sufficient in a legal Proceeding, lest what his Majesty in his own Worth deserves, by after Princes might turn to a Disadvantage.

That which we urge is, how far in form of Law this may be allowed, we shall argue, and that briefly, for the Case needeth no help.

For this Point I take it for leave, under your Lordships Favour, that in legal Proceedings, and regularly, his Majesty's Opinion, and Certificate in Things of Fact, is not binding.

Yea, but they say, it is Matters of State and Government.

For that, to ask the Question, whether or no raising Forces thus is left to his Majesty, that stands and falls on the main Cause.

My Lords, I do agree, in divers Cases the King's Affirmative shall be conclusive in Matters of Fact, that is, when it is not so triable elsewhere; as in a Writ *de Rege inconsulto*, to stay Proceedings, when the King certifies matter of Fact, the Writ must be obeyed, but then withal the Matter is triable elsewhere. But these Cases will not match ours. As for that great Case 20 Ed. I. concerning the Lords Marchers, that the King was *Recordum superlativum*, to say no more, it is but an Allegation of the King's Counsel.

My Lords, the Reason whereon I shall most rely, to avoid the Sense of the Writ, *Salus Reg' periclitabatur*, is thus, That tho it doth now appear by the *Mittimus*, that 4 Aug. the Kingdom was in Danger of being lost, yet it is not sufficient in Law, nor can our Demurrer hurt us; because it must have so appeared in the Writ, 4 Aug. itself; for the Writ and Declaration in Law must ever contain precisely so much of Matter as is necessarily true to warrant the Demand.

In this to see the Mischief, if a Danger now declared makes the Case, how shall the Subject know by the Writ 4 Aug. whether to obey or no? The Law binds not a Man to divine: And if this subsequent Declaration shall mend the Case, then the Subject shall be a wrong doer, *ex parte facti*, which is against the Reason of our Books. I shall remember the Cases put by Mr. *St. John* to another purpose. A Commission sent forth without Cause expressed, that Commission is not good; and it is not denied by Mr. Solicitor, that a Cause must be set to make it good in Law. And if your Lordships be pleased to look on the Precedents, as I know you will, which the King's Side shall bring unto you, your Lordships will find the Danger turned from the first Writ to the last. Nay, in the Writ of this Year I am told it is so, out of their

their Opinion, fearing the Writ 4 Aug. was not so good as they would have it. They put it into the *Mittimus*, which they knew could not do good; but they did it only to cavil.

But lastly, admit the King had said the Kingdom was in such instant danger of Loss, and that there was an instant necessity of the Command this way, and that this could not have expected Consideration in Parliament; yet if the contrary appears in the Record, then neither was the Demurrer a Confession, nor the Certificate conclusive.

I could stand on many other Things, as that the Danger should be more particular, for so are all the old Precedents. To say, *Salus Regni* is in Danger, is too general; as in a Protection, they must alledge, in what place the Party protected is imploy'd.

Secondly, In the *Mittimus* it should not be that *Salus Reg' periclitabatur*, but how *Salus Reg' periclitabatur*, I believe it is meant so; but we must now look to Rules of Law. True it might have been in Danger before, but not *tunc*; as in the Case of Indictment upon the Statute of 8 Hen. VI. for an Entry upon *Whiteaker, existens tenement*. J.S. the Laws will not take notice of the Time, without saying, *tunc existens*, at the time of the Entry.

My Lords, in the Conclusion upon this Discourse, it appears, I have so pared the Case, that in the Writ dated 4 Aug. there appears no Danger of the Kingdom being then lost; and that in the *Mittimus* there are no express Words of Danger to the Kingdom instant or unavoidable. If it were so, it cometh not time enough; for it should have been in the Writ dated 4 Aug. And if there had been such expressing of such instant Danger in the Writ 4 Aug. and in the *Mittimus*, yet not material, if otherwise on Record. And lastly, this Certificate doth not conclude us.

Thus then to shew what the Case is, and what it is not, I have put out of the Consideration of the Case, all Considerations of such Danger to the Safety of the Kingdom, as are unavoidable.

I have left nothing in the Case but Consideration of protecting Merchants against Pirates, but for ordinary Defence of the Sea. If the Case doth fall thus, I humbly conceive, that in this place, I might, without further Argument, with some Confidence, venture my Client's Case upon your Lordships Judgments, notwithstanding any thing objected on the King's Part.

Then, by your Lordships Command I shall proceed: having laid aside the *Mittimus* and *Salus Regni periclitabatur*, and taking the Case only on the Writ 4 Aug. which, as I take it, is nothing of Danger to the Kingdom, but for protecting Merchants, and for common Defence. The Case stands thus.

That tho there be no actual Invasion, no known or declared Enemy; yet the King out of his Judgment, 4 Aug. 11 Car. apprehendeth and foreseeeth Danger to the Kingdom in point to be lost; and that the Danger is so instant and unavoidable, that it requireth this Aid. Whether the King out of Parliameht by his Royal Power can command this Supply?

I have endeavoured not to mistake Mr. Solicitor; it were an injury to requite him so ill. In my Argument I shall desire leave to hold his Course, because the two main Questions are both of one Nature, tho different in Degree.

Our Question is, in case of common Good against Pirates. Upon the whole, my End is to shew, that by the fundamental Policy of England, the King cannot out of Parliament charge the Subject, no not for common Good, unless in special Cases, and of a different Nature, or upon different Reason; nor for a necessary Defence, tho in the King's Judgment the Danger be instant and unavoidable.

My Lords, in the debate of these two Questions, I have learned of Mr. Solicitor not to say all that I could, but so much as is necessary, and as he hath chalked out the Way.

I shall inquire of this Power by Arguments upon Practice constant and allowed in time of good Government, when the Liberty of the Subject was not trampled upon; and shew it by Acts of Parliament, Reason, and Authorities in both.

My Lords, I am now come close to the Arguments on the main: Before I begin, give me leave to profess that I am in a Dilemma. The Question will be, what the King can do in these Cases, by his Royal Power? it much concerns him. And I have learned out of a Speech of his late Majesty, what it is to debate such Questions. Not to argue it were to disobey the Assignment of the Court, and to desert my Client and his Cause. For my part, as your Lordships see I have labour'd to decline the main Question, I should be glad it might so sleep.

I shall not offer it, if happily the Case falls off in the penning of the Writ, and not of the King's Power. I doubt whether the way of Argument shall do the Crown a disservice.

Out of my Duty to his Majesty, and Service to your Lordships, I humbly offer, whether your Lordships may not think it fitting to determine the Question upon the framing of the Case, before it be further argued; and here I shall rest, or upon your Command am ready to go on.

Here the Lord Chief Justice Finch said, we do not use to judge of Cases by Fractions.

My Lords, since it is your Command I shall obey, and go on, notwithstanding the *bicorne Argumentum*, which on each side threatneth.

I hope his Majesty will excuse us, for arguing of that which cannot else be determined. And as he hath given way to an Argument, I hope his Goodness will excuse us, while we do our Duty for our Client. And if I err in my Materials, or in the way of my Arguing, it is from the defect of my Wisdom, I cannot be wiser than God hath made me, and not out of any disaffection to the Service.

My Lords, I hope neither his Majesty nor your Lordships will think it a Point of a higher Nature: yet thus far I assure your Lordships, that if any Matter or Consideration of State come in my way, I shall tread as lightly as I can; yet I must crave Liberty to pick out some to refer to your Lordships Consideration, and shall forbear those things that are unfit.

Here the Lord Chief Justice Finch said, Keep you within the bounds of Duty, as befits one of your Profession at the Bar at Westminster, and you shall have no Interruption.

My Lords, I shall be very wary and tender. I shall now open the Division and Parts of my Argument.

My Negative Part is this, That the King cannot out of Parliament charge the Subject, not only for the Guard of the Sea against Pirates; but also not for the ordinary Defence of the Kingdom, tho the King judge the Kingdom unavoidably in Danger to be lost. And in this I must take in the Defence; as well the Defence at Land as Sea.

My positive part is this, The King regularly is to be at the Charge for guarding the Sea against Pirates; and for the Defence of Land and Sea against Enemies, so far as he is able: And that the King hath Provision for both, especially for the Sea-Service.

In the Prosecution of these two general Parts, I shall not only propose my own Considerations, but join them with Mr. St. John's, as I can further infer them, or justify them against Mr. Solicitor's Denial or Evasion.

And this Course will necessarily bring in many of his Arguments, which I would be glad to spare, if the Cause would bear it, because your Lordships should not think that I do nothing but repeat. In this way I shall humbly endeavour to clear each Part, by giving a Reply before I descend to other Particulars. And where I conceive a new Objection, which will not fall within any former Answer, I will raise it, and endeavour to lay it. Into these general Questions will fall many others of great Consequence.

First, Such as not being the main, I will not draw upon particular Debates. Where there is any thing concerning State or Reverence, I hope to admit such, and save my Client's Cause.

Having thus unfolded my form of Argument, I descend to my Negative, That the King in none of these Cases without Parliament, can charge the Subject.

I will prove it from Reason, which is the Master of all Authorities, as Mr. Solicitor said. And from Reason drawn from the Fundamental Policy of the frame of this *English* Government, in the necessary Attendance of the Publick Advice in Parliament upon the Royal Power.

And Secondly, from the absolute Property the Subject hath in his Lands and Goods. From these two things I shall draw my Reasons.

For the Political Advice in Parliament, I shall humbly decline all School-Disputes. The Spider may make Poison out of that which the Bee makes Honey. I shall omit the Consideration of some Points.

I shall take my Rise from the Judgment of King James 1619. in his Speech in Parliament; wherein his Majesty agrees, that the King *in concerto*, can do no more than the Fundamental Laws of the Kingdom alloweth: and I assure my self his Majesty desireth not more.

Before I enter into the Argument further, Whether the Law hath intrusted the King out of Parliament in either of the Cases put: I here profess for my Client and my self, that while we speak of Political Advice, and how far a Governor subject to Error and Will may use a Regal Power, we do always with thankfulness to God acknowledge our present Happiness, to be blessed with so just a Prince; and we fetch it from our Hearts. And were his Majesty so Immortal as he deserves, and

sure that his Successors may be Heirs to his Virtues as well as to his Crowns, we should wish the Royal Power might be free from Political Advice, and Unlimited.

Here the Lord Chief-Justice Finch said, This belongs not to the Bar to talk of future Government; it is not agreeable to Duty, to have you bandy what is the Hopes of succeeding Princes, when the King bath Children of his own that are like to succeed him in his Crowns and Virtues.

My Lords, for that whereof I spake, I speak as looking far off many Ages, five hundred Years hence.

My Lords, because I might run into further Error, if I should not take your Advice, I shall slip over much; and the Sum of all is,

First, An Argument from the Policy of *England*, in the necessary Attendance in the particular Advice in Parliament.

Secondly, It will be from the absolute Property that the Subject hath in his Goods, taking that for granted, against the Book of *Cowel* written in the Time of King James, who under the Word Parliament, speaking of the King's Power out of Parliament, saith, the Power in Parliament is but a pious Policy. But this was complained of, and by Proclamation the Book was denied. Your Lordships also know of another Book that was sentenc'd upon the same Occasion.

The use that I make of it, is this. If the Frame of *English* Government stands in the Royal Power, and the Subject hath Property in his Goods; then the adequate Reason of both from these is, that therefore the King can without Parliament charge the Subject in his Estate, tho in pretence for common Good, no more than a Prince five hundred Years hence, if subject to Error or Will, may if he will, upon any Occasion or no Occasion, at what rate he will, charge the Subject to the height.

As to the Advice Political, if the King can do this alone, what is become of the Policy for which the Political Advice was made attendant to the Regal Power? *Ne Respublica*, &c.

Secondly, If the Subject hath a Property in his Goods, how is it in the Power of any one alone to charge that? This Reason I must not leave, for on this the Case stands or falls; tho there be many Books and Cases, yet all are from Reason, but especially when these stand together.

The Reason seems so strong, that it ever holds in ordinary Power. It holds *pro bono Publico* & *pro Defensione*, he cannot make a Charge in ordinary things; and Mr. Solicitor did not deny the force of this Objection. The Answer stands thus.

Admit it be agreed, that by the Policy of the Kingdom the King cannot charge the Subject, yet the King may, without Advice in Parliament, in Cases extraordinary; where, in his Judgment, the Safety of the Kingdom is in instant Danger, and that the Business will not admit of the calling of a Parliament. He fortified this part of his Distinction with strong Reason; for in such Cases Property must yield, for *Salus Populi suprema lex*; & *necessitas, lex temporis*; & *quod cogit defendit*, all are true; and to this some home Cases were put: As for building of Bulwarks upon another Man's Land, and burning of Corn in

88. And then foreseeing the Incounter of a Reply, he saith, the Subject must not say, that altho the Power be in the King, he will enlarge his Power, for the King can do no wrong.

This *prima facie* hath a fair shew, and may go far; yet I hope to give it a full Reply. By this Distinction the whole Frame of Political Advice is, under favour, destroyed. I shall shew the contrary by Reason and Experience.

For the Distinction between Danger, ordinary and extraordinary, where the King doth think a Danger and a Parliament cannot be called: That Distinction, I say, must needs destroy the Policy in the whole; for as I conceive, the End of that Policy was but this; for else, what could it be? As it will ever be in the Will and Desire of a good Prince to do all Good for the Subject, to whom this Advice by Parliament can do no Hurt; so what Case soever should happen many Ages after, for that Posterity will look upon it, it should never be in the Power of any Governor to become subject to Will or Error, if he would so do to hurt the Kingdom. That Policy was not made so much for a good King, but looking what might happen many Ages after.

If you allow such a Prince Power extraordinary, and make him Judge of the Occasion; then in Substance, tho Provision be made, yet after his Declaration we must make further Provision.

Yet may some say, here is a *Posse* and *Esse*; because he may, so he will.

True, it is unmannerly to say so of any ordinary Man; but under favour, it is allowable to say, he may if he will: Then if we leave him that Liberty, in such Cases he hath no Restraint, but his Will.

But it is said, the Law will not presume any such thing.

The Law doth not presume a Will, but the Law looks on Things that may be, as well as on Things that will be. True, the Law-Books say, the King can do no Wrong; which proves, that it is possible for a Governor in his Inclination to incline to Wrong, and therefore the Law hath taken a Care that he should do none; for he cannot make a Disseisin nor Discontinuance. There may be an Inclination to Entry; but the Law, because he should do no Wrong, hath made this Act void: which is not a Disability in the King, but a Prerogative, to make him come the nearer to the Divinity in the Attribute.

I shall offer the Judgments of several Ages in England; they ever thought it a dangerous thing, when they thought any Restraint fitting, to allow any Exception whatsoever, tho Cause for it, left the Party, that was meant to be restrained, should be judge, and then go out when he would. *Thomas of Beckett*, he would not swear to the Laws of King *Hen. the Second*, unless he might put in this Expression, *Salvo honore Dei*. The King never meant to violate any of these; but if that had been allowed, the Clergy had been Judges of that, therefore they would not be satisfied: at this Day we have an Experience of the opinion of Kings themselves in this Case.

I shall proceed to the Practice of our Kings. In all Acts of Parliament, where they had ever a Desire to declare the King limited or restrained, if they did admit of any Exception, they would have it in Words so punctual, that they would not

admit of any Matter of Evasion, for fear hereby his Proceeding might be at large. In the grand Charter of King *John*, *Nullum Scutagium imponatur*, there was a Clause of Exception; true, there was a Reason to except how all (not as *Ed. 1.* would have done) saving the Aid due and accustomed; but the *saire Fitz Chevalier*, &c. and so was *Mag. Char.* tho not in the Roll, so careful they were to have no Words that give any such Light.

I come to the Statute of 25 *Ed. 1.* against Aid, saving the antient Aid due and accustomed: no doubt but in these Words there was no more saved than Law must allow the King, and the Parliament did so mean; yet when that same Act came out, the Subject was not satisfied, and therefore the Statute *De Tallagio non concedendo* was made to take away the Exception in that Act. The Statute 28 *Ed. 1.* after the Confirmation of two Charters, and divers Additions, there comes at last a *Salvo Jure Coronæ*. Your Lordships will find in History how all this was satisfied. And 29 *Ed. 1.* at a Parliament held at *Lincoln*, the King made a Confirmation without a *Salvo*, and yet none will deny the Right of the Crown; the Lords did intend to preserve that. Thus your Lordships see the Opinion of this Kingdom, from Time to Time, how careful they ever were in all their Acts, to leave any Way whereby that which they did intend for their Good might be avoided. Now whether in this Case there might not be an Avoidance, I humbly leave it to your Lordships Judgments.

But before I go further, it may be demanded, how came in those Savings into those Acts, if the Parliament did not like them, and if they were put in here was a Trust?

I shall give a double Answer in the Case; tho a *Salvo*, yet it will differ from our Case: the King was not Judge there; but your Lordships are Judges between the King and his People: but in this Case the King is to be Judge of the Necessity.

But to give you the true Answer, the Exception never came in originally from both Houses, but from the Lords themselves; this may seem strange. It was the Difference of those Times and ours in making Acts of Parliament; those were not Times of granting all, or denying all, but to answer some as to some part, and sometimes an Exception. And this being read, the Act drawn up upon the whole by the King's Council; and this Mischief was found out 5 *Hen. 4.* and from that time all Petitions were wholly granted or denied. So your Lordships see how these Savings came in, not by the Subjects, but by the penning of the Acts by the King's Council. The last Example is in late Times in the late Parliament, in the Petition of Right now printed, which was long in Debate in Parliament against Loans and Billeting of Soldiers. After the Petition had passed the Lower House, that those things were against the Law, there was a Proposition in the Upper House concerning the Addition of a Clause of Saving. Upon the Journals it appears, that there were several Conferences between both Houses, where the Reasons are mentioned, and do appear. And in the several Conferences the Commons did not yield, but the Petition passed absolutely; and the Reason was, because to put in that Saving was to undo the Petition.

To conclude this, to shew the Experience of such an Exception, *sine assensu*, what it hath wrought in former Ages, as that of *Normandy*, tho' foreign; yet to shew what such a thing did work there. It had the same Privileges we claim, and much of their Law came in here with *William the Conqueror*. *Lewis* the 11th taxed them high; they made Complaint, he, on the Complaint acknowledged it, and would tax them no more but on great Occasions: What followed, those Histories plainly declare.

Having, as I hope, taken off the Bulk of that Distinction, I shall further shew how it doth not stand with the Practice of the Common Law. It is a fundamental Rule in our Law, rather a Mischief than an Inconveniency: For when nothing can be so absolute in Government, but that there may be one Case or other wherein there is no Provision made, all the Care Men take is to chuse the least. Now his Rule is rather a Mischief than an Inconvenience. Now Mischief is that which perhaps may fall out never; or if it doth fall out, yet seldom; for if it were a thing that might commonly fall out, it were an Inconvenience. On this fundamental Rule, the Law concerning Lands and Liberties is thus grounded. True, there might be a Mischief for want of this Power in a Case extraordinary; but the Mischief perhaps never, or seldom falleth out. But to allow the other, would be an Inconvenience daily. I desire your Lordships to cast your Eye upon a learned Writer, *Comines*, Fol. 107, 131, 180, 181. where in the whole, putting them all together, speaking of the Danger that might come to a State for want of Power to raise Supplies for Resistance, giveth a Commendation of the Government of *England*: True, he doth go so far, saith he, it is hard in a defensive War, that any Preparation, which must be great and long about, can be so acted, but that Princes may take a timely Notice, to call together, and advise by Parliament. In the *Low-Countries*, where they have Wars, tho' they have an Excise for ordinary, yet they do it not for extraordinary, without Consent in Parliament.

My Lords, I go on: admit an Enemy ready to land, no Possibility for a Parliament; see how the Case will now stand: I shall leave it to your Lordships Consideration, whether there be an absolute Necessity, *infra & extra*, to command, and then to shew there is a Command, and by what Law; and by that Law that is more strong than the positive Law of the Kingdom; and doth work more in Point of Fear. I do put this by way of Admittance.

In that Case there goeth out a Writ, a *Mandamus Rogantes*; but it is in *Articulis necessitatis & quatenus a Mandamus Rogantes*, not *sub pœna forisfacti*, of all you can, but for your own Preservation, and Safety of the Kingdom. These Writs have gone forth in such Times, when there hath been a near Danger, and that hath served the Turn; for that Instinct of Nature, that did make some Part of the Kingdom desire Government for Preservation, the same Instinct of Nature doth infer to Contribution for Defence: Nay, that is a stronger Law than ours; for that Law which ariseth from one's own Breast, as it doth command, so it doth compel: There need no Law without, when there is a Judge within. Now in Times of Necessity, there is a Law that doth compel; nay, there is a stronger Penalty than our Laws can imagine; for our Laws can make but a

Penalty of all that you have; but how? To the King. But when there is a Danger from an Enemy there is not only a Danger of losing all that one hath, but of losing Lives and Lands, and all that we have; and all into the Hands of the Enemy.

Put the Case an Enemy was landed, to shew what the Powers are by our Laws in that Case for Defence; when there is particular Appearance of instant and apparent Danger, in that Case, particular Property must yield much to Necessity. These Cases our Books warrant, as building of Bulwarks on another Man's Ground, and burning Corn. In 88. there was an actual Danger, and then it was just to take Corn or Grass, or any thing to raise Supplies. But where do any of our Books say, that upon Fear of Danger, tho' in the King's Case, a Man can, without leave, make a Bulwark in another Man's Land? I do not read. As your Lordships may observe in this Case, of apparent Danger, the Power of the King; observe withal the Power of the Subject, and out of what Principle this doth grow; whether out of a Form of Law, or out of Necessity. In these Cases of instant Danger, and actual Invasion, it is not only in the Power of the King, but a Subject may do as much in divers Cases. For if there be an actual War, the Subject may, without any Direction, do any Act upon any Man's Land, and invade any Property towards Defence: It is the Law of Necessity that doth it. Nay, in that Case, the Subject may prejudice the King himself in point of Property. If an Enemy be landed, and a Subject take away the Horses of the King, he may justify it in any Action; as in case of a Castle or City, if they can justify there was a Necessity, they may pull down the Walls, or blow up the City. In this Case there is no manner of Mischief if Subjects Goods be taken by the King, or any Man; and in that instant Necessity be imploy'd to the publick Good. *Levis timor* will not serve; for then a Man cannot enter for fear of Force, but such a Fear as ariseth from an actual and apparent Danger; then there can be no Loss to the Subject in that Case. *Secondly*, On the other side I shall shew, what Goods were taken for publick Use, were taken by way of Loan, and Satisfaction was made for them.

The Second Day's Argument of Mr. Holborne, on the Behalf of Mr. Hampden, before the Judges in the Exchequer-Chamber.

May it please your Lordships,

TO remember the Question whereupon I left off my Argument the other Day, whether the King of *England* can charge the Subjects for finding of Ships at their own Costs, only upon the King's Judgment of an instant Danger.

First, Whether for Defence of Merchants against Pirates. *Secondly*, For ordinary Defence of the Sea: And, *Thirdly*, For Defence extraordinary against an Enemy, only out of the King's Apprehension of an instant Danger, which cannot, in his Judgment, expect a Supply elsewhere.

Not to repeat, yet in a word or two, I shall open my Proceeding on this Question; and the rather, for that I find some Misapprehension, as if I had granted more than I meant, which is fit to clear.

The Sum of all was but this; That the King could not charge the Subject in any of these Cases. The Reasons I urged were but shortly thus: That the Subjects of *England* having an absolute Property in their Goods and Estates, and the Policy of Parliamentary Advice being to prevent Charge only, then on no Occasion one might err by Weakness, by Evasion or Will: That therefore the King could not charge, in any of these Cases, without Parliament; for that so he might charge, if he would, as on Occasion so on no Occasion, as to 7 *l.* so to 17 *l.* That if this held in ordinary Charges, you may not exert extraordinary Occasions, tho instant in the King's Opinion; for so a King intending to do nothing by his Policy without Parliamentary Assistance, he may, if he would so declare, charge at pleasure, on no necessary Occasion, or beyond all Proportion. This Distinction I endeavour'd to take off, shewing it did destroy the End of the Policy.

That there was no Necessity of such a Distinction here, I shewed. There was one thing which I forgot, for destroying of the Distinction from Necessity, and leaving the King judge of the Necessity; that in Judgment, so to do it, is all one as to leave it to him arbitrarily, if he will, which is that only which was intended to be prevented; if he will, was part of the Charge, if not the principal, in the Lower House of Parliament, against the Divine for his Sermon. I have seen the Charge, for holding the King had a Power in case of Necessity, and leaving the King Judge, and so at Liberty and Pleasure, if he will. This I do but touch here, for I must make use of it in the main; and under favour, shall make the Case somewhat like.

For the other two Matters, that when Danger is apparent, there was no need of positive Laws, I urged it thus; not admitting any thing, wherein I desire not to be mistaken. Admit no Writ of positive Command, yet the Subject will be then under a stronger Law, which as it doth command, so it doth compel, that is, the Law of Necessity, which is the strongest of all Laws; with which the Judgment carrieth an Execution, and that this Law commandeth under a greater Penalty: for tho not under pain of Forfeiture to the King, which as to the Cause of Forfeiture, is but *ad terrorem*; yet under the true pain of Forfeiture of all to the Enemy, from whom we must look for no Mercy.

Lastly, That of an actual Invasion, and Necessity withal, that not by any positive Law of the Kingdom, but of the general Law of Necessity, which is above all Laws, for the publick Good private Good doth yield on all parts. Of these two last I have but touched here, to shew what I mean; I shall speak further of them both towards my Conclusion, in my Answers to Mr. Solicitor's Objections.

I shall now proceed to make good out of our Books of Law, that the Law doth not leave it in the Power of the King (in respect of such a King as possibly may be) to lay any Charge upon the Subject, but only in such Cases where the Law hath made such Provision, that if he would he cannot miscarry.

In this place, because it is taken for a Maxim, that the King can do no Wrong; and therefore the Law doth repose this Trust in him, of charging without any Danger at all: I shall shew, that the same Law doth take notice how, and in what Cases the King can, as much as in him lieth, do amiss;

and where the Law is sparing to leave the King any Power to lay a Charge on the Subject, even in small things, when the *Quantum* rests in his Judgment. It is true, the Law doth allow the King to command Payment of Monies in some Cases; yet where the *Quantum* or Occasion is subject to a Trial; the Ground of all this is, that the Law sees the King may incline to mistake, tho as a King he can do no Wrong.

This may seem a Nicety, but under favour it is clear. This resteth in the Distinction of a double Capacity of a King, as a natural Man; and to say in this respect he cannot err, is strange! Human Nature is not capable of that Prerogative at the best; and they are subject to natural Infirmities of the Body, and must die: even so of the Understanding and Will. And so you see the Law must take notice of possible Mistake in Government; and this Possibility in another is no Injury to a good Prince, but sets off his Merits with a greater Lustre. This is not only true for smaller things, but even in the greatest. How many Acts of Parliament have we in Print (of which your Lordships are Judges) declaring the King's Mistakes in the Acts themselves by way of Complaint, and providing Remedy for the future, yea, in their own Times? To instance in one long since, cast your Eyes upon the beginning of the Acts of Parliaments of *Edward* the Third's Time, where we find a Statute for the Government of the Realm.

As the Law saith, he may incline to mistake in his Natural, so it hath taken care, that in his politick Capacity he shall not. And therefore, lest possible Errors of the Natural Body should reflect on the Body Politick, the Law hath provided antient Means to prevent it, which was a Writ of *ad quod damnum*. *Na. Br.* saith, that if any Damage be to the King's Subjects, the Patent is in Law naught: As if the King grants a Fair, and there is an *ad quod damnum* brought, to inquire what Fairs were kept by it; if found a Damage, the Patent is void: The Books are full of such Cases. It is true, that in some Cases, the Books do allow the King to lay a Charge upon the Subject, yet not in every Case for publick Good; but only in some few, which indeed have been antient, and indeed of the very Essence of necessary Traffick and Intercourse, between one Part and another of the Kingdom; as Murage, to keep the Commodities sold the safer: Toll, for a Fair or Market towards the maintaining of it: Pontage and Paveage, for the bettering of Passages. And in all these Cases the King may grant a Sum of Money to be paid; yet as it is in this common Good, some body must have the Power to grant, and that can be none but the King. So if the King should grant on no Occasion, or howsoever, which is enough for me, a Sum too great, greater than the Benefit the Subject shall receive, it is void in Law. If the Subject hath not a *quid pro quo*, then no Charge; 5 Report: and in this Case there is a Judge of the Justness of the Proportion, besides the King: And this is when a Patent cometh to be questioned, if the Toll be laid too high, then the same Patent is nought. Thus then you see how far it is that the Law doth agree, that the King shall lay Charges upon the Subject, only out of common and ordinary Necessity, there must be some body to have Power. But then there is a further Remedy of a Mistake.

Here, before I leave this, I will make a double use thereof. First to shew, that if the Law doth

not permit the King any absolute Power in this Trifle, shall the King do it in so great a Matter, where you shall have no Judge but himself of the Occasion and Proportion?

I next observe, where the Law permits the King to charge in any Case arbitrarily, it is but where this Power doth arise by Original Contract, and precedent Consideration and Agreement for Land; and then not *quatenus* as a Subject, but *quatenus* as a Tenant, only as *Ratione Tenuræ*, in respect of the particular Signory and Dependence, not in respect of the general Signory of the Kingdom.

My Lords, it is true, at the Common Law the King had a Power and Liberty to charge, till he was restrained by Statute, which was Aids *pur Faire Fitz Chevalier*, *pur file Marrier*, *pur Ransome*, and taxing of antient Burroughs: And these Aids too, were in respect of particular Signory, *quatenus Tenentes*.

The next thing that I observe is, that the Policy of the Kingdom so little delights in these Incertainties, tho it ariseth out of Contract and Consideration, that in Case of these Aids, the Law would not allow that Inconvenience of leaving them to an arbitrary Charge, but in some Case settled a Proportion. It's true in Case of Ransom, because no Man can tell the Certainty of that, it is left at large.

This I further observe, by the Common Law, where the Charge is in respect of the Tenency; yet if the Charge comes often, as the King pleaseth, there the Law did not leave it to the King's Judgment; as in Escuage, which is a Profit arising to the King in respect of the Signory. Tho the Law allowed the said Aids, *pur Faire Fitz Chevalier*, and *pur File Marrier*, because they could happen but once; but Escuage that might happen often, the Law would not allow that to be uncertain; it must be assessed in Parliament, as in the Charter of King John, which was always held to be no more than the Common Law.

My Lords, upon the whole, I desire your Lordships to consider how unwilling the Law is to leave the King a Liberty to charge, even in the King's Case, at Common Law; and how restrained by Act of Parliament, where the Common Law before did give Liberty.

Next observe, that the Law, in none of the said Cases, nor I believe in any other, doth permit a Power to lay an immediate Charge upon the Subject, but only in laying a Charge to be paid in respect of the Benefit which he hath received, which is fit to pay, and none are compelled to receive it or pay it; for if he will not have the Benefit, he may refuse to pay it even in Cases between King and Subject. In the Case of Toll, Pontage and Paveage, it is not laid so on the Subject, that he shall pay it whether he will or no; but as there is a Benefit by the Pontage, &c. which cannot be maintained without Charge, 'tis therefore just, that those that have the Benefit should bear the Charge.

Lastly, I shall offer, that even in Cases where the King doth lay a Charge *quatenus Rex*, it is not so left unto him, either for the Occasion or Proportion, as that if he will lay never so much, he may; for if it be unreasonable, the Law doth make it void, as in case of Toll, if unreasonable.

My Inference is this: If the Law be thus careful in small things, as Penny Matters, whether or no the Law will make no Provision in the Main, but leave the Subject to the absolute Liberty of the King, to charge the Subject when he will say the Kingdom is in Danger, and where there is no Judge at all? I will conclude with Book-Cases, in the Point, that the Law doth not leave a Power in the King to charge, tho it be in the King's Judgment, *pro bono publico*; as in the Case of granting an Office. The King cannot at this Day regularly create an Office in itself with a Fee, but in Law it is void; tho the Office in itself hath a Shew, nay, it may be *pro bono publico*. P. 11 Hen. 4. 15, 16. and in 14. a Grant of an Office of Measurage with a Fee void; and that very thing, 13 Hen. 4. was complained of in Parliament, that it was against the Law, because it was in Charge of the People; to which the King answers, Let the Laws and Statutes be performed. In the Roll, amongst the Adjudicates, the Reason is expressed, *quia sonat in præjudicium Populi*. 16 Ric. 2. the King grants to one a Rate upon every Barge that passed the Bridge, in consideration that the Patentee had taken upon him the scouring of the River, in that Case the Patent was repealed. So in the Case of Lights to be kept for the benefit of Sea-faring-men, this was in Charge of the People. This Patent was complained of, and your Lordships know the Order upon it. I omit many Cases, and conclude with that of *Fortescue de Legibus Angliæ*, Cap. 25. speaking of and commending the Policy of the Government of England, he prefers it before that of France; and shews the good Fruits and Efforts of it; and lays down this for one, That the King cannot charge without Consent in Parliament. And he was a Man allowed for extraordinary Judgment, who sheweth Instructions for a Prince for future Government, being trusted more with the Government of the Prince than any other. I conclude these Cases with this Observation.

This denying of Power of laying Charge on the Subject, is not only in the Case where the King would raise Benefit to himself, which a Man may call *tallagium vel auxilium*; but in Cases of Charge which lies on the Subject, tho not for the King's own Benefit, tho also it be in Cases *pro bono publico*, as in the Cases put before.

I shall now come from the Books, by which I have shewed what is the Common Law, that by these Grounds the King cannot charge the Subject. I shall now offer the Consideration of some things, which are Acts of Parliament, or have the Force of Acts of Parliament.

I shall begin with that of William 1. for a Conqueror I shall not call him, for that Name came in about Ed. 3. his Time; for there being an Edward before, because they could not tell how to give him a Distinction from the Confessor, they called him Ed. 3. after the Conquest, by Direction of Sir Roger Owen the great Antiquary. That which I shall urge is, that which he granted Anno 1. of his Reign, That all Free-men should hold their Lands *ab omni injusta Exactione seu Tallagio*, nothing to be demanded but that which was by Tenure, as in *Eadmerus* by *Selden*. Now whether or no this be an Act of Parliament I shall not dispute; yet in those Times when a thing was granted, between the King and the Subject, tho it had not all the Formalities that now it hath

yet it was binding : however, this is called the Conqueror's Laws, and I take it for a Law.

Then it resteth to examine the Words, whether the Words will serve the purpose, to clear the Subject in point of Sels. It is said, they should be free *ab omni injusta Exactione seu Tallagio, ita quod*, &c. By this all Charges, but such as were by Tenure, are called Exactions. The Rule is, *ubi lex non distinguit nec nos debemus*. This is a Grant, if not of Right yet of Grace, and must be taken largely *favores amplificandi*. The Subject could not have demanded of him, especially that of Forty Shillings, if it had not been the Law of the Land before.

I shall humbly leave it, whether this be not the Law by which *Edward* the Confessor laid down the *Danegelt*; for the *Danegelt* was not only against Pirates and Sea-Robbers, (they were indeed Pirates and strong at Sea) but also against all other Enemies. These called the King of *Man*, *Archipirata*, that is, a powerful King at Sea; and that these Pirates were only strange Enemies; and it was to raise Men, not *obviare eruptioni* but *irruptioni*, not so much to keep them within their own Kingdom, as to keep them from falling on the Land. And by the History of those Times when this was raised, it was by reason of the *Danes* landing in *Northumberland* and *Essex*; and so upon that Irruption of the *Danes*, *Danegelt* was raised. It is called by *Caimden* in his *Brit' irruptione hostium*; and *Lambert* in his *Saxon Laws*: but let it be *irruptione* or *eruptione*, or be it *Danegelt*, to keep them from coming out or landing here, both of them were for the Publick Service. When this had been so much complained of in *Edward* the Confessor's Time, it is clear he damned it. And *Ingulphus* is an Author without Exception, and *Tilburienfis* not to be compared to him. *Ingulphus* was a great Courtier and Favourite of *William* the Conqueror's; and to think that he had not a better Knowledge of what the Confessor did than *Tilburienfis*, who wrote many score Years after, is much. And it is strange that *Ingulphus*, who was so much bound to the Confessor, should carry a Law down to *Edward*, so much to the Prejudice of the Confessor, if he had not been sure of it. *Tilburienfis* was urged, as if he spake, that it had been paid to the Conqueror; he wrote in *Henry II.*'s Time. And, my Lords, observe that he was an Officer in the *Exchequer*, and for the Rules of the *Exchequer* he teacheth them well; but for History against *Ingulphus* I leave him.

If this were laid down by *Edward* the Confessor, then I conceive, this Law of *William I.* was but the Law of *Edward* the Confessor; and there was no Ground for him to require a Law to lay any Charge but what was before. *Tilburienfis* makes this good, for he himself saith, that the Conqueror laid it down and took it up again. If it were laid down, I would know by what Law or particular Direction it was laid down, if not by this; for nothing in all the Laws of the Confessor can cause to lay it down but this: and thus far he standeth with *Ingulphus*.

I shall further shew these Aids and Taillages were meant here. It is a clear Ground, that *exceptio format Regulam in non exceptis*, an Exception often doth enlarge the meaning of the Word beyond the ordinary Sense. As if I do grant to *J. S.* all my Trees, here my Apple-Trees pass not; but if I grant all my Trees except my Pear-Trees, there my Apple-Trees do pass, because this shew-

eth that I meant all my Fruit-Trees. In the Word Trees I apply it, that here is a discharge of all Taxes, except by Tenure. Now I shall shew that Tenures were for Defence and Service of the Kingdom in the proper Place, when I shall shew what Provision and Means the Law hath allowed the King for Defence.

My last Observation is this. This was not a Charter between the King and his Tenants, but betwixt the King and Kingdom; and so something must be laid down that was due to the King.

There are two kinds of Aids, one from Tenants, the other from the Commons; one was by Command from the King without any more, the other by Act of Parliament.

But here Mr. Solicitor hath taken that grounded Argument, of which I have found a contrary Sense, that is, *Sumus fratres conjurati ad Reg' defendend'*, wherefore these Aids not possibly meant here; but this is contradictory. By Inference to overthrow a thing express is against the Law. The Words are express, that there shall be no Taillage; then by an Inference to say, that the Defence of the Kingdom is not meant, is hard. True, all by their Allegiance are bound to defend the Kingdom, all are to fight for it. Acts of Parliament tell us, where and how we do it, and when; but that we must give Aid, is another thing.

It is one thing to supply with the Body, another thing to give or pay Money; and if there be any Invasion, *pro posse suo* every Man is bound to Defence; but whether for every Defence of the Kingdom we must give an Aid, is another thing. Acts of Parliament will be the best Expositors of things so long since; for as Custom and Use will make a common Law, so likewise it will declare an antient Act of Parliament.

Now, I shall come to that of King *John*, *quod nullum Scutagium vel Auxilium ponatur*. The Credit of this Statute I shall first clear. It is not only in *Matth. Paris verbatim*, who wrote in *Hen. III.*'s Time; but the Original was shewed under Seal the last Parliament by Mr. *Selden*, and these very Words were read, *Nullum Scutagium*, &c. And, my Lords, tho this be no where on the Roll, yet that no ways lessens the Authority of it. It is no part of the Essence of a Statute to be found on Record; if all should be burn'd by mischance, what would become of the Laws? tho the Rolls are all burnt, yet the Judges know what are Acts, and what not, tho they have nothing to make it good by, but their own Manuscripts or printed Books, or Traditions. A Man cannot plead against an Act of Parliament *nul' tiel Record*; and that is the Judgment in the Case, in 8th Report, *Prince's Case*. The Duchy of *Cornwal* stands supported by an Act of Parliament, not upon Record. That which I shall shew to make this an Act of Parliament, appears out of the Words: there are two things, *Scutagium* and *Auxilium*; and *Scutagium* riseth from the Tenants, and *Auxilium* from the Subject. To shew that *Auxilium* is laid down by this, it appears, that he could not assess Scutage without Parliament. I hope to shew that Scutage was for the Defence of the Kingdom, and is such a Provision, that no King hath a better, and such an one as will raise in *England* above 40000 Men.

Ay, but saith Mr. Solicitor, not assessed but by Parliament, that is, not meant to bind the King, but the Subject; the King can do no wrong.

Doth

Doth any Man think that the Commons did come to the King to bind themselves; and leave the King at Liberty?

I come now to argue from the Exceptions, *Exceptio format Regulam in non exceptis*. This Exception shews the latitude of the Words to be a discharge of all Aids; that there had not been care had of the particular Aid, *quatenus a Tenentibus*; they were afraid, even those were swallowed up. True, I do not conceive that was a thing of necessity; but as the King may have it in if he would, so the Subject had no reason to deny it him, for it was but just, and was never meant to be taken from him. Nay, the Lords themselves had reason to take care themselves, that this was not discharged; for in all these Cases the King hath no more than a common Person, for he hath his Aid *pur file marrier*, and *pur faire ransom*, and that appeareth 21 Ed. I. A Release from a Lord unto his Tenant: so that there was Reason that the King and Lords should have Care of this; yet they were afraid those Words would be so strong against publick Aids, that they would take away private Aids.

Last Reason that this *Auxilium* must be said publick; look in all the King's Desires, when they did desire Aids, still their Introduction is for the Defence of the Kingdom; which is a Cause of calling the Parliament; which appeareth by Speeches there on Record. Nothing can be intended of these private Aids for himself. I have done with the Charter of King John.

I next come unto *Mag. Char. 9 Hen. III. For Magna Charta*, I humbly conceive that this Charter, at the first, when it was granted, was no more than *verbatim* the Charter of King John, and originally had in it this very Clause of *Nullum Scutagium*: my Reason for it is this.

First, upon all Histories, that after King John had granted a Charter, the Pope would have discharged him of it, as far as in him lay, but that still the Lords and Commons made Claim. He died, *Hen. III.* cometh in. A Difference ariseth between the King and the French. Then it was proposed, that this Charter should be confirmed; Histories say, that at his Coronation he gave his Oath to confirm the Charter of King John. Then in the 9th Year of his Reign, the Lords demanded it; he was unwilling, because it was gotten *per duress*: But the King said, we are sworn to do it, and therefore must confirm it. And in *Matt. Paris* it is said expressly, that the Lords did call for the Charter of King John, and there it was read and confirmed *verbatim*. And *Mat. Paris* lived in the King's Court, and was *adeo familiaris*, that it is said, he eat with him at his Table; and at that time he wrote this Book, and sure he durst not have written it, had it not been true; but we find it not now upon Record: how this might possibly slip, I shall tell you.

First, We have no Original Inrollment of *Mag. Char.*, no *Mag. Char.* but that of King John's. If it be true, which Histories say, that *Hen. III.* did revoke his Charter, it is possible these Rolls might perish in that time: the Authority of the King at Oxford did inforce them to bring in their Records; doubtless they would not leave the Inrollments.

The next step to look for it is 28 Ed. I. confirmed there, and is exemplified; the Original may be lost in so long a time: what became of all Parliament Rolls, till 4 Ed. III? All perished by Fire or some other Mischance; things were

afterwards put together, and upon the Roll. This was not the Original Inrollment of 8 Hen. I. and written in the Roll where Acts of later time are written, and with the same Hand. If it were once in King John's Time, it must be left out somewhere.

Observe this one thing more, that is, as this of *Scutagium* and *Auxilium* doth concern the Subjects in their Lands, there is a Clause also that concerneth the Subjects in their Persons, *Nullus liber homo imprisonetur*, that might be taken for ordinary Imprisonment; then there cometh a Provision for the King that he should not do it, which is *non super eum Mittimus*, such Words as that a Man knoweth not what to make of them: but in the Charter of King John, it is *nec eum in Carcerem Mittimus*. In this great Thing we see the Mistake, and how the other happened I cannot tell.

I now come to Ed. I's Time wherein I hope to make good those Acts of Parliament that we have vouched; and here lieth a main Endeavour. The First was of 25 Ed. I. which is not denied to be an Act, nor cannot. The other is *de Tallagio non concedendo*, which is so full, that it cannot be evaded, and therefore is denied to be an Act. First, for the Act of 25 Ed. I. which is against Aids and Taillages not to be taken without Consent of the Kingdom, I humbly conceive, that by these Words Aids and Taillages used in former Acts, that these were meant of things for a publick Defence of the Kingdom, complained of and not denied. I shall bring home the Roll of the 25 Ed. I. that the King doth not promise to pay them *pur Reason*, to have Words for their Money; but that they must have a reasonable Satisfaction: I will shew that was the Sense given upon the Record.

First, for the Practice of the Times, that there were Ship-Writs went out, these Writs went forth in a more terrible Term than any I ever saw, *sub pœna forisfacturæ vitæ & membrorum*. 24 Ed. I. was the Writ. I am sure that such a Writ by the Common Law would not have been mentioned, that if they did it not, the King should hang them. This Writ was the Grievance upon the Subject, and this Act refers to that. True, there were other Grievances, 4to. and 5to. but this was one; and that these Aids, which were then for the Defence of the Kingdom, were included within the rest, appears. The King in reading the Articles, speaketh, that what was done was for Defence; tho true he had Wars in *Poitou* and in other places beyond the Seas, yet as true that it was a War to be kept from hence by Defence. That part was for Defence cannot be denied; and yet no Distinction to be made between a Foreign War and Defence, and both equally a Grievance to the Commons.

After this Act of 25 Ed. I. there cometh out a Commission, and this was in pursuance of the Promise that the King did make at his going into *Flanders*, and that was to inquire of those Grievances in the Articles, and among the rest; there was *de lanis & coriis* taken away *pro defensione Maris*; and to that the King saith there, *pay pour Reason*. There hath an Answer been given unto this, and much stood upon, that the King should say upon this Commission to inquire of Grievance *pro Custodiâ Maris*, if it were so *il fera taunt ils teneront appayer pur Reason*. That this should be no more, than that

Veu le Parol
del Record.

the

the King would give a Reason why he did it, I question. As if he should send forth Commissions, and afterwards dispute it, or if he did do it, whether lawful or not, that is not the way of sending out Commissions. Suppose that the King should say he would give them a Reason for it, this Commission did go forth to enquire of those Grievances. And if the King had not said he would have given any Satisfaction, yet it is enough that it is inquired of as a Grievance. It is a wrong upon the Subject, Princes may lay Taxes, yet the Subject doth not call for Satisfaction. A Princely Word that it should be done.

But when the King doth say *pais pur Reason*, to think, that that is no more than that he would give some Reason for it, is a very strange inference. In a Bargain they use to say, you shall hold your self content with Reason, you shall not have your own Demand, but he is satisfied one way or other; so here.

To begin with a Record. 21 Ed. 1. Parliament Book. A Petition of the Commons, and they did desire Restoration of all their Monies. 25 Ed. 1. there were Two *de lanis & victualibus* within that Commission; so the Monies and the Things taken were inquired upon by that Commission, 26 Ed. 1. were for Defence, and here *Ordinatum est per Concilium quod Rex satisfaciet eis quam citius poterit*. Upon this Petition they desired Satisfaction. For Goods taken upon the aforesaid Commission, 26 order'd by Parliament, that the King should satisfy them so soon as he can, so that they should hold themselves content, *Ita quod se contentos haberent*. So that you see, not Satisfaction by Reason, to justify them, but the King should satisfy them one way or other. It is that they should have something for it, and not that they should have Reason shewn them why they should have nothing.

But I rest not here, there is one Parliament-Roll remaining before 4 Ed. 3. and that was 8 Ed. 2. *Pro Priore & Fratibus Sti Johannis Jerusalem*. It is there set forth, that Ed. 1. did command his Treasurer and Barons of his Exchequer, to make Satisfaction for Wages taken in *Scrutinio* to the Clergy and Laity, *veluti pro lanis & coriis*; and that Satisfaction should be part by Money and part by releasing of Debts; so as thus the King had no meaning, 26 Ed. 1. to pay back Money presently, but would give them Satisfaction one way or other, by Payment of Debts, or releasing of Debts, as was explained by that of Ed. 2. Another Record P. 27. Ed. 2. Rot. 36. Satisfaction was there given for an Eighth and a Fifth.

Those things which were taken before 25 Ed. 1. complained of, and that confessed by Mr. Solicitor; so as I conceive, tho it had been enough that there had been an Inquiry of these things as upon a Complaint, tho there had been no more Answer. If any Answer make it better, it is no Answer to say, that they should have Satisfaction by Words, but either in Money or releasing Debts; if none at all, Confession had been enough.

I shall now come to talk of Mr. Solicitor's Exceptions to the 25 Ed. 1. where he endeavour'd to shew that this Money for Shipping could not be intended within the Body of the Act; and if it was, yet it was excepted in the Saving of the Act.

The Objection stands thus. No Aids were charged but such as were granted, and we do not shew that these were granted; and there is

a Word beyond that, (Prizes) and how far that extends, I leave to your Lordships Judgments.

But if in the Body of the Act, yet excepted in the Saving all antient Aids due and accustomed; for the saving such an Aid due and accustomed surely was meant there.

In this Answer lieth this Question, whether these were the antient Aids due, or not, by the Common Law? this will stand or fall on the Body of the Argument. I shall tell you what these Aids were, and they cannot be these; there were other Aids mentioned in the Charter of King John, as *pur faire Fitz Chevalier*, &c.

That which takes off all, is, If these Aids were part of the Grievance, tho for the Defence, they cannot be meant in the Saving, for that destroys the purpose of the Act. And for that Saving, it never came in by the Commons, nor the Lords; but the Form being so, to grant in part, and as the King would grant it so they must take it: Histories do say they did not like it, and so they desired an absolute Act.

It was said, that Aids and Defences were meant of Foreign ones. If the King and Council were so wary as to put in such a Saving as before was not in the Act, it shews what Care they had to have that they could not have. If by the Laws they might have them for Foreign Defence and not at Home; they that put in the Saving would have put in a Distinction. I shall leave the Consideration of this Act to your Lordships, how far it shall extend to Aids for the Defence of the Kingdom in that Case.

I shall go on, and conclude with the Statute *de Tallagio non concedendo*. That Act of the 25 Ed. 1. was indeed so well penned, that it gave Mr. Solicitor a very probable Colour to make those plausible Answers. The Lords did desire a better Act, not with these Words, no such Aids; for such is a relative Word, and those are dangerous Words.

Next, if no more be meant by the Saving than *pur faire Fitz Chevalier*, &c. and yet to have left these in the general, and not in the particular, had left a way open to question what they had been. And in *Walsingham* it appears the Lords were not contented with it, tho it was signed and had passed the Great Seal. It is true, that at this time a Pardon did pass to those Lords; the Words are so strong, that this was denied to be an Act: and much said, and very colourable too, to that purpose.

It is true, that this Act is no where on Record, that we find; but for that an Answer hath been given before.

It is said, that is no Act, but only penned as a Charter; that Exception was once made by the King's Council on another Occasion.

Acts of Parliament were then penned so; *Mag. Charta*, and *Charta de Foresta* are but in form of Charters.

Yea, but we cannot tell when it was.

How many Acts of Parliament are there which we know not when they were? Historians best tell that. It is hard to find it when the Records are lost. But this will appear to be in the time of Ed. 1. There is the Pardon to those Earls in 25 Ed. 1. We know that the Rolls of those Times miscarried and were lost, and sure it must be after the Statute of 25 Ed. 1.

But then there is an Exception from the diversity of the penning; sometimes *nullum Tallagium ponetur*, sometimes *ponatur*.

We know upon the entring of the Rolls, there have been divers Mistakes in the entring of *ponatur*; if it be with a Dash, it may easily be mistaken, and so only *vitium scriptoris*, and nothing else.

Then let us inquire what it was if it be no Act. It is said it is no Act, but an Extract out of 25 Ed. 1. and that he urged several ways upon several Occasions.

By the penning of it, it doth appear, that he that wrote it was a Scholar, and not mistaken, to make a thing absolute that was relative; for *nullum* to make it *tale*, and to make that without a Saving that had a Saving, is a strange kind of Saving.

Yea, this cannot be an Act; for at that time there was a Pardon granted to several great Lords.

If that be true, which History saith, when this Act was published, the Lords were not satisfied with it; and these were the Lords to whom the Pardon was granted that were not satisfied. And to make their Pardon the stronger, they did weave it into the very Body of the Act: and for *Walsingham*, he is of great Credit among the Historians.

They say further, that this is no Act, for this takes away those Three Aids, *pur faire Fitz Cbevalier, file marrier, and pur Corpus redimend*.

This is not so, Acts of Parliament speak of it, and Practice speaks of it, and therefore no Law; and practice of Ship-Writs ever since, and for Defence of the Kingdom.

For the Aids, that is a good Act; yet those were not intended nor included within that Act, and therefore that Practice is not contrary, because it is not within the Words of the Act, nor in the Meaning of the Act.

For the Aids therein questioned, the Question was between the King and the Commons, and not between the King and Tenants; then that being the Question, there must be a Consideration according to the Occasion and the Doubt made. But to take thus *Nullum Auxilium ponamus*, these are not Aids put on the Tenants, but Fruits of a Signory, as the Duty riseth not from the King's Command, but from the Laws, and so not within these Words *Nullum Auxilium ponamus*. And so all the Practice ever since will well stand with this Act.

And to say Shipping is not meant, because of the Practice since, is nothing. Let me establish once the Laws, and no matter for the Practice. If the Laws be once settled, we must reduce Precedents to Laws, and not Laws to Precedents.

And for the Practice yet, still the Subject makes a continual Claim against them.

My Lords, to prove this is an Act, *Walsingham* entred it in his time, who did not write very long after it. Tho it hath been said that he was a Monk, and what he wrote he took up in the Street and Market-Place; yet I will not think so of *Walsingham*, who was ever held an Historian of very great Credit. And no Historian whatsoever durst set down any thing for an Act of Parliament, if he had not a sure Warrant for it. It had been little less than Forgery.

In the next place, it hath been said, Histories are no good Authorities in Law.

True, they shall not tell me what the Law is, yet they are good to tell us of *Res gestæ*, whether or no there hath been such things done. He tells us, not that this was for Shipping, or not for

Shipping, but tells us there was such a thing. I have searched after this Act, and I have found in an antient Manuscript in *Hen. 4.* Time where it is, and it goes there under the Name of *Statutum de Tallagio non concedendo*; and I find it mentioned no where, but still find it mentioned as a Statute. I have an Abridgment of *Hen. 8.* Time, and there it is put in as a Statute. I will not urge positively, but probably, and that an Act in *Hen. 4.* Time, 13 *Hen. 4.* A Complaint of laying Taxes on the Subject; the Answer is, Let the Laws and Statutes be observed: this is that positive Act that doth reach it more than any other.

But the main Answer that I rely upon, is, that if they deny the Truth of an Historian for *Res gestæ* as this. If from time to time it hath been conceived an Act, what more strong? What makes our Common Law, but general Opinions and Allowances? And should we doubt of many things, whereof we find the Acts of Parliament themselves, I am afraid we should shake many things done by the Common Law. That which I rely upon is the Judgment of the late Parliament, to which your Lordships will give all Reverence. This, my Lords, did not pass *sub silentio*, but was made a Question, and something proposed on the King's Part, whether an Act or not? in the Conclusion it came into the Petition of Right. The very first Statute mentioned in that Petition was this, *de Tallagio non concedendo*, made in *Ed. 1.* Time. How far this Question passed at the Committee, it is better known to your Lordships, and is the thing whereon it is built. If this had not been an Act, it had been dangerous to have put it into the Upper-House; but it being there read, your Lordships know what was done upon it.

The Petition being thus debated in both Houses, I shall leave it to your Lordships Consideration, how far you will make this Question to go in this Case. And his Majesty did not deny the same, but both King and Council agreed it is a Law.

Mr. Holborne's Third Day's Argument in the Exchequer-Chamber, before all the Judges, on the behalf of Mr. Hampden.

My Lords,

AS the other Day, so now again with your Lordship's favour, I shall be bold to sum up my last Day's Argument in a very few Words; and by the way clear my Meaning, wherein I was any whit obscure, as also add where I was defective, yet briefly in both.

My Lords, The general Question the other Day, being concerning the King's Power to lay a Charge of Money upon the Subject; and my general Ground against it being but this, that tho the Laws did intrust the King in many great Powers in Government, and with the whole Government, according to the Laws; that yet by doing of Acts, which charge or prejudice the Subject in his Estate, the Law did see that it was possible that Kings, as Men, might err, and therefore did make Provision, that their Acts, if against Law, should be void, as in Case of a Disfeisin or Discontinuance, or where they were to pass Grants, that there should go before an *Ad quod damnum*; and also, that if they were passed,

fed, and were to the Prejudice of another, that regularly in that Case, the Law did make them naught, and that they were to be repealed.

And I shewed how this did hold, especially in laying Charges upon the Subject. I shewed that the Law was not willing to leave the King Power to charge in any Case, notwithstanding where the Occasion might be common, and did require, for the Maintenance of Traffick and Commerce between them, so to hold them still as within one Body. The Law must leave in some Body a Power to charge, which would be left in none but the King as supreme Governor. The Cases for this were the Moneys to be paid for Murage, Pontage, Paveage, Ferriage, and the like. That in those Cases, tho the King was trusted with a Power to lay a Charge; yet the Law did not leave the Charge arbitrarily in the King's Breast, so, but that if it were unreasonable, the Grant was naught, and the Proportion was to receive Trial by another, upon whose Judgment it must stand or fall, which were either the Judges or a Jury; like to the Case which I might have put, but did not, of a Fine uncertain upon a Copyhold. I also shewed, that in some Cases the Law did allow to demand arbitrarily upon some Subjects, Sums of Money, yet that was not upon the Subjects, *quatenus* Subjects; but upon some Subjects, *quatenus* Tenentes, which did rise upon the *Jus rentulare*, as to marry his Daughter, to make his Son a Knight, or for Ransom, or upon those who were little better than Villains, the King's Burgeses, whom the Law did not so much regard; yet the Policy of the Kingdom, in those Cases, did afterwards restrain the King to a Certainty, by Act of Parliament.

Afterwards I went to the Cases which were in Point, that the King could not lay a Charge upon the Subject, tho for a publick Good; and instanced in the Case of the Grant of the Office of Measurage, with a Fee, adjudged void, *quia sonat in Oppressione Populi*. 22 Ed. 3. Pat. 31. The King granted to one Pawley, an Office of Alneage of Worsted; and because in Charge and Burden of the People, and a new Grant, adjudged void, and was repealed.

I begin with that of 4 Will. 1. which I now find more clearly to be an Act of Parliament, out of an antient Manuscript of the Church of Litchfield, mentioned to this purpose in Eadmerus. Here I endeavour'd to answer to Mr. Solicitor, when he said, that there was another Law of the Conqueror's, which explained this; and shewed, that the Charges for the publick Defence were not meant, because it is said in another Place of the same Law, *quod omnes sunt fratres conjurati ad Regnum defendendum*. To this my Answer is, that they are so for their Bodies, *Fratres conjurati*, to serve, but not to be charged. Yet I must confes it is *pro viribus & facultatibus*, to defend the Realm; where *pro facultatibus* may seem to imply, that they were bound to be subject to Charges, *secundum facultates*. Under favour, *pro viribus & facultatibus*, are but Words of like nature; *viribus*, that is *facultates*, natural Powers, not Substance; for it is not only that they should be *Fratres conjurati ad Regnum defendendum*, but also *ad pacem dignitatem Coronæ, &c. & ad judicium Regis & justitiam faciendum*.

I went next to the Charter of King John, which I observe to be but Common Law; it's inrolled, remaineth under Seal, and is recited *verbatim* in Matthe Paris.

I went next to the Acts of Parliament, 25 Ed. 1. against Aids and Taillages; there I laboured to shew, that the Act was made against Aids and Taillages, tho for the publick Defence; and that was out of the Articles, whereupon the Statute was made, and upon the King's Answer to the Articles: Next out of the Commons, which was after the Statute, to enquire of the Grievance mentioned in the Articles, to the end there might be Satisfaction, which was promised upon the Articles; where, in the Commons, the whole Inquiry was *de gravaminibus*.

It is enough for me that this Commission was grounded upon the former Articles, and that here this very thing, *pro defensione Regis* was *inter gravamina*. It had been strange, when the King had confessed upon the Articles, that he would not legally justify them, and upon the Commission, in pursuance of the Articles, had called them *Gravamina*, and so to be inquired of, that now when they were found he would justify them in any Point, and say, *a pais pur reason*, give them a Reason for what he did, as Mr. Solicitor saith.

Next I did conclude with the Statute *de Tallagio non concedendo*; and there my Labour was to prove this to be a Statute: and I am sorry I spent upon it so much Time, if that had not been denied by Mr. Solicitor to be a Statute. But now I understand, by the King's Side, that this was no Statute, but made and sealed at the same Time with that of the 25th, and meant to be no more than that of the 25th.

This seemeth strange: For why should they be both at one time? Next, how came they so much to differ, if made at the same time? Why are there some things in the Statute, *De Tallagio non concedendo*, which are not in the Statute of the 25th?

But the Teste will clear all. First for the Teste of that of the 25th, it was *Teste Ed' Principe*, and sealed by no more than the King: To this the Archbishops and Lords put their Hands and Seals. But however, I am glad to hear it now confessed to be a Statute; for then we have no more to do, but to see whether the Charge of the Defence were within the Meaning of these Words, wherein sure the Words are general enough; and what Reasons have been given, why by the Expositions of these, Charges of Defence should be excepted, you have heard; and what my Answers have been unto them, I leave to your Lordships Judgments.

I come now to Ed. the Third's Time, 17 Ed. 3. Parl. Roll. Whereas Commissions have been awarded to the People and Shires, to prepare Men at Arms for Scotland and Gascoigne, or elsewhere, at the Charges of the Shires, contrary to Law; the King hath not, before this time, given Wages, whereby the People have been at great Charge, and much impoverished. The King wills, that it be done so no more.

Ay, but it was said, this was to Scotland, and to Gascoigne; and that this was foreign War; and that was denied, tho not admitted.

I answer, that in those Times, Scotland held in Fee of the Signory of England; and in those Times the King of England was *Dominus directus Scotiae*: And so Ed. 1. when he determined that Quarrel between Bruce and Baliol, and gave Judgment by Writ, settled Baliol King of Scotland, and did justify it; and it is remaining in the Rolls of Scotland, in Mr. Squire's Office. When there

there was a Treaty of Peace between *Baliol* and *Ed.* the First, he refused to acknowledge the Signory of *England*; and there the Parliament resolves he should rather have a War than lose this. So see *Selden* upon *Fortescue*. War in *Scotland*, not foreign War, but like to that in *Wales*; and so was it ever since held, since the Conquest, to be within the Signory of *England*. By the Statute of 12 *Ed.* 1. and by the Statute of *Hen.* 8. it appeareth to be within the Fee of *England*. War against one another, cannot be called a foreign War; as in the War to *Scotland*, *Wales*, and elsewhere, which is not meant of foreign Parts; for then it would have been expressed where, as well as *Gascoigne*. And by the Histories of those Times, we shall find there were Armies carried to no other Place. Nay, to shew this elsewhere is meant in *England*, see the 1 *Ed.* 3. Parliament-Roll before this Parliament. The *Scots* invaded *England*, as appears by a Writ of *Ed.* 3. where is mention of an Invasion, and thereupon requires Aid. If there be Wars in *Gascoigne*, and if occasions to *Scotland*, and in *England* too where the *Scots* are, and this a defensive War. Further for the Wars of *Scotland*, if that should be called a foreign War; if the King should go thither and make a War, yet by the Rules of the King's Council, if a War in foreign Parts is but to prevent a War at home, this War is not foreign, but for Defence.

Another Act made on this Occasion, that the King wills, 1 *Ed.* 3. cap. 5. that no Men henceforth shall be charged to arm themselves, otherwise than formerly in the Kingdom of *England*; and not to be compelled to go out of their Counties, unless upon the sudden coming of an Enemy, and in case of Necessity, and then to be done as in Times past: This Statute coming in the same Year when the Complaint was made for carrying Men out of their Counties at their own Charges.

Here I observe, that the Subject shall not go out of his County, not only at sudden coming of Enemies, but likewise on Necessity, and both together. And when it is said, it shall be done as formerly, it is an Allowance that they had formerly been paid. So then, if this be a stronger Case, admit here an actual coming of Enemies, nay sudden; nay, here is a Necessity, and the Subject is to go out of his Country, *pro posse suo*, yet he had his Allowance.

Perhaps it may be asked, why should not the Subject pay? Is not the Kingdom in Danger? Are they not to defend it, *posse suo*?

They are so in their Counties; and if they go out, the Law hath provided a Supply. Parliament-Roll 13 *Ed.* 3. there was a Time when there were known Enemies, actual Wars in *France*; they intended to divert the War by bringing it home to our own Doors: The Enemies threatened much, nay, did much Hurt; yet did not *Ed.* 3. command these Supplies this Way, but called a Parliament, and there Consideration was had in Parliament for Supply, and that the Kingdom has Ships enough, if they were willing; and this was in way of Defence.

From all this I conceive that it is strongly inferred that he could not force them: And when the Lords and Commons did meet, to take Consideration for the Wars against *France* and *Scotland*, the Commons laid the whole Charge on the Cinque Ports, they disclaim'd to have any thing to do with it. And for the Land-Service, they

said, let those of every County reside there, but no Charge on the Subject in pursuance of this. *Claus.* 13 *Ed.* 3. *M.* 11, & 14. *Dors.* The Town of *Bodmin* doth shew the Execution of this Judgment; it being agreed, that the Sea-Towns, and bordering Shores, should look unto it.

I shall agree, that some Inland Towns are bound by Use and Tenure, but no otherwise, 4 *Ed.* 3. cap. 1. that the People are not compelled to make any Aid out of Parliament; and that the Aid granted shall not be drawn into Example; and that the Aid granted is for the Defence of the Sea.

But it hath been said, that they are Aids granted for foreign Wars, for the Wars in *France*.

True, they were in part granted, some for the Wars in *France*, and part also for Defence on this Side. And where there is no Distinction, why not for the one as well as the other? It must, under favour, be conceived for either, or both. And between this Time of 14 *Ed.* 3. and 25 *Ed.* 3. your Lordships have heard from Mr. *St. John*, some Complaints in Parliament, for charging the Counties with Hobbellers, and going out of their Counties, which are not really compleat, only for Proportion, in regard of their Success, but also for the Thing itself.

2 *Ed.* 3. *M.* 21. The Commons pray to be discharged of the Guard of the Sea; and that the King would keep it at his own Charge. This shews the Judgment of both Houses, and the Weight of it is very great: For when there is any difficult Point concerning the Liberty of the Subject, it is referred by the Judges to the Parliament, to be there decided; of that Reverence is the Parliament.

But it hath been said, this is rather a Matter of Prayer than Right.

Under favour, the Matter shews that they claim in point of Right: And it is to be supposed, that they would not make such an unreasonable Request, as to lay that wholly on the King, if they of Right ought to do it. And if Words were put in a fair Language, it was but a fit and humble Language for so great a Prince as *Ed.* the Third was. But *Ed.* the Third gave no Relief: yet that doth shew the Judgment of the two Houses; and as there was no granting, so there was no express denial. A handsom Prayer, and a handsom Answer. 14 *Ed.* 3. Parliament-Roll, there it appears there was a Charge of 2 s. on all Woolfells, and this for Defence of the Sea; and in the 15th taken away in the Parliament.

I shall conclude this with the 25 of *Ed.* 3. No Hobbellers were to go out of their Counties, unless by common Consent. This Statute is general for Defence; there is no Exception; if an Enemy do invade, the Parliament believes the Kingdom is provided for.

Yea, saith Mr. Solicitor, the Subject is not charged to go out of the County, that is, upon Summons, *ad Exercitum*; for Summons is twofold. First, a Summons *ad Exercitum*, and then a general Summons. By the Summons *ad Exercitum*, only those were to go that did hold by Tenure; and they say it is *encounter droit*, to be charged out of their Counties.

It is true, about this time there are some Records of 16 and 18 *Ed.* 3. in the *Exchequer*, where Charges are laid on the Subject for Hobbellers, and such things: But you shall find in the *Exchequer*, that the Money came thence, which was

before the Statute; these things were the Grievances complained of. So the Practice there will not expound the Statute, for the contrary Practice did beget the Statute. But the last of these, in 24 Ed. 3. who was an active Prince, and maintained Wars, and so had great Occasions for Moneys, and so charged the People higher than they would endure; for which he did afterwards repent, and desired to be prayed for; and therefore there were divers Impositions on Merchants; all which I pass over, only this out of the Roll, 50 Ed. 3. M. 24. It is the Lord *Latimer's* Case, a Privy-Counsellor and Chamberlain to the King; there was a Complaint in Parliament against him for divers things, whereof one was for laying an Imposition upon Merchandize. In his Justification he pleads the Command of the King; and for that Particular he was sentenced, imprisoned, fined and ransomed; so careful were they to revive that Law. And that Sentence of his, 2 Ric. 2. made the great Lords so unwilling to talk of the Defence without Parliament.

And so I come to that of 2 Ric. 2. upon which I must insist, for that it is of great Weight. It doth appear, as well by the Consultation itself, as by History, that the Realm was in great Danger from several Parts; as from *France, Scotland, &c.* and that the Danger was so instant, that it could not stay for a Parliamentary Supply: Therefore the Council of the King were to consider of it, they know not what to advise; they meet together, they had no Time to call a Parliament; but the Lords, both Temporal and Spiritual, and Sages of the Realm, consider'd what to do, when the Safety of the Kingdom laid so at the Stake. The Resolution of these Lords and Sages, who were, as I conceive, the Judges, *propter excellentiam*, conclude that there was no way but by Parliament; and all this was for Defence, and against an instant Danger, which could not expect Summons of Parliament. And the Lords themselves rather lend Money out of their own Purfes, than adventure that which *Latimer* did; which indeed was the Ground which made them wary.

To this there were many Answers, yet all will fall off. 'Tis true, that it is no Act of Parliament; yet such a Resolution, that had it been 300 Years before, would have done much. The Weight of this is thus: If this had been a Parliament, there is little doubt what this Resolution would have done: For the Matter we have the Resolution of the Upper House, and how the Commons would have resolved in a Point of Liberty, we may easily conceive. Here we have the Judges Opinions in point of the Legal Power of the King, what the King would do, as well as what he should do: And in things of this Nature, the Judges are the King's Council. And as in the great Council, (the Parliament) they sit there for Counsel in things that belong to Matters of Law, so at this time in this Assembly, which was instead of a Parliament, these were not left out, being best able to declare the Rule; and this was about two Years after *Ed. the Third's* Death: he could not then have any other than the Council of his Grand-father; and of these their Resolution was, that the King could not charge the Subject out of Parliament: And tho it was no Act of Parliament, yet it had the Honour to be so accounted, else it had never been entered upon the Parliament-Roll.

But it is said, by way Objection, that *Ric. the Second* was then an Infant.

True, he was so, but he had a brave Man for his Protector, *John of Gaunt*; and he had doubtless a select Council, and they were as fearful as might be, that nothing should be done that might wrong the King in his Prerogative.

It is true, they had a Power of doing things by Parliament, yet that was no Act to restrain the King, but an Act of Necessity: The King was an Infant, and therefore it was requisite, that during his Minority nothing should be done but in Parliament, especially that concerned the Kingdom; which was not an usurping of the Regal Power, but a provident Care of the Kingdom and him: and they do protest in that Roll against Incroachments upon the Royal Power; and to say that is good, which is to an ill intent, is a strange Construction.

They say that this Consultation was for foreign Wars; for that *Brest* and *Calais* were in danger, and to be provided for: and for foreign Wars, it is agreed the Kingdom could not be charged.

To this I answer, admit a Mixture of Wars, yet every one looks home first; we have a Care of our selves first: but they would have made no such difference if the Debate had been for both. However, the Lords conclude the King cannot charge without Parliament.

But I cannot leave this Objection, but shall give a particular Answer. Tho *Brest* and *Calais* might be in danger, yet that was no part of this Consultation, for it is said in that Consultation, that in a former Parliament, sufficient Provision was made for them. True, they were in danger, but provided for in Parliament before; and that which clears all, under favour, there is not a Word in that Consultation, but is merely for the Defence, and no Relation to a foreign War.

I end this King's Reign with the 8 and 9 Ric. 2. Rot. 10. where is a Consultation with *John of Gaunt* for foreign Wars, and others mixed together: it appears the Subject is not chargeable out of Parliament.

And so I come to *Henry the Fourth's* Time. 2 Hen. 4. hath been urged, and an Answer given to several Commissions for *Calais*, and for the Defence: there was then a Complaint, and a Desire that those Commissions might be recalled. 'Tis true, we find not this granted expressly; but as no Grant, so no Denial; and as we take it, it was granted. This Time of *Henry the Fourth* did yield many Instances, that the King cannot charge, tho for the publick Defence. I shall remember a Record which the other Day I vouched. *Par. Roll*, 13 Hen. 4. M. 43. it was upon an Action of the Case which we find in the Books, 11 Hen. 4. which was pleaded in 13 Hen. 4. there was an Office of Measurage erected and granted, and a Fee granted in it, this was complained of in Parliament: First, an Action was begun at Law 11, and in 13 Hen. 4. a Complaint in Parliament; and they complain that this was against the Statute, that no Taxes nor Tailages should be laid upon the Subject; and the Answer is, Let the Statute be observed. This Use I make of it; this doth not only shew the Confession of the thing, that this ought not be laid, but that this Statute, *De Tallagio non concedendo*, was to be a Statute: and this Statute was not for Aids that come to the King in particular, but against any Charge laid by the King upon the Subject, tho it be *pro bono publico*; and upon the Record, the Judgment

Judgment was delivered so, because *sonat in præjudicium Populi*.

I shall remember, the Grants of Tonnage and Poundage to *Hen. IV.* and the Grants usually to him were temporary and upon occasion, and not for Life, until afterwards; and in his Time they were for the Defence of the Sea and Kingdom: and it was granted upon Condition, that it should be confessed it was granted of Loan, and not of Right. 9 *Hen. 4. M. 16.* and 11 *Hen. 4. M. 45.* and 13 *Hen. 4. M. 10.* which is the fullest; they make a Protestation it shall not be drawn into Example; yet all that time were imminent Dangers.

But it was said, we cannot shew that purely, and simply, and solely, it was ever granted, but with a Mixture of other things, as that of Tenths and Fifteenths.

But the Parliament was so wary, that they did sever them, and lay the Tenths and Fifteenths by themselves, and Tonnage and Poundage by itself; for tho they are the same Acts, yet upon the Matter they are several.

I am now come to *Henry* the Fifth's Time, and for him there is not much, but like *Henry IV.* Parliament Roll, 1 *Hen. 5. M. 17.* a Grant of Tonnage and Poundage for the Defence of the Realm, and Safe-guard of the Sea, with a Protestation that they should not be charged for the time to come. I think after this time we find no more Protestations or Grants upon Condition.

But that which I argue from these Grants made in this manner; is, Sure it was the Opinion of the Parliament, that they were not bound, and the King by his Acceptance doth acknowledg so much: No Landlord accepts that from the Tenant as a Gift, which he may command as a Duty; and to take it on Terms so advantageous for the Subject, and not only give an Acquittance for it, but put it on Record as in point of Right.

But here is an Affirmation of the Commons; and tho they cannot make a Law, yet that which they do, and the King accepts, shall be of a strong Proof.

Again it is true, you shall not charge the Subject with Tonnage and Poundage without Parliament; but shall not the Subject be charged another way?

To what end would that Protestation have served, that the King should do it another way? And it is all one, if the Commons bear the charge of Defence, whether they bear it by Tonnage and Poundage, or otherwise; for that which falls on the Particular, falls on the other. To charge them thus, were as if the King should say, tho I cannot charge you this way by Tonnage and Poundage, yet I will charge you another way.

In the Time of *Henry* the 6th there's little.

I come next to the Time of *Ed. 4.* wherein, tho there is not much upon Statute, yet there is a Speech of his that shews much of this. 7 *Ed. 4. Parl. Roll 1.* there was a Speech made and cited; the King first protests, which was not immediately upon his coming to the Crown, that he will live of his own, and not charge the Commons but in Cases extraordinary, and those Burdens too should be *secundum morem Majorum*; and that he hopes they will be as tender of, and kind to him as to his Predecessor, saying that he would lay no Charge upon them, but in extraordinary things.

V O L. V.

This shews, that what was granted by the Commons, tho upon extraordinary Occasion, was not out of Duty, but out of Tenderneſs; and this was a good while after his Victory, and could not upon the matter be called a Brokage. And this falls not under the Answer of Mr. Solicitor, that Money was borrowed of the poor Men, and reason that they should be paid again.

But those Loans were by way of Commission, and not to some poor Men, but they did concern the general. And tho *Rich. 3.* had Reason to bring in good Laws, because of the Defect of his Title, yet my Lord of St. *Albans* called it a kind of Brokage to get the Peoples Good Will: yet, however, this must be a Declaration of both Houses of Parliament; and it was not so much offer'd by *Rich. 3.* but because *Ed. 4.* had made many borrowings.

I come now to *Hen. 7.* Time; that which hath been pressed, is the 19 *Hen. 7. Cap. 11.* Provision that the King's Servants that were to attend upon him in the Wars out of the Counties, should be paid; then if they were to have it, then *a fortiori*, they that were not to attend. This shews that the King is to be at the Charge, and not the Subject.

The Answer is, this extends to foreign Wars, and then no Reason but that they should be paid; and so will not serve our Turn.

If there be such a Difference between Foreign and Home Wars, why do not the Acts of Parliament make a Difference? the Words are general and extend to Wars out of the Realm and in the Realm; and where the Laws do not distinguish, neither, I hope, will your Lordships.

Now I come to *Hen. 8.* who was as unwilling to beg, as powerful to command. 13 *Hen. 8. Cap. 20.* the King desires for some Necessity of Government, and against an instant Occasion, to have Power to make a Proclamation for Government, and to do it under Penalties. A Law seasonable for that time, tho it continued in *Ed. 6.* Time. As he would have Liberty, which he could not have without Parliament, to lay these kind of Penalties on Men; so the Parliament was as careful to give him no Liberty to lay any Charge upon their Estates, Lands, or Goods. So as, tho for the natural Government they leave him a Power to lay Penalties upon others; yet to lay any thing upon their Goods, that which is *meum & tuum*, he had no Liberty, which is a Declaration of the Opinion of the Parliament, that by the Common Law he could not do it.

But in the Preamble of the Act it is said, that there is some intimation of the Power of the King, if he will; and upon that Preamble indeed *Cowel* would have built the Royal Power of the King. But *Cowel* was mistaken, and had his Reward.

It is true, there is something in the Act that speaketh of the Regal Power in Necessity, but not absolute; and that too came in by the penning of it on the King's Side. And 21 *Hen. 8.* your Lordships know his Power, and how he was not to be resisted in small things. If he could pull down those Abbeyes, what could he not do? Therefore it was not for them to question with the King upon the penning of his Preamble, but a Dutifulness in them to conform themselves. And when there was Provision enough made against that in the Act afterwards, it had been a weakness of the House so to do.

Yea, the Act was that the King could not charge the Lands nor Goods ; but there is no such thing in our Case.

It is true, there is no immediate Charge laid upon the Lands or Goods, but in Substance and Consequence there is a Charge. It is all one to me in Substance, where my Life and Benefit is the same in either Way. And if I am taxed *secundum statum & facultates*, I must pay the Money out of my Estate ; and in the penning of an Act *non litigatur de verbis sed de intentione*. And if I am charged and pay not, my Goods are taken away and sold ; so it is all one to me, as if it had been laid upon my Goods.

For the times of *Ed. 6.* Queen *Mary* and Queen *Elizabeth*, and his late Majesty King *James*, I shall put my Observation of all these into one. I find not much upon the Parliament Rolls for these four ; few Statutes were made, yet in every one of these is offer'd one Act of Parliament, which is a stronger Proof than any of those which have been urged, and such Proof as doth only come home to the Defence of the Kingdom, in case of extraordinary Defence, in case of Necessity, and in case of Invasion. All this ariseth out of the Consideration of the penning of the Statute of Tonnage and Poundage, in the beginning of every of their Reigns. The Act that I mention, is *1 Jac.* where it is said to this Effect, that there may be Times of Necessity where Treasure is not to be wanting ; and it is unfit the Treasury should be unprovided at any time upon necessary Occasions ; and therefore they grant unto the King Tonnage and Poundage, but how ? Not for *quid pro quo*, not merely for Defence, but towards the Defence of the Kingdom. Then by the Judgment of the Parliament this being not granted formerly, but towards this Defence, and towards his great Charges : therefore, by that, the Charge by the Laws ought to lie upon the King.

Now, my Lords, if the King were not bound to the Defence of the Kingdom, whether or no would he accept it on these Terms ; and whether it seems not more than probable, that in case of Necessity the Charge may not be laid on the Subject. *1 Ed. 6. Cap. 13. Mariae Cap. 18. 1 Eliz. Cap. 19. 1 Jac. Cap. 33.* are the several grants of Tonnage and Poundage.

I conclude this Part with the Times of his Majesty that now is, which in the point of Defence have been stronger and greater than before, both in point of Laws, and in matter of Example. I take my beginning in this upon that Parliament *3 Car.* upon the Petition of Right, and his Majesty's Answer and Judgments to that are something home.

The Commission of Loans and Benevolence, the Necessity of the Time did require an instant Supply ; and it appears by the Commission, that there was a Necessity which could not stay for a Supply another way, and your Lordships know what was done in this. This Commission was not to borrow of a few, but it was general, with an equal and proportionable Weight ; and this, as it appears, was for the Defence of the Kingdom.

It hath been said, that mention is made of supply for the *Palatinate*, and to send Aids to *Denmark*.

True, it is so ; but that of the *Palatinate*, and that of *Denmark*, do upon the matter concern us ; for

that War being upon our Resolutions, there was a kind of Ingagement laid upon us.

In that Commission, there appears more than a possible Danger to the Kingdom ; there was a Necessity, yet this was laid down, it held not ; and in pursuance thereof there was an Order, whereof we have a Copy ; it is in the Exchequer moved by the King's Attorney for staying the Proceedings for Money spent about Loans, which was by his Majesty's gracious Command, wherein his Majesty did prevent the Commons desire.

The Petition goes on, that there were Soldiers billeted in several Parts, and there was a Charge ; and this was after a late foreign War, an Enemy then known and declared ; there was a Necessity for instant Defence, and to stand upon our Guard ; the Enemy might in a short time have been upon our Coasts : yet your Lordships know what was said to that.

And as the Petition looks back to those things that are taken of their Hands, so it looks forward and provides, that no such things should be taken hereafter by the Power of the King alone, altho upon matter of Necessity. And all this was a Petition not of Favour merely, but in point of Right, according to our Laws and Statutes, which are the Statute *25 Ed. I.* the Statute *de Tallagio non concedendo*, and *Magna Charta* the ground of all. And to all these his Majesty promiseth such things should be done no more. And they not content with this, his Majesty gives this Answer, *Soit droit fait*.

I cannot leave this great Strength thus, but bring it home to this very Case. The Substance of this Petition being for charging of the Subject out of Parliament by the Royal Power, when this Petition had passed the Lower House, it came to the Lords ; and upon some Motion, there was a Proposition of a Saving to be put in the End of the Petition, Saving the Sovereign's Power, which his Majesty is intrusted with for the Defence of the Kingdom. All this your Lordships know, that after several Conferences, in the Conclusion the Petition passed without any Saving.

My Lords, upon what Reason this Saving was left out, your Lordships may see by the Record, which your Lordships and the rest of the House best know, and whether upon this Reason or not.

That the Laws the Petition went on, whether the Saving would stand with those Laws.

My Lords, it appears that the first Answer was, that the Laws should be put in Execution ; yet in the Close there is put in a Saving of the Prerogative, but this Answer did not satisfy ; and therefore there was a general Answer, *Soit droit fait*. But now what was granted by the last Answer more than by the former, only that the Law was left more absolute ?

As to that Commission of Advice for consideration of Means to raise Supplies, and it was for Defence, and a necessary Defence, and that did not bear delays, that Commission was laid down by his Majesty ; yet in that there was no more than this Consideration, how Supplies might instantly be raised, which could not indure delays by Impositions or otherwise, that is still lawful ways. If there had been any to lay a Charge on the Subject by way of Loan, then that Commission had not been excepted against ; yet his Majesty was pleased to lay down this upon the desire of the House.

I conclude with that which I conceive to be the Judgment of both Houses in point. It is the Judgment of both Houses against the Sermon touched upon by Mr. *St. John*, which I shall press as far as it will be applicable to our Case.

The Sermon was to shew the Power of the King in Case of Necessity to lay a Charge on the Subject without a Parliament. When this came into the Lower House, this was the main and principal Charge, I say not the sole Charge. When it came into the Upper House, there it was pressed against that Divine by the King's Council; and it appears by the Journals of the Upper House, that the Crime was, that he should shew the King's Power to charge the Subject without Parliament. It appears by the said Journals, that the Doctor's excuse was, that he meant nothing but to shew what Kings might do in extreme Necessity of Danger. And your Lordships may read in his Sermon, that he speaks of Necessity, not attending the slow Motion of Parliamentary Advice; so that it is pinched on extreme Necessity: but neither one Excuse nor the other did serve his turn. The Offence is acknowledged, Submission made in both Houses, and the Sermon called in by Proclamation.

Ay, but saith Mr. Solicitor, this Sentence was for other Matters.

I say not, but that the Sentence was for this thing alone; there were other things, but they were only by the by; only occasioned by this. Now how far this Case comes to our Case, I leave to your Lordships Judgments.

Mr. Holborne's Fourth Day's Argument in the Exchequer-Chamber, on the behalf of Mr. Hampden, before all the Judges.

May it please your Lordships,

I Have thus far gone on in my Poof from Reason, Books, Cases and Authorities, all being of highest Nature, that is, by the Laws of England; that the King cannot charge his Subjects without their Consent in Parliament, tho it be *pro bono publico*, or for Case of Necessity. It now remaineth that I offer, what either the Practice hath ever been in the best Times, and the contrary Practice decried from time to time.

In this I shall do a Work of Supererogation. It is not material what the Practice is, if the Laws be once settled. A Law once made, overruleth all Practice afterwards. And as a Law is Law before Practice, so it is Law against Practice: yet because Practice may be an Expofitor of Law, especially where the Words may seem general, I shall shew from Age to Age, that the Subjects without their Consent could not be charged.

From the Practice of the Kings themselves, even in all Ages, that on extraordinary Occasions they have resorted unto Parliaments; and when they could not do good by that, they have made many Borrowings, as appears by the Parliament-Rolls. What other Courses they have taken, your Lordships have heard upon the former Argument. And when the King received these Supplies, it came voluntarily, and with Protestation, that those things should not be drawn into Example.

I shall go now to the Practice of the Subjects Part. First, I shall go as high as the Saxons Time. That of *Danegelt* did begin by a common Consent: and in the very Laws in Mr. *Lambert*, it is said *Statutum est*. Tho it always did not signify a Statute, yet when it was written by one that knew the Laws, and writ of the Laws, it must be so taken. *Tilburienfis* saith, as it was the Act of the King, so it was the Petition of the Commons; *Statutum est a Regibus*, still the King. It is strange in that time of *Ethelred*, when *Danegelt* was so great and common as it was, the Subject being easily drawn unto it, that the King should not ask it, when he might have it for asking. But this *Danegelt* being raised by *Ethelred* upon emergent Occasions, as it was not like to be always, so the Provision was not for all Times. After him came in some of the *Danish* Kings, and they continued the *Danegelt*. And what became of those that were the Collectors of the *Danegelt* between *Ethelred* and the Confessor, doth appear in *Huntingdon*, and how the People did decry it in general; then it was laid down *ut gravissimum*, as appears in *Ingulphus*.

Edward the Confessor he laid it down. At the Conquest, still they go on with the *Danegelt*. It was part of the Terms made by the People with several Kings, that it should be laid down, and King *Stephen* did promise to lay it down; tho notwithstanding they did now and then take it up. In *Hen. 2.* Time yet still more Complaints, and that was left out of the Charter of King *John*.

The Use of all this is, That tho there were a Practice under pretence for Defence of the Kingdom, yet the People did decry it; it was not such a Practice as could bring in a Law.

When *Danegelt* was thus laid down for the time of King *John*, *Hen. 3.* and *Ed. 1.* in which times Practice for Shipping will not be material, for in all those times the very Shipping itself was decried. *Parl. 25 Ed. 1.* there the very Charges of the Subjects for Shipping were the Complaint, the Complaint is the thing I am upon. After the *25 Ed. 1.* and the Statute *de Tallagio non concedendo*, the course of these Proceedings did alter; for before in *24* he sent forth Writs under a great Penalty, and *29 Ed. 1. M. 10.* he contracts for his Ships, and they go at his Charges. *P. 76. Ed. 1. Rot. 35. Reginald de Grey* when the Scots entred the Kingdom, he was commanded to bring Seamen out of their Counties, and he durst not without Money; and thereupon he had Money out of the Exchequer.

But the Answer was, this was for Scotland.

For that no doubt this War was at Home, for in the *26* the Scots had enter'd the Kingdom. *Br. Trin. 32 Ed. 1. Rot. 11.*

I come now to *Ed. II.*'s Time, there is not much against us, but for us. This I shall observe, that the first Writ that went out was *9 Ed. II.* It is true, a *Mandamus* went out for Shipping, and against an Enemy, and for Defence of the Kingdom, but how? Not a *Mandamus firmiter injungentes*, nor *sub pena forisfacturae*; but a *Mandamus rogantes*, and the means of compelling *quatenus honorem nostrum & Salvationem vestram diligitis*. So you see how the Course of the Law altered in that time.

I come to *Ed. III.* for I will but touch upon every Time, and offer but one Thing to shew the Practice in it. As I find a Statute in the beginning

ning of his Reign concerning Provision made for Wars, so I find an Execution. *Rot. Sco. 1. Ed. III. M. 8.* there went out two Writs, and they were concerning raising of Shipping, and in respect of the *Scots* entring that Year. This is that I put it for, to shew that upon that Occasion 1 *Ed. III.* Soldiers were paid, altho for the Wars in *Scotland*. It doth recite that the *Scots* had entred the Land that Year, and did make further Preparation; and if they could not have their Peace on their own Terms, they would proceed. *Consideratis etiam periculis*, for it was in *articulo necessitatis*; he giveth a Command that there should be Ships, but it is a *Mandamus rogantes*, nothing at all by Compulsion or Forfeiture in the Writ, *Sicut honorem nostrum*. It appears by the Writ, that he said, he sent Money at that time for the Victuals for the Soldiers; and this very Writ was *pro Salvatione Regni*, and that we could not be safe without Shipping; and this was in a pure and innocent Time.

I will not say, that in all the Actions of *Ed. III.* he never broke this Rule: your Lordships know what Wars he had, and what Necessities, and what those Necessities brought him to; but he was so far from justifying of himself, as it appears by *Daniel's* History, that he sent to the Archbishop of *Canterbury*, to pray for him, and desired the People not to think ill of him for laying those Charges upon them in Case of Necessity. 12 *Ed. III. Rot. Alm'*. Your Lordships shall see upon that Acknowledgment, how he began to alter his Course. Parliament-Roll, 13 *Ed. III.* tho he laid Charges before now, he calls a Parliament, and desires Supplies for Shipping that way; and that Acknowledgment 12, will answer home that famous Year of 10 *Ed. III.*

Next, my Lords, to shew the decrying of the People in this time of Shipping itself, in the Rolls of 21 and 51 *Ed. I.* there the People said they were not to bear the Charge; so it was no Practice, for the Commons did decry it. That for Hobbellers, they were at the Charge of the County before 25; but that they were complained of in Parliament, wherein the Statute of 25 *Ed. III.* was made. But all that I aim at in this is, whatever the contrary Practice was, to out-balance it by the contrary Opinion, and Claim of the Kingdom; and the Practice I hope shall not be able to make it Law.

I come now to the Time of *Rich. II.* for his Time I shall remember but one, *Tr. 7. Ric. II. M. 15. de contribuendo ad Custodiam Maris*, there is a Recital of *Danegelt*; and that the Subsidies that the King had were not sufficient, and therefore commanded an Aid, but to do it *gratuitur*.

I do observe, that all Ship-Writs do end in the Time of *Ed. III.* one or two perhaps may be after, and therefore I do end with the Practice of those Times; but from those Times downwards to *Hen. VIII.* this was offer'd, and not denied. That there are several Records, how the Kings of *England*, both at Sea and Land, did bear the Charge of Defence; and all the Answer was, that it doth not appear how the King doth raise the Monies.

For the Time of *Hen. IV.* 2 *Hen. IV.* Parliament-Roll. A Complaint of the Commons, of a Commission for building of Gallies for Defence: And their Complaint was, that it was done without Consent of Parliament, which ought not to be

done, and this Commission is repealed. This shews the decrying of the Subject, and that the Practice hath been, that the Defence was at the Charge of the King.

I have thus finished the Negative Part of the Argument, that the Subject is not compelled to find Shipping for Defence at their own Charge.

Next for the positive Part, that the Charge both in Cases ordinary and extraordinary lies on the King, and that by the Common-Law; and that the King hath Provision and Consideration for it.

My Lords, for Provisions regularly, whatsoever Estate is in the King in the Politick Capacity, is in him as *Rex*, and not in him in his natural Capacity; and what is in him so, is for the Benefit of the Kingdom: and that hath ever been the Ground of the Acts of Resumption, and some of Resumption made by *Hen. VII.* where Lands were aliened by him, he made a Resumption; and those many Privileges that the King hath in him, are as *Rex* in his Politick Capacity. All which Cases are put together in *Calvin's* Case in the 4th Report, and not only in *England*, but in all Christendom: All Estates in Princes are held for the Benefit of the Kingdom, as well as for themselves; and that is not denied by King *James* in his Answer to *Perron*; he would have it absolutely to be to that purpose. All that is to the Advantage and Honour of the King, is for the Benefit of the Kingdom.

My Lords, from the Consideration of the Interest of the Kingdom in the Estate of the Prince, the Parliaments have so often offer'd their Service to the King: And the Parliament in former Times did require a Hand in the naming of a Treasurer, they called it *antiquus Mos*. And it was 5 *Ed. III.* in a Parliament, but repealed 15 *Ed. III.* And for antient Lands of the Crown they were not devisable out for that Reason; and that none should buy the Land of the Crown, for it was not alienable in that Time.

My Lords, in the Form of our Government, the King in the Supposition of the Laws had all these. By the Books cited by Mr. *St. John*, all were in the Crown, and being so, they were for the Service of the Kingdom; and that is the Reason that all Land is held immediately or mediately of the King. As a Lord of a Manor, when he hath a Circuit of Ground, he lets one Part to one Man to plow in Knights-Service, and part he keeps for himself. So the King when all was in him, he disposed of some for the Service of the Kingdom. Hence ariseth the Tenures originally. As they kept in their Hands Palaces and Demesne, so for publick Service they made distribution of certain Lands for publick Defence; some by Knights-Service, some by Scutage, some by Cornage, and some for Castle-guard and Grand Serjeanty, all for the Service of the Kingdom; and Tenures *per Baronagium*, which was an eminent Service, as appears by the Books of the Knights Fee. Petty Serjeanty for meaner Offices, and Grand Serjeanty for greater Offices.

Divers Lands were given to find Ships, as in *Doomsday-Book*, besides the Cinque-Ports, which were to find a certain Number; and so some Inland Towns did find Ships, but how? As by Tenure, not generally as Subjects. And tho Mr. *St. John* did urge one or two Precedents by way of Example, yet he said not there were no more.

Mr. Solicitor did give an Answer, that all those came out of the Estate, what was that Charge to the Publick?

It is true, if the King had that for himself originally, he said well; but if it was in him originally *pro Regno* as well as for himself, then it is otherwise.

But it hath been said, what are a few Men, or one Ship?

But it appears in *Doomsday-Book*, the King hath a great Navy. There were sixty thousand Knights Fees in the Conqueror's Time; and tho divers Serjeanties are turned into Rents, yet the Revenue is the same. I shew it for this, that there was a Provision made in the Institution of our Frame of Government, but for the guarding of the Sea more particularly.

The King for the guarding of the Seas hath all the natural Profits thereof; as all great Fishes, Whales, Sturgeons, &c. and all other Profits of the Sea, if the King would take them; and so Letters of Marque: and tho some of them are got into the Subjects Hands, yet originally they did belong to the King. So the old Customs by the Common Law, *Antiqua consuetudo*: and so holdeth Sir *John Davies* in the Customs of Ireland. So Prizes and Impositions are for the Defence of the Sea. So Tonnage and Poundage, which was originally granted for ordinary, but oftentimes upon emergent Occasions it appears it was granted *pro Salvatione Regni*, and not granted amongst other things, but by itself. But in latter Times, when it was settled upon the Prince for Life, then it was for extraordinary Defence, and to have Money in readines for an instant Occasion: for it is said, in the very Grant to King *James*, that the King must not be without Money; and therefore, towards his Charges upon an instant he must have it. And tho it was granted on particular Occasions, yet that is enough that it was granted on great Occasions; and this was granted out of their Love to him. The Words of the Act 1 *Jac.* speak of a sudden Invasion; now whether this is by Sea or Land, it is general.

My Lords, I shall now upon the whole observe what I have made good, either upon those general Statutes, that the King shall lay no Charge, or rather by the Books, that the King cannot charge for little things; or upon the Practice of Times, where in every Time the King hath been at the Charge, and when it hath been on the Subject they have decried it. How you, my Lords, believe it in point of Right, I leave it to your Judgments.

My Lords, I shall go on to the Answer of Mr. Solicitor; I have made a Reply to all his Answers to our positive Part. It remains I should offer an Answer to his positive Part.

First, I shall give a general Answer to his whole Argument; for if the Case be, as we conceive it is, that the Point of *Salus Regni* is not now in question, the Argument will fall off.

How far *Salus Regni* is in the Case, notwithstanding, I shall argue over, and examine the nature of his Proofs.

I am sure he had none from Parliament, either Act or Declaration of both Houses; what there is, is against him. The Answer of the King, with the Judgment of both Houses, is a main thing in point of Right. I did not receive any legal material Record, but that of the Abbot of *Robertf-*

bridge, not any Book-Cases in Point, where it is said the King shall charge, but the Books 13 *Ed.* IV. I shall answer these First, Practice next, and Reasons last.

To begin with the Case of the Abbot of *Robertf-bridge*, which was open'd by both Sides. It was 25 *Ed.* I. the Abbot had Land agifted *ad Custodiam Maris*; and in an Action brought, the Abbot pleads that he had found a Horse for the same Land. Here is an Argument, that the Abbot doth admit that the King might agift *ad Custodiam Maris*: now if that Admittance in this Case should be of any Authority to alter your Judgments, I shall leave it. The Abbot's Counsel did no more than a discreet Counsel would have done. If an Action be brought for Words, and it appears the Action will not lie, what then? If the Abbot had a Plea that he was agifted to find a Horse, what Reason had he to put himself on matter of Law with the King? So the Authority can be nothing against us; and at the best the Case did rest there, and went no further.

For the Book-Case, 13 *Ed.* IV. where it is said, that the King can lay a Charge, that Book is with reference to Toll; and such things are nothing to our main Case; and that Book will prove strongest against the King. The main Case was concerning a new Office of Measurage erected with a Fee, this was *pro bono publico*, yet an Action brought; it began in 11 *Ed.* IV. then cometh the Parliament in 13. and this was complained of to be against the Statutes, that provide that no Taxes should be laid. The Answer is, Let the Statute be observed.

To the Case of Toll, which for common Necessity to maintain Traffick, and because there must be a Power in some Body, and without a Fee not possible to maintain the Charge, it is allowed it may be done by the King: but in our Case here is no common Necessity, here is a thing that may seldom or never happen. The ground of granting Toll is this, because it is *pro bono publico*; yet if not for common Necessity, the King could not do it.

Next, the Toll is not so much a Charge, it is *quid pro quo*: in the 5th Report it is said there, that it is no Charge for the Benefit in the thing itself will quit the Charge.

Again, Toll is but *inter minimum*, this of Weight; and tho an Argument will hold *a minori ad majus* in the Negative, because a Man cannot do a less, therefore not a greater, but not in Affirmatives, because he can lay those, therefore greater, *non sequitur*.

Next, for Toll; no Man is forced to pay Toll, because no Man is compelled to come to the Market; if he will come voluntarily and receive the Benefit, then there is Reason he should pay it; but this is not our Case.

Lastly, The Law doth allow in this Necessity, in case of Toll, to the King a Power to grant, yet the Law doth not leave the King absolute Judge of the *quantum*: For if the Toll be not proportionable to the Benefit, the Patent is to be avoided, as in case of a Fine uncertain. Now, my Lords, in our Case here is no Judge of the Proportion but the King; so the Argument is thus:

If the Law admit not the King to charge but in common Necessity, then not in Cases that may happen but seldom or never; if not in small things, then not in greater.

I come now to Practice : And for Practice, where there is no Opinion, either for Records or Books to warrant it, it is something weak, especially when there is no urgent Occasion.

For the Practice, I shall give this general Answer: If I can satisfy your Lordships by Authorities of Parliament, how the Law standeth; the contrary Practice, either before or after, is not material; and for that, I must leave it to your Lordships.

Your Lordships have heard us read the Words of the Acts of Parliament, and explain our Meaning thereon, and we have brought them home to our Case: It will be hard to make an Exception if the Act be general.

For, my Lords, the Practice, it consists of two Parts. *First*, Arrays of Men. *Secondly*, Of Shipping, and for Shipping; *de Navibus congregandis*, or *munitionibus* and *invenendis*.

For Practice of Arrays, I shall lay them by, and give them a general Answer: for there were very few if any that went from the Beginning of *Rich. II.* but only to see if they be armed, & *prompti*, and that is made by the Statute of *Winchester*. It is one thing to see that they be armed and in readiness; and another thing, at whose Charge they shall go: that appears not out of those Arrays. There is no doubt but the Subject, on the Statute of *Winchester*, ought to be ready with Arms, and in his County to make Defence; and upon Occasion he ought to go out of his County, but at whose Charge, that is the Question. And if those Writs of Array were the same with the Commissions now to the Lieutenant, yet I know not how; this is my Argument in the Case: and so your Lordships see that a great Number of the Arrays falls off this way.

But if Arrays had been, and at the Subjects Charge, yet against the Statute; I leave it to your Lordships to judge, how far Practice shall be an Argument.

But for Shipping, for Writs *de Navibus congregandis*, those are nothing; for the Matter is, whether they shall be paid before they go, and many of the Ship-Writs are of that Nature. No doubt but the King may command *ad congregandas Navis*, to use them upon occasion; but the Matter is, at whose Charge they shall be. And for all the Writs that are to find Ships, I hope those Writs are not concluding.

My Lords, for those Writs that are *sumptibus propriis*; a Writ, and no more, without Execution, is not a Practice sufficient to make a Law, no more than a common Evidence, when to prove Right by Usage. Now whether or no they have shewed a general Execution, by obeying and doing it at their own Charge, or Money levied upon them, I leave it to your Lordships; I see no Proof. It may be, such Writs might be; but that there was an Execution of them at their own Charge, or Money levied on them, we see no such thing. And if Writs were to find Shipping in these Times, it is like the Moneys were returned by the Counties, and so the Receipt might shew it, especially if Inland Counties, where nothing could be had from them but Money.

But, my Lords, to examine on those Grounds, whereby a Practice must make a Law: If this charge be within the Words of the Law, no Practice can take this out of the way of Exception. The Practice must either shew that was the Common Law, and so *Generalis Consuetudo*, or must declare the Meaning of a Statute by con-

stant Consent; which must be of those that could consent, and those which did not express a Dissent.

We are now upon Inquiry as on Practice, tho the King cannot generally lay a Charge, yet whether he can do it in this Case, to make an Exception of Law; it must be done by Use and Practice; as to make a Law, Practice doth not make Common Law, but as it is a Proof of common Consent: for all Laws are made two ways.

First, By express Consent of Parliament: Or, *Secondly*, By Use, from Time to Time, whereby it doth appear this was excepted, and the Use becometh a Common Law: So as still, if an Use doth make a Law, such Use it must be as doth prove a tacit Consent.

Next, as the Use must bind the Kingdom, so it must be general over all the Kingdom; it is not enough to be at some times and seldom, but it must be *semper eadem*. And, *Lastly*, It must be reasonable.

I shall examine on these Rules, for these are undoubted Rules to examine a Law by, the Writs of *Hen. III. Ed. I. and Ed. III.* In all these Times the Practice, as to this, will not make a Law; here will be no Proof of a Consent.

First, For *Hen. III. to 28 Ed. I.* here the Subject, as before the Complaints, which begot the Charter of King *John*, was upon the Charges imposed on the Subjects; so afterwards, until the *25 Ed. I.* the Law of the Liberty of the Subject was not settled: For tho King *John* did grant his Charter, yet the Pope did dispense with him, and he broke it, and so it rested till *9 Hen. III.* So all this time the Subjects of *England* were under Power; and what in that Time he might do by Duress, was not by Consent.

Then, *9 Hen. III.* he made a Charter, yet from time to time he broke it, tho he desired to be excommunicated if he did it; and so it rested until *25 Ed. I.* and then with much ado was gotten a *Confirmatio Chartarum*: yet this satisfied not at all. Till *28 Ed. I. Mag. Char.* not observed. I could shew divers Cases point-blank against these.

The Statute *28 Ed. I.* saith expressly, that this Charter was not observed; and it was once a Punishment for those that were the Breakers thereof. Now when Acts of Parliament declare that the Law of the Liberty of *England* was not observed, I shall not need to shew any Record how it was broken: So that all the Practice in *Hen. III.'s* Time, tho much, yet that will not serve the Turn; for that Government was more of Force than Law.

But for that of *Hen. III.'s* Time, I shall give a further Answer; the very Courts of Justice were shut up, then it was *in flagrante Bello*.

And for *Ed. I.'s* Time, all the main ones considerable were immediately before the making of that Statute; if rightly apprehended, they did particularly occasion that Statute: so the Subject did deny it, and it is a Dissent.

After *28 Ed. I.* little considerable; and *Ed. I.* when he made *28 Ed. I.* when the Charters were confirmed, yet he had his *Salvo Jure Coronæ*, which did not please the Subject: And afterwards, notwithstanding he made some Grants in Parliament, yet sometimes he did revoke. Your Lordships know what a great Renunciation he made; but as some of our Historians observe, when he had Occasions for Moneys he did grant, but otherwise did not; so that in all his Time the Subjects did

did not consent, but as much as they could, did dissent: and in the 25th, you see how the Practice did alter for commanding of Ships.

Next for *Ed. II.* for his Time, we see how he went. In the Beginning of his Reign he sends but a *Mandamus Rogantes*. In the End of his Reign, whether his Government was more of Law than Power, I leave to your Lordships; that little Practice that way, if it doth come home, is not sufficient to make a Law, who was under Will.

Next for *Ed. III.* for him in his best Times, you see how he went, he laid not the Charge on the Subject at the first; afterwards there is no Age wherein there were so many Complaints as in his Time, from the first to the last: and not only in this of Shipping, which, as often as it was, there was still Complaint, but in Impositions on Merchants, whereupon Lord *Latimer* was imprisoned: so that in point of Charge, the Subject did enforce him upon it in time of Necessity. So that in those Times the Practice will not be any Argument against us.

That of 10 *Ed. III.* he confessed that he had laid too heavy Charges on the Subject, and did ask Forgiveness; so here was no Consent, but a several Dissent by their several Complaints. And if I take off these three Kings Reigns, I take off all the force of Practice concerning Shipping; for from that time afterwards you will find very little, for what cometh afterwards is but for Matters of Arrays.

The next Thing is, that every Practice that must bring in a Law, must be constant and continual, so long together as may bring it into a Custom.

Now out of what your Lordships have heard, if you conceive in the Times of those three Kings, that they had one way and the Subject another, then there is no constant Practice to lay it on the Subjects. And for Arrays, I conceive them to be no part of the Case.

And for the next; if Practice make a Law, it must be general thro' the whole Kingdom; for that is our Case, we are in an Inland County; and observe how few Writs we have that went over the whole Kingdom: Nay, have you any that prove it indeed? That they went to some Inland Counties it is true, but that they went to all thro'out the Kingdom, you shew not.

Now if you will have a Practice to bring in a Law, you must not bring your Practice by pieces; at one time in one part, and at another time in another part: for that in one part of the Inland Counties alone will not be justifiable, for that was to lay a Charge on the one, for the Maintenance of the whole; and that is against Reason, and the Reason of this Writ. So to charge the whole Kingdom, you must shew they went over the whole Kingdom; for Obedience in some Parts, will not bind all, so once or twice will not do it; for the Writs that have been produced, many of them went to the Sea-Towns only.

Next, my Lords, admit that the Practice had been constant from King *John's* Time down to *Hen. III's*, so to this Day; under favour, as the Case standeth, your Lordships could not find such a Practice as could now introduce a Law. The Custom, which must be of a Manor, you must not shew the Beginning of it, that within Time of Memory the Thing was not so. True, if the Time

had been long, and I cannot shew when it hath not been, that is Time out of mind.

To examine this upon the Rule; it hath been said, that from the Time of *Hen. II.* *Danegelt* was taken: True, it was taken, *de facto*, but not *de jure*. The Subject was not at that Time charged both with *Danegelt* and Shipping too. Then our Course of charging the Subject to find Shipping, must begin since that Time.

But peradventure it will be said, as *Sir Henry Spelman* in his *Glossary*, that when *Danegelt* went down, this other came in. And peradventure it will be said, this is enough to shew this begun, tho but in Memory; then it is but to see upon what Warrant of Law this begun.

If *Danegelt* had not been legal, then this to come instead of that which was not legal is not sufficient. Now for *Danegelt*, it was not legal, and so *fallit Fundamentum*: if it had been legal, yet not so pursued in the Course as is legal, so that there is no Ground for it on Right or Wrong.

That *Danegelt*, when it went, it went over all the Kingdom, and in a proportionable way to all; yet these Writs for Shipping were commonly to the Sea-Towns, and but some times to some Inland Towns. If *Danegelt* were on the Land, and certain, this is on the Person, and uncertain; this respects both Lands and Goods, the other not. There is no such Assurance of equal charging in this, or in the other, if *Danegelt* had been legal; yet whether this coming in lieu of *Danegelt*, being of a far different Nature, be legal, I leave it to your Lordships Judgments.

Next to examine it upon another Reason, upon the Reason of the Practice. If the Practice went over the whole Kingdom from time to time, there was the more Equality; but if the Practice went over the Kingdom, but by degrees sometimes to one part, sometimes to another, tho over all the Kingdom at Times, yet this is not sufficient to make a Law. For that Act which is unreasonable in itself, and not agreeable to Justice, will never make a Law; for a Law will never arise out of an Act illegal. Now, my Lords, when a Charge is laid upon Parts of the Kingdom, which the Whole should bear, it is unreasonable. I will not deny, but in Manors, where you are to have a Custom, sometimes on one Piece, and sometimes on another; this may be good, tho it goes not over the whole Manor; because in this Act there is nothing against Justice, for here one Man doth not bear the Charge for the whole; but 'tis otherwise in our Case.

My Lords, I shall go further; as for the Inland Towns, so for the Sea-Towns, we do not find a general Practice of all Sea-Towns together, sometimes to one, sometimes to another; if any to all, yet not to all oftentimes.

My Lords, admitting Arrays would be material in this Case, as I conceive they will not; yet under favour they will be no Precedent for the defending of the Sea, the Case doth differ.

For tho the King be Lord both of Sea and Land, and hath in them both the sole Dominion; yet in the Sea he hath the whole Property, and in a manner all the considerable Profit and Privilege; the Subject hath but the Passage of the Sea, and the *Minima* to take Fish, not considerable in point of Benefit: But for the Land, that is our own, and the Land of the Kingdom is the House of the Kingdom. As for the Charge of the

Land to find Shipping, there will be a great deal of difference between Sea-Towns and Inland Towns: As those that live in Sea-Towns are in more Danger from the Sea, so they have more Profit and Privileges; and that is the Reason that in the Parliament 13 Ed. III. the Sea-Towns should do it in regard of their Profit and Privileges.

And for the Command to find Ships, the positive Law is to make those to find Ships which are chargeable, as your Sea-Towns, and for Inland Towns to find Arms; because both are not fitted alike, there is no Reason that they should be charged alike. Upon this Reason is the Case of *Beverly* put before 2 Ric. II. where the Complaint is, that they are charged for Shipping, being a dry Town; they say they were charged *indebitè*. 10 Ed. III. *Shoreham*, they plead they never found Arms, but Shipping, and a good Discharge. And in *Mat. Paris*, upon Wars with France, the Sea-Towns complain, and desire Help; so that the Burden, lies on them if on any. My Lords, I have gone over in a general Way, as well as I can, and endeavour'd to answer the Practice; to have gone over all in particular would have required longer Time than your Lordships can spare.

The Reasons now only rest to be examined; for if no full Authority, nor sufficient Practice, Reason alone will not argue against a fundamental Rule: for we are not now to examine on Reason what is fit, and what not, but to see what is the Truth.

The first is, that *Salus Populi suprema Lex*: the Question is not what we are to do by Necessity, but what is the positive Law of the Land? The Question must now be as before; What Power is in the King, and did our Forefathers in that Time of Peace and Government leave in the Crown, not in Case of Necessity and publick Danger; when with them, *Salus Populi* was *Suprema Lex*, and upon that they did ground the Rule of Government? In this Case, whether or no, in their Consideration, they did conceive for the publick Good, to leave the Power in the King or not, to lay a Charge on the People; there the Rule came in, *Salus Reipublicæ Suprema Lex*: And that which they looked on most, was the Benefit of the Multitude. So that now, my Lords, it is not to dispute, whether it be better or worse, but that it was.

And to shew there was no such great Necessity as can countervail the Possibility of Prejudice the other way: If there do come such a Danger, then the Subject is at that time under a Law of Preservation of Life; and all which makes the Subject as willing to obey, as to submit to Government in the Creation. This Law is of an higher Force than any positive Law can be.

But admit that this cease in this Case, and all positive Laws of Property yield to the Law of Necessity; yet I admit nothing, tho I might admit much, and not prejudice the Case.

Tho no positive Law doth charge, yet in case of imminent Danger, if I should say my private Property is become publick, it is no Mischief, for so it is in some Cases: for in this Time of imminent Danger, the King and Subjects are under a Law of absolute Necessity, and publick Safety. In all human Reason, when the Danger is in *Proxima potentia*, we may prevent it; thus if another Man's House be on Fire, mine may be pulled down to stop it: so that we may see by

what Grounds we do go in case of absolute Necessity. If the King doth command any thing concerning the Property of Goods, in respect of Danger, the Execution may not be by any positive Law merely, which in such Cases do cease in *furor Belli*; for those are acted by Formalities, and *inter Arma silent Leges*. And in these Cases, as the King may command my Property, so may the Subject command the Property of another: The Books are so, 8 Ed. IV. for hindering the Landing of an Enemy, Bulwarks may be built on my Land without Consent. So the Power is not only in the King in these Cases of Necessity, but in the Subject: and the Books say not that the Power is only in the King, but I can do it, and the Law of Necessity is the Warrant.

Then, my Lords, it resteth considerable in this Case, what shall be said to be a Time of Necessity. I speak still by way of Admittance, for I grant nothing.

It must be in a Danger now acting, or in *Proxima Potentia*; as Fire, tho not burning, yet ready to burn: that is, there must be a War, *furor Belli*. Note, That when the King makes Proclamation of War, or the King is in the Field: and that indeed was not Mr. St. John's Meaning, it was taken further than he meant it.

It must be in such a Danger, when this Power is of Necessity to be used, as in case of Fire; there must not only be Fear of Fire, for one House must be first actually on Fire, before the House can be pulled down, but withal such a Danger, that if this be not pulled down, the other will be lost: And as in case of an Enemy, a Subject, out of Fear of an Enemy, cannot build a Bulwark on another Man's Land, but when he is a coming. So that none of these Cases will match ours.

The Property yieldeth not in Fear of Danger; but such a Danger, as Help must come in *nunc aut nunquam*. This Time is not when the King will think there is Occasion to exert this Power, as in the Case in 88. Tho the Queen and State did command the burning of those Goods and Provisions, if an Enemy landed; which was a lawful Command, and justifiable to be done, so they did land; but could not command them to burn their Corn before an Enemy did come.

Your Lordships know the King may command in case of Danger the Destruction of all Suburbs, rather than an Enemy should come in them. But if there be a fear only of Wars, if the King should command it, how far that is justifiable, I leave it to your Lordships Judgments. All this Difference appears out of the Case of the *Gravesend Barge*, *Duffield's Case*, 12 Jac. If there be a Storm, or a Leak in a Ship, that the Danger be actual, it is justifiable for the Master to throw out the Goods; but if he sees a Cloud arise, and out of Fear of a Storm he threw out the Goods, I doubt on a Jury which way this will go with the Barge-man; but if a Storm do come, or a Leak spring in, in that Case the Barge-man may do it. So you see upon what Law my Property yieldeth.

That Position generally taken, as it is said, may be of a great deal of Consequence; for it doth not rest there, solely upon yielding of the Laws of Property: for all positive Laws do cease in that Danger; then the positive Laws of my Liberty and Person also do cease.

Now, whether or no you conceive all Laws of Liberty and Person cease in this time of Danger,

ger, when the Danger was but conceived and not actual, that I leave to your Lordships Judgments. And if that Rule be general, then why not the other?

So we may see the difference from our Case; for in that Case there is no manner of loss to the Subject, for he shall have Allowance for his Loss, or make Suit to the Parliament, and they can recompense him; for what is taken for the publick Good is but borrowed. As in Case of Shipping, if my Goods be cast out to save the Ship, every one of the Ship is to bear a share; so in our Case, either the King must do it, or the Parliament: so there is no Prejudice.

So upon the whole, my Answer is, admit the Rule of *Salus populi suprema Lex*; yet the Law of Practice doth not yield, till there be an actual Enemy, or *flagrans Bellum*. It is not enough that there be but an Apprehension.

There were divers other Reasons urged, (but those two of *Salus populi suprema Lex*, and of private Property must yield to publick Safety) were the two *Rationes cogentes*; the other were but *a pari & a simili*; and all those I shall pass over which were only for Convenience, as the granting of Toll, or a Corporation to make Ordinance for the good of the Corporation: all these will not come home in the manner. My Lords, in all these Cases *a minore ad majus non valet, negativum valet*.

But there are only two Reasons urged, which require an Answer: The Trust that the Laws put in the King in greater Matters, *viz.* the shutting of the Ports; and the *Droit Royal* of Wars and Peace.

For the shutting of the Ports, there is more difference in point of Prejudice of the King than the Subject. The King cannot shut the Ports but to his own Prejudice. Again, the shutting of the Ports without cause of Necessity, the King hath the Loss as well as we; for by that he loseth his Customs, and by shutting them he can gain nothing at all. And besides, there is no Law at all that hinders him from that. But there is a Law faith, that he shall not tax the Subject without Consent in Parliament.

The next is the *Droit Royal* of Wars and Peace. It is one thing to say, the King can make War and Peace; another thing to say, he can charge. In War and Peace the King is equally charged with the Subject, nay more; and for those things there are no great Reasons, but that in the first form of Government they might be well suffered. For that Cause touching the King's Power over Coinage, there was a Necessity to counterpoise the like thing in another State; in that Case the King loseth and we lose. The King may dispense with Penal Statutes, and make them as none. Doth any Laws say he shall not do it? The Reason differeth in that Case; there is a common Necessity that there should be a Power in some Body, for Acts of Parliament are but *Leges temporis*. It is one thing for the King to have Power in point of Favour, and another thing in point of Charge; so in case of Pardon, there is no hurt if he doth pardon, God forbid that he should not have Power to shew Mercy.

My Lords, there are in the Case two Points more which I shall move. Whether or no, admit the King could command the Subjects to find Ships, he can give Power to the Sheriffs to make

the Assessment as in the Writ? The Ground is upon this, that in all Cases of politick Charges the Law takes an especial Care to, make an Equality. In Parliaments of old, they were always careful to make Provision that way, as upon Fifteenths and Subsidies. And in *Danegelt* they went such a way, as there could be no Inequality; they went by taxing of Hides. Now if the Law doth make this a legal way of charging, it allows the like way for Assessment that is allowed in other Cases, such a way as wherein there can be no Inconvenience. Now how a Sheriff hath that knowledge to lay it on Men's Estates and Lands, I cannot tell.

My Lords, not to leave a Power in the King to lay an arbitrary Charge, but in the Sheriff to lay more or less on any Man; tho the Law may trust the King, yet it is a Question, whether it will trust the Sheriff.

Nay, I ask if the Sheriff be an Officer of Law in this Case; yet the King may command any Man as well. Assessments are usually made by others, and not so much by the Sheriff. So I do conceive that this is a Thing that doth properly belong not to the Sheriff, he is not an Officer sworn; and it resteth not only in the Sheriff, but the Under-Sheriff. So that if the Law doth trust the King, yet whether or no this be the way to charge it, I leave it to your Lordships Judgments. If a Hundred be charged, they have ways to lay it on themselves proportionably.

The next Thing is this; admit a Levy may be well made, whether the Money thus paid may be brought into the Exchequer by a *Sci. Fa.* I do think that this is the first Writ that ever was of this kind, I do not find it regularly.

My Lords, I think it is hard to find where there is a Writ that commands and prescribes the manner of Levy. It not only gives you Power to levy, but sets the way of Levying, by Imposition, by Distress, by Selling; for my part I know no Case can match it.

The First Day's Argument of Sir John Banks Knight, his Majesty's Attorney-General, on behalf of his Majesty; before all the Judges in the Exchequer-Chamber, in the great Case of Ship-Money.

May it please your Lordships,

There was a *Sci. Fa.* brought against Mr Hampden, and divers others, to shew Cause why those Sums of Money assessed upon them by the Sheriff of Bucks should not be paid and answered; it beareth Teste the 22d of May 13 Car. and a *Sciri Feci* returned.

Mr. Hampden demandeth Oyer of the Original Writ 4 Aug. 11 Car. and of the *Certiorari*, and the *Mittimus*, and of their several Returns. The Writ 4 Aug. which went out to provide a Ship of 450 Tons, with Victuals, Men, Ammunition, &c. that Writ giveth Power to the Sheriff to make an Assessment upon the County, and giveth Power of Distress and Imprisonment in case of non-payment. He demandeth Oyer of the *Certiorari*, which consists of two Parts; the one to certify the Sums assessed, the other to certify the Names of the Defaulters. And the Names of those that made Defaults were returned, and Mr. Hampden amongst

amongst others. He doth demand Oyer of the *Mittimus*, which doth recite the Tenor of the first Writ.

Upon Oyer of all these, both of the Writ 4 Aug. of the *Certiorari*, *Mittimus*, and *Sci. Fa.* and their several Returns, Mr. *Hampden* hath demurred in Law.

The Case that riseth upon the Record is thus. The King is Lord of the Sea (for that is part of the Record) the Seas are infested by Pirates and *Turks*, which commit Depredations, and take Goods and Merchandizes, both of the King's Subjects and others that traffick here, and carry them away into Captivity. There is Preparation of Shipping and imminent Danger, for so the Writ reciteth: A Danger that the King's Dominion of the Sea should be lost, or at least diminished. There was a further Danger, that *Salus Reg. periclitabatur*, whether in this Case the King *pro defensione Reg' tuitione Maris, securitate subditor' & salva conductione Navium*, may command his Subjects *per totam Angliam*, by Writ under the Great Seal, to provide Ships at their own Charge and Cost; and this do, when the King in his own Judgment conceiveth such a Danger, as doth necessarily require that Aid? That under favour is the Question upon the Record.

There is in this Record, whereof your Lordships are Judges, four Writs. First, That of 4 Aug. 11 Car. which goeth out of the *Chancery*, for setting forth this Ship of 450 Tons. Secondly, the *Certiorari* 9 Martij 12 Car. Thirdly, the *Mittimus* 5 Maij 13 Car. And Fourthly, that of the 22 Maij 13 Car. which is the *Sci. Fa.*

The Second and the Fourth Writ, which is the *Certiorari* and *Sci. Fa.* they are returnable. The First and the Third Writ, which is the Writ 4 Aug. and the *Mittimus*, they have no Returns; but they give Command, and require Execution shall be done, *prout de jure, & secundum consuetudinem Reg' Angliæ fieri consuevit*.

The First Writ, which is the Ground of this Business, it standeth upon two Parts: A Preamble, and the Body of the Writ. The Preamble that containeth, First, A Direction; and Secondly, the Causes and Motives of the issuing of this Writ. The Body containeth Six Parts. First, the Direction that is to the Sheriff of the County of *Bucks*, *nec non* unto the Bailiffs and Burgesses of the Borough of *Buckingham*, and Mayor and Burgesses of *Chipping-Wiccomb*, alias *Wiccomb*, and *pro his hominibus* of all the County. Secondly, the Motives and Reasons inducing this Writ, which are nine in Number. 1. *Quia Piratæ & Maris Grassatores, &c.* That these commit Spoils and Depredations by Sea, and take the Goods of the King's Subjects. 2. Because they carry the King's Subjects into miserable Captivity. 3. Because of the Preparation of Shipping that is made *undique* to infest the Coasts. 4. *Quia pericula imminent, &c.* 5. *Quia pro defensione Reg. tuitione Maris, &c.* 6. *Quia pro debellatione quorund' hostium satagent, &c.* 7. *Quia Progenitores nostri Reges Angliæ dig' Maris temporibus, &c.* 8. *Quia onus defensionis, &c.* 9. The most prevalent, *Quia hoc per legem & consuetudinem Angliæ, &c.* The Body of the Writ contains also several Mandates to the Sheriffs and Head Officers, *quod fide & legiancia, &c. & sicut nos & honorem nostrum diligitis*. The Mandates are six. 1. To provide a Ship of 450 Tons well manned and furnished with Provision, and

that was to be in readines by the first of *March*, to continue for the space of six and twenty Weeks, *ad proficiscendum cum Navibus nostris, &c. pro tuitione Maris, &c.* 2. That the Sheriffs and Head Officers meet within thirty Days, and set down what shall be taxed upon the incorporate Towns. 3. A Command to the Head Officers of those Incorporate Towns, that within their Baliwick they make an Assessment upon particular Persons, and compel them to pay the same. 4. A Power to the Sheriffs to assess all the rest within the County, *juxta statum & facultates*. 5. A Command for the levying of these Sums by distress, *& quos rebelles inveneris* to imprison their Persons. 6. That no part of this Sum collected shall be converted to any private Use; but if any Money shall be remaining, it should be paid *inter solvendo*.

My Lords, the Reasons expressed in this Writ might justly satisfy any Man's Judgment without further Argument; but I shall clearly manifest there is no Clause or Practice by this Writ, but is verified by many Records, and is *secundum Legem & Consuetudinem Angliæ*.

The Question that is made, is of a high transcendent Nature; it concerneth the King, both in his ordinary and absolute Power. Whether the King in those Cases, where he in his Royal Judgment shall conceive a Necessity for the Defence of the Realm, may command Ships in this kind; whether by his Royal Power he may do it, or must require the Aid *per commune Concilium* in the Parliament. And I conceive his Majesty may do it, not only by his Kingly Prerogative, but *Jure Majestatis*.

This Power is not only *inter Prerogativa Regis, sed inter Jura summæ Majestatis*. I find by many Records, that these Writs have issued out in all Succession of Times; in the times of the *Saxons* before the Conquest: But I never find that this Power was judicially questioned in any Court at *Westminster* before now. I find Questions made touching Assessments, whether they have been equal, touching the Levying, whether within the Warrant of the Office; touching the Discharging of some, by reason of a Grant of Exemption; but to question the main Power, whether the King by his Royal Power might command this for the Defence of himself and the Kingdom, was never disputed before now. But his gracious Majesty, who hath declared himself, that he will rule his People according to his Laws, for the Satisfaction of the People, and to clear his Justice and Judgment, does suffer these Writs to go forth, to which Mr. *Hampden* hath demurred, and to be questioned in this legal Way to be determined by your Lordships, to which I hope you will give a clear End.

My Position shall be thus, That the King, as he is King of *England*, *pro defensione Reg' tuitione Maris, &c.* when his Majesty in his Royal Judgment conceiveth it a Time of such Danger, as doth necessarily require the Aid commanded in this Writ, that he may command and compel his Subjects *per totam Angliam* to set forth Ships with Men and Ammunition and double Equipage; and this may be done, as well by the King's Writ under the Great Seal, as by Consent in Parliament.

For the Proof of this Position, I shall reduce what I have to say to these Heads. First, That this Power is *inter Jura summæ Majestatis*, innate in

in the Person of an Absolute King, and in the Persons of the Kings of *England*. That this Power is so inherent in the King's Person it is not any ways derived from the People, but reserved unto the King when positive Laws first began. And that in this Case the King is sole Judge of the Danger, and how this Danger is to be prevented and avoided: this is my first Ground.

The Second is this, that the Regal Power is not confined to the Politick Advice, that the King must be *in Cathedra* sitting in Parliament; but that it hath been always done, either *per ipsum Regem, aut per Regem & Concilium, aut per Dominos suos, aut per Regem*, when he shall please to call a Consultation of Merchants and Portsmen experienced in the Service.

My Lords, I shall present unto your Lordships, that this Power is so inherent in the King, that during the time of Parliament, and in those Years when Parliaments were sitting, these Writs issued out by a Regal Power, without any Aid or Power from Parliament; and that Advice was not thought necessary in former Times.

3. I shall also shew unto your Lordships, that this Power is implied out of the Sovereign's Titles given unto him by the Common Laws of *England*.

4. And also I shall insist upon Precedents; and herein I shall desire your Lordships to take notice that these Writs have not issued out at the first any sudden Advice; but that there was a great search made: First, By my Predecessor Mr. *Noy*, a Man of great Learning and profound Judgment; other Searches made by the King's Counsel and some others; and a great Number of Records were considered of maturely before these Writs issued: so nothing was done upon the sudden; and we that are of the King's Counsel, did think it fit that most of these Records should be cited in the first Argument by Mr. Solicitor, to the end that the Counsel at the Bar might give an Answer to them in their Reply: many more have been added by Mr. Solicitor, and many more I shall cite which have not been remembred.

My Lords, in the vouching of these Records, I shall observe eight Things. (1.) That the Records we insist upon, are not grounded upon any private Custom, or upon any Charter, or upon any Covenants, but upon the Laws of the Land; and there is not in any of these Records any recital that these Writs went out upon any of these Grounds.

(2.) That in all Ages before the Conquest, and in the time of *William 1.* that these Writs have issued *per ipsum Regem, per Regem & Concilium*, and did not issue upon any Advice of Parliament.

(3.) That these Records and Writs were sent out, not in case of *Hannibal ad portas*, or an Enemy discovered, or sudden Invasion; but upon case of Rumours, and in that a Danger might happen; so not in approaching of an Enemy, but in case of Preparation to provide against an Enemy.

(4.) That the King did command Shipping to be set forth in those Years wherein there were Parliaments, and sitting Parliaments, by his Royal Power, without Advice of Parliament.

(5.) That when great Subsidies and Aids have been given unto the King by Parliament *pro defensione Regi*, in the same Year that Writ went forth for the Defence of the Kingdom.

(6.) That these Aids have not been required only from the Maritime Parts, the Ports, nor from the Inland Counties only, but *per totam Angliam*.

(7.) That many times when these Writs issued, there have been no such Causes declared, as hath been in this Writ. I shall observe, that in many of these Writs no Cause at all is set forth in them, but only that they should repair to the place of Rendezvous, and there receive further Directions.

(8.) I shall verify every Clause of this Writ by many Precedents. A *Mandamus*, and not a *Mandamus Rogantes*, Shipping at the Charge of the County, and Assessments made by the Sheriffs, as Commoners, and a Penalty greater, not only Distress and Imprisonment, but Extent of Lands, seizing of Goods, till the King was paid. These are the Things I shall observe out of the Precedents, when I shall come unto them.

My Lords, in the *fifth* Place, when I have laid these Foundations, I shall then dispel those Mists that have been raised, remove those Forces that have been mustred, and answer the Objections of those Gentlemen, that will not be satisfied by the King's Writ under the Great Seal: And in the *sixth* give a particular Answer to the Acts of Parliament that they have cited, to the Records that they have insisted upon, and to the Reasons and Authorities they have alledged.

In the *seventh* Place, I shall answer their Exceptions that have been taken unto the several Writs, Records, and Proceedings thereupon, that have been produced by us.

And in the *eighth* Place, I shall collect some Conclusions and Reasons out of the Premises, and cite unto your Lordships some Judicial Records, that may satisfy your Lordships in point of Judgment. These are my Materials, I shall proceed to the Building.

My Lords, my first Ground was, that this Power is innate in the Person of an Absolute King. All Magistracy it is of Nature, and Obedience, and Subjection. It is of Nature. And before any municipal Law was, People were govern'd by the Law of Nature, and Practice did rule according to natural Equity: This appeareth in the Reports of Sir *Edw. Coke*, written by him, when he was Chief Justice, 7 *Rep. Fol. 13*. I will not take occasion to discourse either of the Law of Nature, which doth teach us to love our Country, and to defend it, to expose the Hand to Danger, rather than the Head should suffer; nor of the Law of God, which commandeth Obedience and Subjection to the Ordinance of our Superiors; nor of the Law of Nations, which doth agree, that there must be Protection from the King; and Obedience from the People; and without Defence there can be no Protection; and without Aid of the People there can be no Defence: Nor of the Imperial Law, which saith, that in Cases, *pro communi utilitate*, the King may *statuere* alone.

My Lords, upon this Subject I will confine my self to the Law of the Land, and insist upon such Records, and such Precedents, and such Reasons, and such Authorities, as I find both by Records of former Times, and in our Books.

First, In the Original Government of this Nation, I do not find that it was a Monarchy; I find the contrary, that there was a great Number of petty Regiments. And when *Julius Caesar* invaded this Realm, he writeth there were Four Kings in *Kent*; and *Strabo* saith the like, *Lib. 4.* so those

Times

Times will not be material. During the Domination of the Romans, which continued five hundred Years, the Romans had their Prefects here in England. No Man will doubt but that they might command what they pleased, *Notitia utriusq; Imperij, Fol. 161.* that in their Times there were special Officers, called *Comites, &c.* Officers appointed by Sea, and other Officers by Land. Those that succeeded the Romans were the Saxons; and in their Times, both by antient Grants, and by Edicts of the Princes of those Times, it appears, that this Naval Power was commanded by them for the Defence of the Realm.

First, To begin with King *Ina, A. D. 725,* King of the *West-Saxons.* This King in that Year made a Grant to the Abbot of *Glastenbury, Quod, &c. sint quieti ab omnibus Regiis exactionibus & operibus quod indici solent, except Expedit Arcium, & Pontium constructionem sicut in antiquo, &c.* which shews that these Expeditions were accustomed to be done. *Wuldredus,* who was King of *Kent* in the Year 742, granted unto his Churches, *quod sint liberi ab omnibus secularibus servitiis, except expedit Pontium &c.* so in that Grant these Expeditions were excepted. *Ethelredus,* King of the *Mercians, Anno 749,* granted *Monasteriis de, &c. except ut supra.* So as in those Times these Services were common, and were done by a *Discreto Regis.* That the Churches should be free from all Services, except these three, Expeditions of building Castles, Bridges and Forts; *a quibus nulli unquam laxari possunt. Egbert, An. 840.* commanded a great Navy to be provided; and that for the Defence of the Realm, and Safeguard of Ships. *Ethelwald,* that was King of the *West-Saxons, Anno 854,* granted to the Church, that it should be free from all Service Temporal, except *Regalibus Tributis.* In the Time of King *Alfred,* who was the first Monarch, and King of all *England;* one who was a Privy-Counsellor in his Time, and wrote the Story of that Time, he, in the ninth Page of his Book, saith, *Quod Rex Alfredus misit Galleas longas Naves & Cymbas edificari;* and agreeing with this, is the History of *Asser Menevensis, Florentius Wigornensis 316,* and *Huntingdon 351.* wherein your Lordships may see by the Record, it was done *ex praecepto Regis per totum Regnum.* This King made a Law, which is not remembered by *Lambert* in his *Saxon Laws,* to this effect, That no Man, by Summons, by the Horn or Word of Mouth, should sit still in Matter of Theft, Bloodshed, or going to War, whensoever his Expedition should require; and there he doth mention it to be upon pain of Forfeiture of Life.

King *Edgar,* who styled himself *Angliae Basiliscus,* he in the Year 959 provided a great Navy of 3600 Ships, as saith *Wigornensis,* and *Matth. of Westminster;* and he gave a Command, that every Year, at *Easter,* a Navy of three or four Thousand should be set out, and divided into three Parts, *East, West and North:* The Ships in those Times were not so great as now they be. The same *Edgar,* in the Year 973, granted to the Abby of *Thorney* all manner of Immunities, and that it should be free from all Services, except those three of building Bridges, Castles and Forts. And the same King, in his Charter to the Church of *Worcester,* granteth them to be free *ab omnibus exactionibus, except constructionem Pontium, Arcium, &c.*

My Lords, by all these several Grants, and what hath been done by those Kings, it doth ap-

pear that these three fundamental Services were ever reserved unto the Crown, saving the Grants to two or three Abbeyes, which had some particular Exemption. In the Year 1008, which was remembered by Mr. Solicitor, there was then a great Navy provided by King *Ethelred.* The Words are thus: *Rex Ethelredus per totam Angliam ex 310 Hides, Navem unam, &c. prae parare fecerat, &c.* that was for every 310 Hides of Land to build one Ship; and every eight Hides of Land to find a Man and a Corset, and to meet at *Sandwich* for Defence against the *Danes.* This appeareth in *Huntingdon 360. Matth. of Westminster 387. Hoveden 426. and Malmsbury, 100.*

In this Record these Things are observable, *Rex parare facit, & Rex eos misit;* then *per totam Angl.* all *England* was to be charged. By the Glossary of that Learned and Judicious Antiquary, Sir *Henry Spelman,* it appears that *Virgata terrae continet 24 Acras, quatuor virgatae continent unam bidam, & quinq; bidas Feod. Militar.* Upon casting up of this, it doth appear, that there be in *England* 363600 Hides of Land; and every 310 Hides being to set out one Ship, the whole Number amounteth to divers Thousands, 11072; and every eight Hides, to set forth a Soldier, amounts to 45450 Men: but it is not the Number, but the Matter that is done by the King's Command, *per totam Angliam.*

In the thirtieth Year of King *Ethelred,* he made an Edict, which Mr. Solicitor caused to be read in Court, saying he had it out of an old Book in *Cambridge, Quod instaurant tiel number del Naves per singulos annos.* I read it to this Purpose, to shew that in the thirtieth Year of his Reign, there was a Naval Expedition to be always ready at *Easter,* and sheweth the Penalty of such as did depart without License.

King *Canutus, Lambert Fol. 117, 118. ex sapientum Concilio, &c.* ordained a Command amongst his Temporal Laws, *Cap. 10. quod praesidia fiant, &c.* commands Ships to be provided; and *Fol. 118.* a Penalty upon all those that refused to pay 120 s. which was a great Sum in those Days.

That which I observe out of these two were these: First, That they were made by the King, by the Advice of his Lords; that there were to be yearly Preparations for Shipping; and those that departed out of the Service without License, were to incur the Forfeiture of all their Estates. If these Edicts were Acts of Parliament, they stand unrepealed; and if no Acts, then they stand by Command from the King's Power.

My Lords, I have shewed you the Practice, as it was before the Time of *William the First:* He did not abrogate the former Laws, but was sworn to perform them. Nay, it was said that he did confirm *Antiquas Leges & Consuetudines Angliae.* So then, if these were the Laws, and this the Power that the antient Kings of *England* had before his Time, he did ratify and confirm it, but not diminish it.

This power of commanding of Shipping, for the Defence of the Realm, it is a principal Part of the Power Royal. This Kingdom, it is a Monarchy, it consists of Head and Members, the King is the Head of this politick Body; it consists of Clergy and Laity: The Head, it is furnished with entire Power and Jurisdiction, not only to administer Justice in Cases criminal and temporal unto his People, but likewise for Defence of both; and he may command the Power both

of the one and the other. This Power I find to be mentioned in the Register of Original Writs, written before the Conquest, 127 *b.* it reciteth, that *Nos considerantes quod ratione Regiæ dignitatis maxime ad providendum Salvationi Reg' nostri circumquaq; astringimur.* It appears by *Stamford*, in his *Prerogat. Cap. 1.* that as the King is the most excellent and worthiest Part of the Commonwealth, so is he also the Preserver, Nourisher, and Defender of his People. I find it in *Fortescue*, that they have cited; that a Commonwealth, without this Head, is but a Trunk, as the natural Body is a Cadaver. I find it in *Fitz. Her. Na. Br. Fo. 73.* or 173. that the King of Right ought to save and defend the Realm, as well against the Sea as against the Enemies, that it be not surrounded nor waisted.

How is this Defence against the Sea and Enemies of the Kingdom? Is the King bound to defend the Kingdom by Sea-Walls at his own Charges?

No, the Power of Defence is a Superintendent Power in his Majesty, to authorize Sheriffs and Commissioners to see it done, but by his Power; yet at the Charge of the People. Register 127 *b.* it appeareth there, where the King commandeth the People by his Writs; the one directed to the Sheriff, and the other to Commissioners, and in both willeth and commandeth, *quod distringat A. B. & al.*, to distrain the Lands of all those that may receive Damage to repair the Sea-Walls, as well as the *Ter' Tenn.* This Writ was before any Statute concerning that, for the Register was before the Conquest; and the first Statute that concerneth Commissions of Sewers, was made 6 *Hen. 6.* So it is by the Power the King had at Common Law, and not upon any Statute: And this was to the Sheriff, as well as to Commissioners; and that it was done at the Charge of the Country, and not at the King's Charge. *Pat. 33. Ed. 1. M. 4. Dorf.* agreeth with the Register: The King doth there recite, *Quod ratione Dignitatis Regis, &c. & per Juramentum sumus astricti ad providendum Salvationi Reg'*; and there he giveth Power to Commissioners to distrain the People to make Defence against the Sea, at their own Charges. *Pat. 2. Ed. 2. pars 2. M. 5. Dorf.* in the Case of *Wifeman.* Rep. 2. Fol. 15. the King, *ex officio*, ought to govern his Subjects in Peace and Tranquillity. 7 Rep. Fol. 9. Protection of the King is general over all the Kingdom, there is Reason why it should be thus: For the King of England, he hath an entire Empire, he is an absolute Monarch; nothing can be given unto an absolute Prince, but is inherent in his Person, as may appear by Books, Records, and Acts of Parliament; *Braët. Lib. 2. Fol. 55. b. Sciendum, &c. Dominus Rex super omnes qui ad Coronam pertinent.* This appears likewise in the Statute 24 *Hen. 8.* there it is declared that this Realm of England is an Empire, and hath been so accepted in the World. *Stat. 25. Hen. 8. Cap. 21. 1 Eliz. Cap. 1. 1 Jac. Cap. 1.* the Crown of England is affirmed to be an Imperial Crown; and Acts of Parliament are Proofs of the highest Nature. 16 *Ric. 2. Cap. 5.* that the King holdeth his Empire immediately of the God of Heaven: And at his Coronation, his Crown is elevated as a Signification thereof. This is likewise acknowledged in the *Irish Reports, Fol. 60. Rex Angliæ est absolutus Monarcha in Regno suo.* *Fortescue* saith, the King of England, as well as any other

King or Emperor, hath all the Liberties within this Kingdom in *Imperio suo.* The Law of England makes the King of England, not as his Subjects are, a Natural Body, but a Body Politick, freeth him from all Imperfection and Infirmary; he is immortal and never dies; the King ever liveth, *Com. 177. 11. Rep. Fol. 7. 21 Ed. 4.* and other Records.

My Lords, as he is an absolute Monarch, so all these, *Jura summæ Majestatis*, are given unto his Person by the Common Law.

First, He hath supreme Dominion, both by Sea and Land, as is proved by the *Mirror*, the greatest Part whereof was writ before the Conquest. Some things are added to it by *H. Horne* in the Reign of *Ed. 4.* he holdeth, that all Lands, and all Jurisdiction, and all Dominion is derived from the Crown: That whatsoever was not granted from the Crown, remaineth in the Person of the King. This *Supremum dominium* is so inherent in the King's Person, that if the King grants away his Lands, *absq; aliquo reddendo*, yet the Tenure must still remain to the King; 8 *Hen. 7. 12. 30 Hen. 8. 45. Dyer.* This Dominion is not only upon the Land, but it is upon the Sea. And so the King he hath not only a Dominion at Sea, but he is *Dominus Maris Anglicani*; he is both Owner of the Sea, and of the Soil under the Sea. And so it was resolved lately, by my Lord Chief Baron, and the rest of the Barons in the *Exchequer*, in the Case of *Sutton Marsh*, *Mich. 13 Car.* That the Soil of the Land, so far as the Sea floweth, is the King's, and the King is seized thereof, *Jure Coronæ. Mirror 8. Braët. Fol. 8. Temps Edw. 1. Avowry, 46 Ed. 3. Com. 3. b.* That not only the Dominion of the Sea, but the very Soil belongeth unto the King.

In the next place he hath, besides his *Supremum Dominium*, a Sovereign Jurisdiction, and that extends both by Sea and Land.

First, For Creation of all his great Officers and Judges; Creation of the Admiralty, time out of mind. 20 *Hen. 7. Fol. 8. 12 Hen. 7. Fol. 17.* Power to make Justices could not be granted; and all these Powers resumed in the Statute, as inherent in the Crown. 12 *Hen. 7. Fol. 17.* there it is said by *Fineux*, that at the Beginning all Administration of Justice was in one Hand, that is, in the Crown. And surely this Jurisdiction did not begin in the Time of *Ric. 1.* when those Laws were renewed by him at his Return from the Holy Land; but there were Admirals in England, and the Admiral Law by Sea long before. 27 *Ed. 1.* a famous Record in the Tower, that the Commissioners for the Emperor, Spain and France, did appear before the King's Commissioners; and did acknowledge the Sovereignty of the King of England upon the Sea, did belong unto him time out of mind. And for further Proof of this, it likewise appeareth in that learned Book of Mr. *Selden's*, called *Mare Clausum.*

My Lords, the next inherent Power of the Crown are Pardons of Offences and condemned Persons, and Restitutions, which none can do but the King himself, 1 *Hen. 4. fol. 5. 20 Hen. 7. 8.*

The next is *Jus nummi percutiendi*, a setting of a Royal Stamp upon his Coin, the advancing of the Value of his Coin, and the debasing of it. 21 *Ed. 3. 6.* That the King only can put a Value

lue upon it. 5 Rep. fol. 114. That the King, by his absolute Prerogative, may make any foreign Coin lawful Money of England, by his Proclamation, Davies Reports, fol. 20.

The next, *Jus summe Majestatis*, is that of concluding War and Peace, which is absolutely inherent in the King's Person, which he may do without calling his great Council, 19 Ed. 3. 6. and 7 Report 25. That all the Subjects of England cannot make a War, *Bellum indicere* belongs not to the Subject. And to make *Aliens, Denizens*, is a high Prerogative.

My Lords, this Trust that the King hath for making of War and Peace, and for the Defence of the Realm, both by Sea and Land, it is a great Trust, inherent in the Person of the King; no Man ought to mistrust where the Law doth trust.

There is an Objection made, That if it should rest in the Power of the King, he might do it when there was no Ground for it, and without Cause; and cause Forces to be mustred, and Ships provided where there is no imminent Danger, in such a manner, as that it might be grievous unto the People.

These are Objections clearly against Presumption of Law; for where the Law trusteth, we ought not to distrust. The King, as appeareth by all our Books, is the Fountain of Justice and Piety, and will do Justice unto all his Subjects, 1 Com. 240. All Justice is derived from the King, 13 Ed. 4. 8. The King can do no Wrong, *Bract. Lib. 3. Cap. 9. 8 Hen. 6. 20.* It's Royal Power, *De aver Correction de luy m.* He is the sole Judge, and we ought not to question him, *Bracton, Rex non habet superiorem nisi Deus*, 11 Rep. fol. 72. The King is the Fountain of Justice and common Right: And the King being God's Lieutenant, cannot do wrong, 17 Ed. 3. 49. The King could not be made an Instrument of Covin and Fraud, but the Patent was void, *Littleton's Comment. 99. the 5th Report, fol. 14.* That Religion, Justice and Verity, are the sure Supporters of Crowns and Diadems, 24 Ed. 3. 42. *Stamford's Pleas of the Crown, fol. 72.* At the common Law, the Law doth not distrust where the King doth commit one, but that it is upon just Cause, and so we are not to doubt it. And therefore at the Common Law, *West. 1. Cap. 15.* a Man committed by the King was not repleviable: Nay, if he was committed by his Council that was his representative Body, he was not repleviable. Shall we then, when the Law hath committed this Power unto the King, who is the Fountain of Justice and Equity, who is mistrusted by the Law of the Realm, and the Commonwealth intrusts him; shall we think that succeeding Kings will do that which is not fit to be done? I say, if the Law trust him, we ought to trust him. At the Common Law, if the King commit a Man *per Bouche*, he is not repleviable.

But for a further Reason, those that are his Delegates or Judges, are not to be mistrusted. That which a Judge doth, as in his Office, shall not be assigned for Error. If it be so in the Delegate Power, much more in the Primitive and Fountain. 5 Mar. Dyer 163. the Court of Kings-Bench did receive a Record of *Nisi Prius*, the *Postea* returned by the Clerk, and the Death of the Justice of Assize assigned for Error, and could not be received; and so, 1 Mar. Dyer 89. a Writ of Error to reverse a Fine, *prout in Dyer.*

That is the Reason of the Book, 7 Hen. 7 fol. 46. 10 Hen. 7. 28. *Fitz. Her. Na. Br. 126.* faith, he cannot assign for Error, nor shall be admitted to alledge any thing contrary to the Office of a Judge; as to say, the Judge did not give right Judgment, or the Clerk did not make right Entries, *M. 7. Ed. 1. B. R.* and that is the Reason why a Man of *Non compos mentis* in a Fine, and suffering of a Recovery, it shall not be assigned for Error against the Acts of a Judge, 8 Rep. Dr. Bonner's Case. Records by a Judge, nor Justice of Peace, not traversable. Good my Lords, then, if by the Laws of this Kingdom one shall not be admitted to receive an Averment against any Acts done by your Lordships the Judges, or against Acts done by inferior Judges; surely in this, where the King is absolute Judge, it shall not be allowed to say, there was no Cause of Danger, or that is done by the King which ought not to be done. *Bract. Lib. 1. cap. 24. est in Corona Regis facere Justitiam*; The King is so absolutely trusted with this Defence, that a Subject cannot make a Fort or Castle upon his own Freehold without the King's License; that appears in the old *Mag' Cbar' fo. 162.* Inquiry made of those that do build Forts and Castles without the King's License, *Rot' Parl' 45 Ed. 3. M. 34. 6 Hen. 4. 19.* and a Book of *Long. 5 Ed. 4. fol. 129.* that a Subject cannot make a Fort or Castle without the King's License; not in his own Ground.

My Lords, the King hath so discharged this Trust, that tho there were no Account unto the Subject, yet these Ships that have been commanded were *ad proficiscend' cum Navibus Nostris*. The King hath been at greater Charge with these Ships going out, than any King of England ever was, as will appear by those vast Sums of Money the King hath spent in these Years; besides what hath been contributed to it by the Subjects.

My Lords, I have done with my first Position, that it is an inherent Right in the Person of the King of England; and that the King is the sole Judge, both of the Danger, and when and how it is to be avoided.

It hath been objected, that the King of England may do it, but how? It must be according to the Institution of the Laws of the Realm; there must be a concurrent Power, a Politick Advice in Parliament, and so it may be done. But the King, either by his ordinary Power or absolute, without the Assistance of the great Council, he cannot do it, as hath been objected.

And therefore in the second Place, I shall come to the second Thing I did propose, that was, That the King, as he is King of England, that he alone, for this common Defence of the Realm, without the Aid of Parliament, may *Statuere*, &c. That the King, by the Advice of his Council, when he pleases, may do it; that he may ordain several Ways by the Institution of the Common Laws, by his Ordinance, by his Proclamation, by his Patents, by his Writs, and in legal Matters by his Judges. That this may be done by him,

First, It is agreeable to Reason; for Kings were before Parliaments; and then surely they might have done it. As Justice doth flow from the Crown originally, as it was in *Moses*, so it is in the King of England, only in the King's Person. But afterwards the King did depute his Deputies, and gave others Power; this is no Con-

ceit of mine. 12 Hen. 7. Fol. 17. b. per Fineaux, there was a Time when there were no municipal Laws, when positive Laws were not established, when Kings did rule their People according to natural Equity; and then surely the King might ordain. No Man will question it: since there have been positive Laws and municipal Laws, the Kings of England they have ordained, as by those several Records cited appears. It appears by the Practice since the Time of William 1. that the Kings of England in all those Writs that they have ordained, have prescribed the Time for issuing of these Writs, the Numbers of the Ships, the Times of meeting, the manner of Munition, and to stay for the Defence *quandiu nobis placeret*. I have made a Collection of what have gone out by the King himself, what *per Regem & Concilium*, and what by Advice of his Council, and with the Advice of Merchants and Portsmen; but they are so infinite, and so many of them, that I will not trouble your Lordships with the Répétition of them.

These Ordinances for the Defence, they are suitable and agreeable to the Ordinance that the King maketh in other Cases, where the King alone doth ordain, as by his Proclamation. *Clausf. 24 Ed. 3. Pars 2. M. 2. dorf.* The King by his Proclamation commanded all Earls, Barons, Knights, Esquires, and other Men at Arms, that none of them should depart into foreign Parts. *Fitz. Na. Br. fo. 85.* he agreeth it; and saith the Book, he that transgresseth this Proclamation shall be fined for his Disobedience. And this Command may be under the Great Seal, Signature, or Privy-Seal; for saith the Book, the Subject is to take notice of any of the King's Seals: so in all Ages he hath commanded no Victuals shall be transported. *Clausf. 24 Ed. 3. M. 7. dorf. 5 Dec. 4 Hen. 8. 11 Hen. 7. 23.* The King granted a Proclamation for a Justing; and if one of the two that be fighting be killed, it is no Felony. *5 Report 114.* the King by his absolute Power may make any kind of Money current by his Proclamation. In the next Place, the King may ordain by his Patent alone. *40 Ed. 3. fol. 17, 18.* the King did grant a Privilege to the Scholars of Oxford, that they should have the Choice of the Inns in Oxford, which was before there were any fair Colleges in Oxford: saith the Townsman, this is my Freehold, the King cannot do it; say the Judges, this is by the King's Patent, and is in favour of Learning, and therefore a good Ordinance. So the Justice in Eyre may take up the principal Inn in a Town. Is there any thing more usual than for the King to give Power to a Corporation to make Ordinance for a common Good? *49 Ed. 3. 162.* Shall it be so in the Creature, and not in him that makes the Creature? A Case or two upon every one of them. The King may ordain by his Writ, and that appears *9 Ed. 3. 16.* a Writ of *Cessavit* against the Tenants of Northumberland. The Tenants had been mightily oppressed by the Scots; they petitioned the King, and said, they were not able to pay their Landlords their Rents, by reason of those Incurfions upon them of the Scots, and desired stay of Suit; and there it appeareth, that the King did ordain by his Writ, that those Suits upon those Reasons should not proceed against the Tenants for non-payment of their Rents. Out of the same Reason are the Writs of Protection.

Then the King and his Council may ordain, for that I find, *M. 4. Hen. 3. Fitz. Her. Na. Br. Dower 179.* a Writ of Dower there brought by a French Woman. The Tenant of the Writ pleaded, that there was an Ordinance of the King and Council, *Quod nullus de potestate Regis Franciæ respondetur in Angliā antequam Angl' respond' de jure suo in Francia*; that is, We Englishmen should not be compelled to answer any Frenchman or Woman in a legal Way, till the English were answered in France to their Suits there. *39 Ed. 3. 7 per Thorp.* The King and his Lords may make an Ordinance, which shall be as binding as a Statute. *Rot. Franc. 72 Ed. 3. M. 6.* The King by the Advice of his Council did ordain *quod omnes Magnat. & al' qui habent terras & tenementa continue morat'*, &c. Upon this Ordinance I can shew above 40 Writs that have gone out to the Nobility, Clergy, Archbishops and Bishops, and to all the King's Subjects too that had Houses in the Maritime Parts. *Rot. Franc. 22 Ed. 3. M. 16. and 50 Ed. 3. M. 47. dorf. 24 Ed. 3. M. 6.* that of 24 is to the Inlands within 16 Miles of the Sea-Coasts. *40 Ed. 3. M. 37.* the like Writs awarded to most Maritime Counties, upon pain of Seizure of their Lands and Goods. So likewise for Provision for the Army; the King and his Council have ordained, both for Markets to be kept within such a Distance of the Army, and Wine to be sold there, and no where else, *Rot. Sco. 10. 12 Ed. 2. M. 13 dorf.* So they have set down the Number of the Men of Arms that every Town should be charged with, *Clausf. 13 Ed. 3. pars 1. M. 14. dorf.* with a Command that they should distrain the Commonalty of that County for the Wages of those Men at Arms.

My Lords, if the King may at any time of Danger, by his Proclamation, by his Patent, by his Writ, by the Advice of his Council; surely in case of Necessity it is much more lawful; for *necessitas est lex temporis*, where a Defence by Sea and Land is required. *5 Ed. 4. 6. 14 Hen. 7. 29.* Jurors by Law are to hold together till they give up their Verdict, yet otherwise, if the House be like to fall upon their Heads. *38 Hen. 6. 11.* upon a *Precipe*, the Tenant may be excused if he could not pass the Waters.

My Lords, I find that in legal Matters the King and his Judges make certain Explanations upon the Statute of Gloucester, as appears by *Mag' Cbar.* And what was done then by the Judges Advice, hath the Force of a Law at this Day. So as you see by the Laws of England, as well in other Cases, as in Cases of Defence, the Law hath given the King of England this Power to ordain for the Good and Safety thereof.

I find that in all Ages, and in all Times, the Incidents to a Defence, as well as this principal Part, hath been given to the King himself, as he is King of England.

First, For the Murage of Towns: That the King hath commanded the Murage of Towns to be done at the Peoples Charge; the Precedents are so many, I will mention none of them; and shall he not command for the Defence of the wooden Walls of the Kingdom? *Rot. Alm' 12 Ed. 3. pars 2. M. 10.* The King commands by Writ a Place to be fortified towards the War; and every Man having Rent there to contribute, or to be compelled thereto by Distress; that was commanded to be done by Writ, *Pat. 12 Ed. 3.*

pars

pars 3. M. 5. it appeareth it was done. The King imposed a certain Rate upon all Goods and Merchandize that came unto *Kingston upon Hull*, and commanded this should be employ'd to the walling of the Town; this was *de voluntate Regis*; this appeareth *Rot. Pat. 19 Ed. 3. pars 1. M. 12.* There was the same Command for other Towns, as *Dover*, &c. the said Roll, *M. 22. Pat. 12. Ed. 3. pars 3. M. 14. dorf.* A Writ for the repairing of the Walls of *Winchester* at the Subjects Charge. *Rot. ib. M. 15.* The King by special Grant gave Power to the Mayor and Burgeses to affess the Inhabitants towards the making of the Wall, and the Defence of the Town. *Claus. 1 Ric. 2. M. 12.* *Oxford* was commanded by the King to be fortified at the Inhabitants Charge. *Claus. 12 Ed. 3. pars 3. M. 32.* The King commanded particular Subjects to fortify their Castles at their own Charges in Time of Danger. *Pat. 18 Ed. 3. M. 9.* The King taketh the Castles of the Subjects into his own Hands in Time of Danger, *ad evitandum damna & pericula quæ nobis evenire possint.* *Claus. 13 Ed. 3. pars 1. M. 36. dorf.* The King by Advice of his Council did ordain, that the Town of *Southampton*, *pro salvatione ejusd'* should build a Wall.

My Lords, if the King may command the Walling of a Town at the Charge of the Inhabitants, he may likewise command the Defence of the Kingdom by Sea; so for other Incidents of Defence, as for erecting Beacons upon the Sea-Coasts. *Rot. Vas. 11. 12 Ed. 3. M. 29. de Communibus in singulis*; *Claus. 1 Ric. 2. M. 4. dorf. de Ordinatione per Regem & Concilium pro vigiliis faciend'*. So likewise the King in all Ages hath commanded the imbaring of Ships for the Defence of the Realm, and for all publick Service; this appeareth *Claus. 14 Hen. 3. M. 17. dorf.* all Ships arrested that could carry 16 Horfes. *Rot. Sco. 10 Ed. 3. M. 2. dorf. Omnes Naves pro defensione*, &c. *Rot. Alm. 12 Ed. 3. M. 23. pars 1. & 12.* for the imbaring of Ships for the Defence of the Realm.

So likewise the King commandeth and appointeth who shall be Officers, who shall be Admiral of the Fleet, who shall be *Custodes Maris*, as appears *Pat. Ed. 2. M. 7. dorf.* and in the same Roll, *M. 10. Pat. 15 Jobannis M. 10. Pat. 48 Hen. 3. M. 5. Claus. 23 Ed. 3. M. 5. dorf.* and an infinite Number more.

Then that the Country paid the Charges of those who had *Custod' Maritim'*. that appears, *Rot. Fra. 12 Ed. 3. M. 31. dorf. Claus. 13 Ed. 3. pars 1. M. 14. dorf.* The King when there was Cause he moderated the Expence. *Claus. 25 Ed. 3. M. 16.* The King did order how much, and how long the County should pay for Wages; and commanded the Stay of those that could have been gone before their Time: and this appeareth *Pat. 48 Hen. 3. M. 4. Claus. 48 Hen. 3. M. 2, 3. dorf.*

Then it appeareth by many Records, that this Guard of the Sea-Coasts was to be according as the King should order and direct, sometimes *per Regem*, and sometimes *per Nos & Concilium*: and this appeareth *Claus. 23 Ed. 1. M. 5. dorf. Claus. 13 Ed. 3. pars 2. M. 14. dorf. Pat. 29 Ed. 1. M. 1.*

Sometimes the King out of his Royal Power hath been pleased to give Discharges to particular Men, to be discharged from this *Custod' Maritim.* this appeareth *Claus. 23 Ed. 1. M. 5. dorf. Portsmouth* discharged, because their Ships were in the King's Service. *Claus. 8 Ric. 2. M. . a Discharge*

for the Abbot of *St. Albans.* *Pat. 12 Ed. 3. pars 2. M. 8. Pat. 12 Ed. 3. pars 1. M. 14. Discharges de Custod' Marit.*

Then the Power of punishing those that should neglect those Commands hath been always in the King, and to be punished by his Commissioners, or by his Writs, and that in a high manner.

That there have been Commands by Distress, by Imprisonment, by Seizure of Lands, Goods, and Forfeiture of all that they had, this appeareth, *Pat. 48 Hen. 3. dorf. Claus. 48 Hen. 3. M. 3.* and a great Number in the Times of *Ed. 2.* and *Ed. 3.*

The King hath so far meddled in this Business, that tho it hath been the Money of the Country, yet the King hath appointed the Pay-Master, *Claus. 48 Hen. 3. M. 20. Claus. 16 Ed. 2. M. 13.*

So all Arrays for mustering of Men between 16 and 60, have been in all Ages, and by the King's Command, to be in and continue in readiness so long as the King shall please, *Rot. Alm. 12 Ed. 3. pars 2. M. 6. dorf.*

So, my Lords, it doth appear by these Precedents that have been cited, by these Records, and by these Book-Cases, that the Kings of *England* have in all Ages given Command, and made Ordinances by themselves, by their Council, by their Judges, and by their Peers; and these Ordinances have been obey'd.

My Lords, I promise upon this Head to make it good, that in these Times, and in these Years, wherein there were Parliaments, that tho the Parliaments did determine Matters concerning the Land Forces, and the going of the King's Army into *Scotland*, that yet sitting the Parliament, the King hath commanded the setting forth of Ships by his Writ; this was ever left to the Royal Power. For the Proof of this, there was the 24 *Ed. 1.* a Parliament, as appears in the printed Books of that Year; and in that Year the King commanded Ships by his Writs at the Charge of the Subjects. *Pat. 24 Ed. 1. M. 17.* Command to take up a hundred Ships; and in *Pat. 24 Ed. 1. ex parte Regis Rem. Exchequer-Roll 22.* Command *pro Custod' Marit'*. *Hil. 9 Ed. 2.* a Parliament holden at *Lincoln*, and yet in the same Year Writs went out to provide Shipping, as appears by *Rot. Pat. 9 Ed. 3. pars 2. M. 26.* I find there was a Parliament held 12 *Ed. 2.* This appeareth in the Book of Statutes, *Rot. Scot. 11 and 12. Ed. 2. M. 8.* the King recites certain Inroads made upon the Men in *Northumberland*, *& quod de communi concilio*, held at *York*, *ordinavimus*, &c. and assigns the Earl of *Pembroke*, and Bishop of *Norwich*, *ad requirend' Norff' & Suff' juxta discretiones vestras subsidium facere per Naves*, &c. *per tempus trium vel quatuor mensium.* At this Time there was a Provision by Parliament for the King's Service by Land, and for his Armies to meet him at *Newcastle*; and for two Reasons why *Navale Subsidium* should be necessary. First, to hinder the bringing of any Victuals into *Scotland*. Secondly, For the free intercourse of Trade. So as you see, in this Year wherein a Parliament was holden, this *Navale Subsidium* was commanded by the King's Writ without an Act of Parliament; tho this Writ was for *Norfolk* and *Suffolk*, yet the like was for *Dorset*, *Somerset*, &c. It appeareth likewise 10 and 11 *Ed. 2.* which were those great Years of sending out of Writs, that then Parliaments were holden. And so it doth appear by the printed Book of Statutes; yet in that Year of 10 *Ed. 3*

Claus

Cl. 10 Ed. 3. M. 37. dorf. A Writ directed to the Mayor and Bailiff of Bristol, with a Command, that all Ships of 40 Tons & *ultra*, should be *fitz d. 10 Ed. 3. M. 21. dorf.* Command that the Ships should be set forth for the preventing of Danger, and that no Foreigners Ships come in to aid the Scots, *M. 21. dorf.* The same Roll, Command to the City of London to set out Ships at their own Charge. *Seco. 10 Ed. 3. M. 21. dorf.* Writs to the Sheriff of Bucks to send Horsemen and Footmen to the County of Southampton: so there were Men drawn out of their County, and the Refusers there were called Rebels. *Rot. ib. Writs de Navibus pro defensione Regni.*

My Lords, there was something more observable in this Year of 10 Ed. 3. for some of the Writs that went out bear Teste 3 Octobris 10 Ed. 3. and mention a Parliament, but did not go out by any Ordinance of Parliament; so that the awarding of these Writs 10 Ed. 3. were fitting the Parliament, and by the Royal Power: which is a strong Argument, there needeth not Aid of Parliament for the King to command his Forces. 11 Ed. 3. there was likewise a Parliament, as appeareth in the printed Books of Statutes, yet Writs dated 10 Januarii 11 Ed. 3. *per ipsum Regem*, Ships are commanded *pro guerra super Mare*. *Rot. vaf. 20 Ed. 3. M. 6. dorf.* Proclamation to several Counties, that all Ships be in readines. In the 12th Year of Ed. 3. there was a Parliament at Northampton, *Claus. 12 Ed. 3. pars 2. M. 1. the same Roll pars 2. M. 32. and yet the same Year the King commanded Shipping at the Charge of the Counties, as appeareth Rot. Parl. 12 Ed. 3. pars 1. M. 12. Claus. 12 Ed. 3. pars 3. M. 29. And in the 13th Year of Ed. 3. there was likewise a Parliament holden, as appeareth 12 Ed. 3. M. 9, 10. but printed Statutes make no mention of a Parliament then.*

My Lords, in this Record these Things are observable, cited, and made use of by the Defendant's Counsel; a strong Record as any can be against them! In that Parliament the King he did pray the Advice of the Commons in Parliament touching his War with France, and the guarding of the Sea-Coasts; the Commons they make Answer, *Prient les Commons que ils ne Counsel doner al choses de quel ne pass Connuzance, &c.* They say further, And they grant that the Maritime Towns ought to make the Guard upon the Sea without Wages, and the Inland Towns upon the Land.

Two Things are observable in this Record. First, When the King doth descend so low as to pray the Advice of his Commons in Parliament, and Assistance for the guarding of the Sea; the Commons disclaimed it, and said, they have no Connuzance, &c. and yet the Defendant's Counsel did press, that now the King should ask the Advice of the Commons in Parliament; a Thing disclaimed by the Commons in Parliament 13 Ed. 3. to have any Cognizance of. Secondly, That by this Record, the Maritime Parts ought to guard the Sea at their own Charges: This, tho it was granted in their Petition, it was not granted by the King; for it appeareth in the same Year, *Rot. Alm. 13 Ed. 3. M. 13 Dorsf.* that the King that Year hearing of some Preparations in France, commanded Ships for three Months. *Claus. 13 Ed. 3. pars 1. M. 14.* That in several Counties Men were distrained for not Payment of Wages for the Archers and others that guarded the Sea-Coasts. It appeareth by these Records, that both

the Guard of the Sea, and the Sea-Coasts, was done *juxta Ordinationem nostram*, Order made by us and our Council. *Rot. Alm. 13 Ed. 3. M. 15. dorf.* the King appointed the Archbishop of York, Hugh de Percy & al' for that purpose, &c.

So, my Lords, I have done with the second Ground, that is, that the King is the sole Judge of this without his Parliament: That the Commons in Parliament have disclaimed to have any Cognizance of it: That in the same Year, when Parliaments were holden, the same Year these Writs have issued without Advice of Parliament.

The third Thing I did propose was those supreme Titles, which the Common Law of England giveth unto the King, which may enforce this. *Bract. lib. 2. cap. 24.* saith, that the King he is *Vicarius Dei*; his Power, as was agreed, is *Jure Divino*: God is the God of Hosts, and the King is a Model of God himself. 40 Ed. 3. fol. 181. The King is the chief Guardian of the Commonwealth. The Sheriff hath *Posse Comitatus* under the King, the King's Vicegerent in the County: And he hath this Power, not only for the Execution of legal Process, but for the Defence of the Realm. 12 Hen. 7. fol. 7. This delegate Power of the Sheriff, is as well for Defence, as for the Execution of Process. Shall the Sheriff do it, and not the King? 10 Hen. 3. fol. 1. B. Hen. 7. fol. 1. The King is the Conservator of the Law. 20 Hen. 7. fol. 4. *Rex est Capitalis Justiciarius totius Angliæ*; he is not only to maintain Justice in the Courts of Justice, but to protect and defend his People. *Stamford's Prerogat. cap. 1.* The King is the most worthy Part of the Body of the Commonwealth, the Preserver, Nourisher, and Defender of it: And by this they enjoy their Laws, Goods and Lands. 11 Rep. fol. 70. b. *Magdalen-College's Case, Rex est Medicus Regni & Sponsus Reipublicæ*. It is the part of a good Physician, as well to prevent Diseases, as to cure them; and the Office of a good King, as well to prevent Danger, as to remedy it. *Com. fol. 130.* He is the Soul that animates the Body of the Commonwealth; and we ought to move as he moves. 11 Rep. fol. 72. The King is the Fountain of Common Right, therefore we have no Reason to stain the Fountain.

I am now come to my fourth Proof, which is by Precedents, wherein I shall be somewhat long.

The Second Day's Argument of Sir John Banks Kt. his Majesty's Attorney-General, before all the Judges in the Exchequer-Chamber, on the behalf of his Majesty.

May it please your Lordships,

TO remember I shewed by Charters, Aids, and a great Number of Precedents, that this Royal Power was in the King of England before the Conquest: And that tho some were exempted from the setting forth of Ships by Grant unto some particular Men, or some particular Churches; yet these three fundamental Services of Expedition, repairing of Castles, and making of Bridges, were always exempted.

Then I shewed, by a great Number of Precedents, that not only the Principal, but all other Necessaries that concern the Defence of the Realm, both by Sea and Land, hath been always commanded by the King's Writ: for the fortifying of

Towns and Castles, and the Murage of Towns, the Appointment of Admirals of the Fleet, and those that should be Guardians by Sea and Land; the Imbarring of Ships, and Arrays of Men, the erection of Beacons, and discharging of some upon just Cause, and by punishing of those that were refractory: And all this was done by the King's Command, *per ipsum Regem*, or *per Regem & Concilium*, without any Aid of Parliament.

Likewise, I have made it appear to your Lordships, that the King is the sole Judge of this Defence: That the King is not to be mistrusted in the Execution of his Office, as King; nor your Lordships as Judges, are not to be mistrusted. I have then shewn out of Precedents, that in those Years, wherein there have been Parliaments, and sometimes sitting the Parliaments, Writs have issued *per ipsum Regem*; and *per Regem & Concilium*.

I shall proceed to make good other Particulars, which I have opened unto your Lordships. First, That these Precedents that have been shewed, and which I shall shew unto your Lordships, have not been grounded upon any particular Covenant or Charter of Custom, but upon the Law of the Land, and upon such Reasons as are irreversible, and bind all the King's Subjects, as well Clergy as Laity. For this I shall remember *Claus. 48 Hen. 3. M. 3.* The Writs do recite, *quod tum Milites & liberi Tenentes quam omnes alij, &c. ad defensionem Regni teneantur*. *Claus. 9. Ed. 3. M. 11. pro defensione Regni omnes teneantur*. *Scot. 10 Ed. 3. M. 12. quia consonans Rationi, quod omnes tangit per omnes supportari debet*: And the same Roll, *M. 20. dorf. ex legiantia ad defensionem contra hostiles ingressus inimicor' manus exponere adjutrices, &c. Rot. Alm. 12 Ed. 3. M. 1. dorf. omnes & singuli tenentur, &c. Se & sua exponere*; the same Roll, *M. 12. dorf. omnes & singuli ad defensionem Regni astricti*. And I think every Man will acknowledge himself to be bound out of his Allegiance. *Rot. Alm. 13 Ed. 3. M. 13. dorf. ex legiantia ad defensionem Regni & vestri & vestrorum*. Same Rolls *M. 17.* And there be Writs unto all the Bishops of England, *quod invenerint homines ad arma pro defensione*. Francke Almoigne Tenure was no Plea against this Service. *Rot. Franc. 46 Ed. 3. M. 34.* There was a Writ directed to the Bishop of Canterbury, for the arming and arraying all Ecclesiastical Persons within his Province: The like to the Bishop of York in the same Roll. So it extends to all the King's Subjects, as well to the Clergy as the Laity.

Nay, Ports that were obliged to do particular Service, yet in case of extraordinary Defence, that there the Writs went out, not only to perform the ordinary Services, but Services *ultra debitum*. The Cinque Ports, by their Charter of *Ed. 1.* were to set forth 52 Ships at their own Charge for fifteen Days; yet we find by several Writs, and in several Kings Reigns, that the Cinque Ports have been required to do further Services. Arrests have been of their Ships, *Ultra servitium debitum*. *Scot. Roll 10 Ed. 3. M. 2, 3. dorf. and 28. dorf.* there is a Command, that all their Ships of 40 Tons should be arrested for the King's Service. And so likewise, *M. 22.* that all the Ships of the Cinque Ports, *tam majores quam minores*, should be arrested. *Rot. Alm. 13 Ed. 3. M. 13. Omnes Naves quæ transire poterint*, arrested and brought to the Cinque Ports.

So then, to tell of particular Rolls, that these and these Towns were obliged to do these Services; this, under favour, is no Argument. For altho

they be obliged to do the Service, yet upon other Occasion, the King took all their Ships, *ultra servitium debitum*. *Claus. 16 Ed. 2. M. 13. dorf.* The King writeth to divers Earls, Barons and others in this Manner, *Quod sint tam citius quatenus poterint parati*, beyond your Service, with Horse and Arms, and come to our Town of Newcastle upon Tyne: So as this Writ was directed to all the Lords Spiritual and Temporal, and all the King's Subjects; not only with their due Service, but beyond their Service, to be at Newcastle. So your Lordships see the Motives, and Grounds, and Reasons of these Writs are universal; they concern not a particular Part and Subject, but all the King's Subjects; and they are *Legiantia sua debita*. So that is the first Thing I would observe to your Lordships, that these Writs and Precedents are grounded upon the Law of the Land, and not upon particular Custom.

The second Thing is this: That all these Writs have issued by the King's Mandate, either by the King only, or by the King and his Council, without Advice in Parliament; of which I have made a Collection: And it is better for me to attend your Lordships withal, than to cite them; because they are above five hundred, wherein I have distinguished what have been *per Regem*, and which *per Regem & Concilium*, and where the Advice of particular Merchants and Portsmen were required, *Scot. 11 Ed. 3. M. 2. dorf. 19 Ed. 3. pars 1. M. 26. dorf.* And in these, the Advice of particular Men were called to assist the King and his Council.

Now, my Lords, if before the Time of William I. and since, and for so many 100 Years together, this hath been done; shall not these Precedents make a Rule?

That Precedents that are not against the Law, nor contrary to the Rules and Reasons of the Law, make a Law, this appeareth by *4 Ed. 4. fol. 43.* The Lord-Chancellor sent forth a Writ of Error. The Judges took Exceptions both to the Matter, and the Manner, saith the Book, because it hath been always so; the Precedents make a Law. *33 Hen. 6. fol. 20.* An absurd Return made by a Sheriff; yet because Precedents to warrant it, a good Return. *2 Ric. 2. fol. 7.* where a Duty was to be paid to a Corporation of Mayor and Commonalty, the Duty to be paid to the Body, and an Acquittance to be had from them; but because it had been used the Mayor alone to give the Acquittance, a good Acquittance. *2 Rep. Haines's Case*; the King shall not part with his Interest without the Great Seal; but yet a Lease for Years, under the Seal of the Exchequer, is good by Custom. *4 Rep. fol. 9.* that the Precedents of the Court are good against the express Words of a Statute. Having so many Precedents, I will not trouble you any longer, tho I have reserved a special Place for answering of Objections; yet such Objections, as fall materially in the way, I shall give an Answer to, tho I reserve the Answer to the main Objection to the fifth Place.

It hath been said, by Mr. Holborn, that here hath been a Discontinuance of Time; and that since the Time of *50 Ed. 3.* none of these Writs have issued.

Shall Discontinuance of Time take away the King's Right? If there have been no Use within the Time of the Memory of Man; yet if there have been an inherent Right in the Crown of England, shall the Crown lose it by Discontinuance of Time,

Time, contrary to the Rule of the Law? 10 *Hen. 4. fol. 6.* Where the King is the Founder of a Bishoprick or Abbey, and is by common Right to have a *Corody*, tho not used, and the King hath not demanded it in time of Memory, yet the King shall not lose it. *Fitz. Her. Na. br. fol. 5.* A Writ of Right brought by the King, where you must alledg *expleis & Seisin*, will not bind the King to alledg a *Seisin* in him and his Progenitors: for if once the King had a *Seisin*, Protracts of Time shall not discontinue it. 12 *Hen. 7. fol. 20.* The Statute of *Mortmain* confineth the Lord to enter within a Year and a Day; but it shall not bind the King, for he may do it any time. 35 *Hen. 6. fol. 26.* If a Villain doth alien his Lands, it barreth not the King. Plenary after six Months, no Plea against the King. 6 *Rep.* no Discontinuance of Time, if the King hath a Right. 7 *Ed. 4. 30.* If an Alien and another Man purchase Lands together, and the Alien dies, the King shall not be prevented by Survivorship: and in personal Goods, you shall raise no Prescription against the King. 35 *Hen. 6. fol. 27.* There is no Man can pretend a Title to the King's Goods, for Waifs, Estrays, or Wrecks; for no Prescription can invade the King's Profit.

But then they say the Precedents are not in all Times; for we have not shewn, nor cannot shew that in all Times these Writs have issued.

A strange Objection, in all Times! My Lords, it is a casual Service. In all Times, God be thanked, not that Occasion or Necessity of this Defence. Will you have us shew you Precedents for a casual Service done at all Times? 4 *Rep. fol. 10.* If a Man hold to do Service to his Lord, to go with him into the War of the King, this is out of the Statute of Limitation; for it may happen not once in two or three hundred Years: therefore the Law doth not require we should have a *Seisin*, for this very Reason, because it is casual. 33 *Hen. Br. Fealty 15.* That for Homage and Fealty, casual Service, they are out of the Statute of Limitations: so as now, by the same Reason that they would tie us to Precedents where there was no Occasion, by the same Reason the Tenants are to do Homage, or go into the Wars when there was no Occasion.

But besides, he is much mistaken, these Precedents do not end with *Ed. 3. 7 Ric. 2. M. 18. 13 Hen. 6. M. 10. 14 Hen. 6. pars 1. M. 14.* a great Number of Ships commanded then in the King's Service.

But it hath been said, that the People have always petitioned against it, and there hath been a decrying by the People; and they have petitioned in Parliament against it. And these things, that must be made good by Custom, must gather Strength by a Consent. And further, that when Petitions have been preferred, the King hath not denied the Petition expressly.

My Lords, I shall shew, when I come to give a particular Answer to those Records and Petitions that they have mentioned, That notwithstanding these Petitions, this Service hath been always continued: and for the Answer that he speaketh of, that they have not been denied; these are the very Words of the Answer, *Le Roy se aviserá.* We know whether this be an express Denial or no. So tho the King took time to advise of the Petition of his Commons, this is no Argument, but that it is a mannerly kind of Denial. Besides, in these very Years of 10, 11 & 12 *Ed. 3.* the

Writs went out for the Shipping Business, by the Royal Power.

Then it hath been said, that we can make no Precedents of these; for tho Writs have gone out, yet it doth not appear that these Writs have been put in practice, or that any Executions of them have been done.

But the Service hath been done, as doth appear by the Monuments of those Times. Then it doth appear by other Records, that the Wages of Mariners have been paid by the Country. These very Years, *Rot. Claus. 20 Ed. 3. M. 6, 7.* It doth appear, that some particular Men had particular Discharges, either because they were in the King's Service, or in *Gascoigne*, or lived on the Sea-Coasts; that they pleaded their Discharges, and had them allowed for that Reason, 23 *Ed. 3. M. 14.*

So as, my Lords, upon this second Ground, that these Writs have gone forth thus constantly in several Ages; that there being such a Number of Precedents, the Discontinuance hath ever been when there was no Occasion. That the Precedents of the Courts of Justice make a Law, and Discontinuance cannot take away the King's Title. This is the second Thing I do insist upon, that these Precedents make a Law.

The Third thing I shall observe upon these Precedents is, That these Writs have gone forth, not only in Cases of an actual War, or in Cases of an Invasion, when the Enemies Fleet hath been upon the Sea; but by way of Preparation before-hand, when the Enemy meant to come; and in contingent Cases, when the King might conceive any Danger might ensue: But in these Cases Writs have issued out, will appear. *Rot. Claus. 48 Hen. 3. M. 2.* The Writs are here in Court. *Cum necesse sit ad defensionem Regni esse promptum, &c. Claus. 23 Ed. 1. M. 5.* There were several Writs directed to divers Earls, Bishops and others, *de custod. marit.* the Words are thus, *Quia volumus quod partes marit' in Com' Essex, &c. contra Inimicos diligenter custodiend. forsan si in partes illas venire contingent.* 24 *Ed. 1.* Remembrancer in the *Exchequer*; upon Information given, that there were 1000 Men in *Flanders* made Preparation to come unto *Yarmouth* to burn the Town, Writs sent forth by the Treasurer and Barons, *ex officio*, to be in readiness in case there was an Invasion. *Pat. 9 Ed. 2. pars 2. M. 26.* Writs directed to all the Port-Towns between *Southampton* and *Thames*, to set forth Ships at their own Charge, for the better Defence of the Kingdom; and against those that commit Depredations upon the Sea, as well to Men of this Kingdom, as to others coming to this Kingdom. *Rot. Scot. 11 & 12 Ed. 2. M. 8.* The King, by several Writs, directed to several Commissioners in several Counties, reciteth the Provision made for his Army at Land at the last Parliament, and saith, *Nos considerantes ad expeditionem præd. tam ad impedend. Scotos, quam pro custodiend. Maris, &c.* and so commandeth for that purpose, that Ships should be sent out of several Counties for these two Causes; the one to hinder Victuals from going into *Scotland*, the other for free Intercourse of Trade. It appeareth, 10 *Ed. 3.* that the Ships of *France* were not upon our Sea-Coasts, but were in *Britain* in *France*; and yet the King, upon Relation that they had an Intention to invade the Realm, did send forth for the providing of Ships in most Parts of the Realm; this was only upon Information. *Rot. Scot. 10 Ed. 3. M. 30. Ut audivimus: M. 23. Ut intelleximus; M. 16.*

M. 16, 22. *Quod audit. M. 18. dorf. 12. dorf. 5. dorf. in partibus transmarinis.* So by these Records, this Preparation of Shipping was only upon Information. *Franc. 26 Ed. 3. M. 5. Quia vulgaris opinio Regnum nostrum Angliam invadere,* therefore commandeth Shipping by Sea, and Forces by Land. *Rot. Franc. 10 Ric. 2. M. 23, 24. Quia certi rumores quod Franc. infra breve tempus cum magnis Armis hoc Regnum invadere, &c.* commands the Custody of the Sea and Sea-Coasts. So as it doth appear, by these Records, that upon an Information, or Conjecture of the King, he may send forth these Writs, and command his Subjects to be in readiness, in case that Danger might happen; better so, than to receive a Blow, and then to make Preparation for Defence; we should buy that Wit with Repentance. *Prudentissima ratio, quia timor Belli, &c. preparavit.* And surely when the King sees those Preparations abroad, those great Armies in adjacent Countries, *qui nocere possunt,* great Reason we should be in Preparation.

This is not only consonant to Precedents, Wisdom of Times, Policy of State, *Venienti occurrere morbo,* but to the Reason of our Common Law. If a Man be in fear, that another Man lieth in Wait for him to do him a Mischief, shall he stay till he receive a Wound? *17 Ed. 4. 4.* In this case he may have a Writ to bind him to the Peace, *13 Hen. 7. fol. 17.* If a Man have a Warranty for his Land, shall he stay till he be impleaded? No, a *Warrantia Charta* lieth till he be impleaded. If Lord and Tenant in antient Demesne, and the Lord shall require more Service of the Tenant than he ought to perform; shall the Tenant stay till there be a Distress taken? No, he shall have his *Monstraverunt, Fitz-Her. Na. Br. 40 Ed. 3. fol. 45, 46.* and this only upon Verbal Demand of Service.

Shall then the Common Law of England secure the Subject not to stay till a present Danger, but he shall have his *Warrantia Charta*, and *Monstraverunt* before Distress taken; and shall not the Common Law provide for the King, that he, in his Expectation of Danger, may make his Preparation against it? So surely these Precedents are according to Reason of Law.

The next Thing that I did observe out of these Precedents was, that in these very Years, wherein there have been Aids granted to the Crown *pro defensione Regni*, in those very Years these Writs have issued out by the Royal Power. *Claus. 48 Hen. 3. M. 2, 3. dorf.* There was then a Tenth given by the Clergy *pro defensione Regni*; and yet in that Year he did command the Defence of the Realm, both by Sea and Land; and that appeareth, *Pat. 48 Hen. 3. M. 6. dorf. and Claus. 48 Hen. 3. M. 30.* In the 22 Ed. 1. the King had given him in Parliament, *pro subsidio guerræ*, a Tenth of all moveable Goods, which was to be collected in the 23d Year, as appears, *Pat. 22 Ed. 1. M. 2.* My Lords, this very Year, when this was paid, he commanded a great Number of Shipping for the Defence of the Coasts, and that appeareth, *Pat. 23 Ed. 1. M. 6.* Writs were directed to divers Counties, as *Suffex, Southampton, Dorset, &c.* commanding them to be aiding and assisting to *William Thornton*, in the taking of all the Ships in those Counties, *Pat. 23 Ed. 1. M. 7. a Com' Radolpho de Salwico ad providend. de Navibus, ita quod prompti sint quandocunq; mandamus.* So to be in readiness with all Ships in those Parts, that were of 40 Tons. *M. 8.* Some Roll-Writs directed to most of the Sheriffs of England to be assisting to *John de Barwicke*, to the

chusing and sending forth of Archers, *ad proficiscendum cum Fleeta nostra.* So as they were not only brought out of their own Counties, but all the Counties of England, *ad proficiscendum.* My Lords, this 23 Year, when this great Aid of Tenth, and Part of all the Moveables were granted, *Pat. 23 Ed. 1. M. 7.* the King writeth to all the Archbishops, Earls and others, reciting, that he hath committed the Custody of the Sea to *William de Stoaks, Ita quod idem Willielmus vos omnes,* naming the Archbishops, Bishops, Earls, &c. *prout necesse fuerit.* So as you see the greatest Subject is not exempted from these Commands, but should be *auxiliantes, respondentes & intendentes.* *Claus. 23 Ed. 1. M. 5. dorf.* The King commanded the Bishops of *London and Norwich*, for the Safeguard of the Sea Coasts. *Pat. 23 Ed. 1. M. 1.* A Command to all Archbishops, Bishops, Abbots, Earls, Barons, Knights and others; commanding them to be aiding to *Adam de G. Ita quod idem Adam compellere posset quoties necesse, &c.* So *Claus. 23 Ed. 1. M. 5. dorf.* the like Commands. So as, my Lords, in those Times, which was 23 Ed. 1. when there was an Aid granted by Parliament, it doth appear, those great Defences, both by Sea and Land, were commanded.

My Lords, 10 Ed. 3. in a Parliament holden at *Nottingham*, there was a Fifteenth granted to the King for three Years, and so it was recited in the Record. And it appeareth likewise, *Pat. 12 Ed. 3. M. 2. Pars 3. Claus. 12 Ed. 3. M. 28. Pars 3.* it appeareth, that a Tenth and Fifteenth were granted to the King in Parliament; and this was *tam pro defensione quam arduis Negotiis.* *12 Ed. 3.* The Prelates, and Lords and Commons at a Parliament holden at *Westminster*, gave the King ten Thousand Sacks of Wool, said to be given *pro defensione Regni*, as appears *Rot. Alm. 12 E. 3. pars 1. M. 1.* In the same Year there was granted likewise *pro defensione Regni medietatem lanarum*, the Moiety of all their Wool, *M. 31, 32.* In the same Year the Clergy, they gave the King in Parliament, *medietatem lanarum usq; vigint. mill. saccar.* as appeareth, *Rot. Claus. 12 Ed. 3. Pars 3. M. 13. Rot. Claus. 12 Ed. 3. Pars 2. M. 1. dorf.* And in this Year the King collected a Tenth and Fifteenth, that was granted to him by the Laity in Parliament for two Years; as appeareth, *Claus. 12 Ed. 3. M. 30.* And besides all this, the Clergy gave the King a Tenth, *Claus. 12 Ed. 3. Pars 3. M. 30.* These I cite the more particularly, because no Memory of them in the printed Statutes.

Were all these Aids granted, 10, 11, 12 Ed. 3. *pro defensione Regni*; and shall the King in those very Years send forth Writs for the Defence of the Sea and Kingdom? And may not the King do it now, when he seeth such great Cause?

Now, my Lords, in this 12th Year, when all these great Aids were granted, *Rot. Alm. 12 Ed. 1. 3. Pars 1. M. 12. Walter de M.* was appointed Admiral of the Fleet towards the North, and appointed Commissioners, *ad assidendum villas bonis & Catallis ad contribuendum, &c.* and commandeth all Sheriffs and Officers to be aiding and assisting. So in this Record it doth appear, that in these 10, 11 and 12 Years, Ships and Forces were commanded. *Claus. 12 Ed. 3. Pars 1. M. 17. dorf.* Command by the King, that the Men of *Surrey and Suffex* should have their Goods seized, and Persons imprison'd, if they refused to contribute towards the Charge of Shipping. *Rot. Alm. 12 Ed. 3. Pars 1. M. 2.* A Commission to *William de B.* and others,

ad affidendum omnes homines juxta statum, and to seize their Goods and Chattels, if they refused to contribute for the Wages of Mariners for the Ships.

So as your Lordships see by these Records, tho there be Aids, Tenths, Subsidies and Fifteenths, granted by the Clergy and Laity; yet in that very Year, if an extraordinary Occasion comes, tho Ships not upon the Sea, the King hath commanded the Defence of the Sea and Land at the Charge of the Counties. I have done with the fourth Particular.

The fifth Particular is this. This Aid, and these Contributions, they have not been required only from the Maritime Towns, but from the Inland Counties, *per totam Angliam*. And this is materially to be insisted upon, because we are now in an Inland County, in the County of Bucks.

My Lords, That this was done before the Conquest, your Lordships have heard. For *Alfred*, the first Monarch, Anno 827. *jussit Cymbas, &c. per totam Angliam*. *Affer Menevensis fol. 9. Wigor. Floren. 316. Huntington 351.* That King *Ethelred* did the like, Anno 1008. *per totam Angliam*, every 310 Hides of Land to find one Ship. *Floren. fol. 9. Matth. of Westminster 387. Huntingdon fol. 360.* The Decree or Council, which was held at *H.* about the 30th Year of King *Ethelred*, was that Ships should be prepared against *Easter*. And those Laws, which are remembred in *Lambert*, were before the Conquest, *Cap. 10. fol. 106. Quod præfidii, &c.* So it was general and universal throughout the Realm, concurring with those antient Precedents and Council, since the Time of *William* the First. *Claus. 48 Hen. 3. M. 2.* For where a Record is to be applied unto several Purposes, I must mention that Record again. It appeareth by that Record, that *Bedfordshire*, which is an Inland County, was charged with the Guard of the Sea-Coast, and paid for Wages: Same Roll, *M. 3. inus M. 2. dorf. Rutland, Oxfordshire, Dorsetshire*, Inland Counties charged for the same Service. *Pat. 48 Hen. 3. M. 7. Cambridgeshire and Huntingdonshire* charged for the like Service, and that they should do *prout per Concilium nostrum ordinatum fuerit. 24 Ed. 1. King's Remembrancer in the Exchequer, Rot. 77, 78, 79.* Title *de associando pro custod. Maris*; and Writs went out for Ships in divers Counties; and amongst others to *Bucks. Pat. 26 Ed. 1. M. 21.* When there was a Complaint that the Subjects did suffer upon undue Service, the Commissions that are directed for Enquiry thereof, are directed to all the Counties of *England*, as well Inland as Maritime. *Pat. 23 Ed. 1. M. 5.* That Men, to furnish a Fleet, were drawn and commanded from the most Parts of the Kingdom. *Rot. Scot. 10 Ed. 3. M. 14.* Inland Counties charged with Shipping for the Defence of the Kingdom, as *Cambridgeshire, Huntingdonshire, Nottinghamshire, and Derbyshire. Claus. 13 Ed. 3. Pars 3. M. 14. dorf.* and there *Oxfordshire* is charged with *Custod. maritim. Rot. Scot. 12 Ed. 3. M. 12. dorf. Bedfordshire, Bucks, your County, and Derbyshire* charged there with the same Defence. *Claus. 1 Ric. 2. M. 18.* There *Cambridge and Huntington* were to provide a Barge at their own Charge; and yet Seafaring Men there were none. Writs were then also directed to *Nottingham, and Derby*; tho they had no Seamen, yet they had Money and Means to provide them, *Rot. Franc. 7 Ric. 2. M. 18.* The King sends his Writs into most Counties of *England*, as well Inland as Maritime, reciting that the King of *France* was gone with an Army into *Flanders*, and that *Calais*,

was in danger; and commandeth all Knights, Esquires and Archers, and every of them, according to his Estate and Faculty, to be sufficiently arrayed and armed, and come to the Port of *Sandwich, ad proficiscend.* My Lords, in this Record there was mentioned *Bucks, Bedford, Huntington, Cambridge, Nottingham, Derby, Leicester, Rutland, Northampton and Berks*, all these Inland Counties. The Words of the Writ are, *Quod omnes tenentur pro defensione Regni, &c. Claus. 9 Ed. 3. M. 12. per omnes supportari. Rot. Alm. 12 Ed. 3. M. 12. vel 20. quod, &c.* All and every of our Kingdom, out of their Allegiance, to be ready to defend the Realm. *13 Ed. 3. dorf.* a great Number of Ships.

By all which it doth appear, *First*, That the Service was commanded from those Inland Counties. *Secondly*, That the same Reasons which are given to bind the Inland Counties, are given to bind the Maritime Counties, *Pat. 23 Ed. 1. M. 6.* for the taking of Ships in *Sussex, Devon, Middlesex*, and other Counties. If so be the Maritime Counties be in danger, surely the Inland Counties cannot be in safety. We are in an Inland County; and the Entry of an Enemy upon any Part of it, concerns the Safety of us all. And by the Rule of the Law, every one that is to receive a Benefit is to give a Contribution. As the Case of *16 Hen. 7. fol. 13.* all Feoffees, whose Lands were liable to a Statute, the one shall have Contribution against another. If four or five Cognizors in a Cognizance, all shall have Contribution one against another. *40 Ed. 3.* Parceners, upon whom a Warranty descendeth, they shall be equally charged. If a Man bind himself and his Heirs in an Obligation, having Lands partly by his Father, and partly by his Mother, and they descend to several Heirs, both shall be equally charged, as it is *3 Rep. fol. 13. Herbert's Case.*

So I go upon these Reasons, that it is consonant to Reason of Law, besides these Precedents, that where a Danger is to all, and all receive a Benefit, all are to be equally charged.

My Lords, to illustrate it by further Reasons, that tho the Inland Counties, and Maritime Counties be charged, I find that the Ports, by the Charter of *Ed. 1.* were to find 52 Ships. I find that when the Necessity of the Service did require it, then all their Ships were seized in the King's Service. I find likewise, that when there hath been a Disability in the Ports to perform the Service, as now they are, for then the main Part of the Trade was in the Port Towns, but now it is gone from thence, and gone to *London*; and few Ports have the Trade, but *London, Newcastle, Bristol and Hull*; and shall it not now be required of the Inland Counties, since there is a Disability in the Ports? *Rot. Franc. 21 Ed. 1. M. 23.* I find there, that *Plymouth*, and some of the Port Towns, did bear more than *London*; for *Plymouth* found 4 Ships, *Dartmouth* 6, *Bristol*, 4, *Newcastle* 3, *Norwich* and *Yarmouth* 4, *London* 2, *Hartle-Poole* 2, *Sandwich* 2, *Dover* 2, *Rye* 2, *Shoreham* and *Arun-del* 2, and other Places found but one. It appeareth, *Rot. Alm. 13 Ed. 3. M. 3. dorf.* that *Yarmouth* furnished, at their own Costs, 4 Ships, *Kingston* 2, *Boston* 2, *Lynn* 2, *Harwich* 2, and *Ipswich* 2.

My Lords, are these Ports able to furnish the King with so many Ships in these Days to do their Service? The Wealth of one Portfman in those Days, was worth the Wealth of a whole Town now.

Admit

Admit the Maritime Towns were bound to it; yet if there be a failing of their Ability, that they cannot do it, shall it not elsewhere be required? That it is agreeable to the Rule of the Law, before any Commissions of Sewers, where particular Men are bound to defend the Sea-Banks, yet before any Statute, in case the Man was not able, the Service was required from the County; for by it they might have either Gain or Loss. This appeareth by the Rules of the Common Law, before any Statute; *Register fol. 123. Quod distringat omnes, &c.* when one Man was to maintain the Banks against the Sea; if not able to do it, the rest that had Benefit by it, were to be distrained to do it. *5 Rep. fol. 99. 10 Rep. fol. 140, 141.* the Case of the Isle of *Ely* agreeable, that all that have *Salvationem & Damnificationem* shall contribute.

To this purpose are those two Records mention'd by Mr. Solicitor, *Rot. Parl' 7 Hen. 4. M. 18.* that where there was a Subsidy granted to the King for the Defence of the Realm, it was assigned to Merchants, yet with a Salvo, unless Royal Power came. *Rot. Franc. 6 Ric. 2. M. 8.* certain Merchants had the Custody of the Sea, except *Regalem potestatem*.

So the Conclusion is, if an extraordinary Defence, there may be no Cause to go into the Inland Counties; but if a Royal Power, or extraordinary Danger, tho not imminent, the King may require an extraordinary Contribution, *per totam Angliam*, from all his Subjects.

But this hath been objected against, and some Records vouched; that is, say they, we will shew you many Precedents, wherein *Navale Subsidium* hath been required from Inland Counties, and they have been discharged thereof, as *Pat. 2. Ric. 2. Pars 2. M. 42. dorf.* The Town of *Beverly* petitioned, because they were to contribute, being an Inland Town, towards the finding of a Ship with the Town of *Hull*, and were discharged thereof.

This is Truth, but not the whole Truth: for the Town of *Beverly* was discharged by reason of a Charter of Exemption granted unto them *in honorem S. Jobannis de Beverly*, the King's Confessor; upon that Charter they were discharged.

They have objected likewise the Town of *Bodmin*, an Inland Town in *Cornwal*, was discharged a *Custod' Maris*: For this *Claus. 13 Ed. 3. Pars 2. M. 14.* was vouched for it, that the Town was discharged of this Contribution.

For answer to that, it will appear, that one *Trussel* was Admiral then of the Fleet, and was by his Commission to be furnished from the Ports at their own Charge for three Months. My Lords, this appears, *Rot. Claus. 13 Ed. 3. Pars 1. M. 35.* and so that Town, an Inland Town, was to be discharged. My Lords, likewise there were other Discharges; upon this Reason *Norwich* was discharged from finding of Men for manning of Ships, because the Admiral's Commission did not warrant it, *Rot. Scot. 10 Ed. 3. M. 15.* for it only extended to the Ports; but yet *Norwich* was charged to find Ships, *Claus. 13 Ed. 3. Pars 2. M. 14.* So *Colchester* was discharged for finding of a Ship, but it was because they were not within the Words of the Writ, as appeareth, *Rot. Claus. 13 Ed. 3. Pars 1. M.* So to tell your Lordships a Story of a great Number of Land Tenures, discharged *de Custod' Maris*, and not to give your Lordships the Reason, it is nothing to the purpose.

So, my Lords, having verified these five Points by the Precedents, and justified them by these

Reasons, and answered these Objections, I shall now come to the sixth Matter upon this Record; and that is, tho no Cause be declared in the Writ, no Danger manifest, nor against what Enemies; that yet the King by his Writs hath commanded Shipping for Defence of Sea and Land; and in the King's Wisdom the Danger hath been reserved in his Breast, and not communicated to his People by his Writs.

First, I find that antient Precedents have been so, that it hath been reserved to the King himself, and those that he did depute to take care thereof; this appeareth, *Rot. Claus. 14 Joban. M. 2.* the King directed his Writs to *Herbert*, with a *Mandamus* to make ready all Ships for our Service, when we shall command; not a Word of the Cause declared, or an Enemy proclaimed. The same Roll, *M. 6.* the King by Writ, directed to several Parts, causeth all Ships that could carry six Horses or more to be sent unto *Portsmouth*; and the like Writs were directed to other Ports, *Rot. Pat. 15. Joban. M. 4.* The King appoints a Guardian upon the Sea-Coasts, and commandeth all Men that they should be *intendentes*; and other Writs in the same Roll, directed into many Counties with a *Mandamus, Claus. 17. Joban. M. 7. dorf.* Writs for taking of Ships, and bringing them into the *Thames* Mouth, without shewing any Cause: All this was done in the Time of King *John*. In the Time of *Hen. 3. Rot. Pat. 13 Hen. 3. M. 5.* a Writ commanding the Sheriff of *Kent* and *Suffex* to arrest all Ships in those Counties to be at *Portsmouth*, to be ready to go into that Service we shall command. And it appeareth in the same Roll, that these Ships were able to carry but six Horses. So *Rot. Claus. 14 Ed. 8. M. 13.* To our Bailiff of *Portsmouth*, and Keeper of our Navy, to make ready one good Ship, and to be ready to go in our Service, whither and when we shall command it. *Rot. Claus. 23 Ed. 1. M. 5. dorf.* The King declares that he will have the Sea-Coasts in *Essex* guarded against the Enemy; and there commandeth them to be obedient to such an one, who had the Custody. *Rot. Pat. 23 Ed. 1. M. 2.* The King writeth to all the Archbishops, Bishops, Sheriffs, Knights, and others, to be assisting unto *William de S.* who had the Custody of the Sea. So as by all these, it appeareth the King did give no Account to his Subjects, either of the Service, or the Time when. *Rot. Scot. 10 Ed. 1. M. 13.* The King commanded all Ships to be arrested, and Men and Mariners to be sent to the Admiral of the Fleet, *ad proficiscend.* The same Roll, *M. 5. dorf.* a Matter fit for the Council, and not for the People to know. Same Roll *M. 20.* that they should do *prout nobis, &c.* the King oweth no Account to his Subjects of these things. *24 Ed. 1. M. 19.* The King having commanded *E. S.* to take up 100 Ships fit for his Service, commandeth the Sheriff of *Northumberland* and others to be assisting. Same Roll *M. 17.* A Command to the same effect, that all Ships should be taken between *Lynn* and *Berwick*. It was so likewise in the Time of *Ed. 2. Pat. 9 Ed. 2. Pars 2. M. 26.* Ships taken up at the Charges of the Inhabitants, to defend the Sea against Malefactors and Pirates. *Rot. Claus. 12 Ed. 2. M. 11. dorf.* Writs directed to the Mayor and Bailiff of *Sandwich*, to make ready all Ships within their Port of 40 Tons, *Ita, &c.* that they be ready within three Days Warning to go, as we shall more fully declare; but the Service that was to be

be done, not mention'd. So it appear'd by other Writs to other Towns in the same Roll, 17 Ed. 2. M. 11. Pat. 14 Hen. 6. M. 14. *Rex quia quibusd' arduis causis, &c.* doth assign John Hoxham to take up all Barges of 10 Men and upwards.

So in all these Times of King John, Hen. 3. Ed. 1. Ed. 2. Ed. 3. and Hen. 6. Writs have gone out generally; that the Service hath been conceal'd; and for Instruction, they were referred to the Council.

It standeth with Reason, for Resolutions of War are not to be communicated; his Majesty hath a separate Council of War from the Body of his Privy-Council.

Now, my Lords, for the Objection that hath been made against the first Writ of 4 Aug. 11 Car. that is, That the King hath not declared sufficient Cause for the issuing of this Writ: The King hath not communicated to J. S. and J. N. what the Employment must be; he must satisfy the Council at the Bar, which he ought not to communicate to his Privy-Council, but is reserved for his Council of War.

This is a Writ to command Obedience from his Subjects, and upon such Reasons as may satisfy any reasonable Man; and if fewer Reasons, it had been the better agreeable to all former Writs.

For the next Matter out of the Precedents, which is, that during the Times of the Sitting of Parliaments, these Writs have issued out by Command from the King, I have made it good upon my former Head.

The last Thing I observe upon the Precedents was this, That there was no Clause, no Particular in the Writ of 4 Aug. 11 Car. but was warranted by many Precedents: And that in this thing the King doth but *jubere per legem*.

First, For the Direction: It is, as in this Writ, sometimes upon one, or *probis hominibus* of such a County, sometimes the Direction is to Commissioners; sometimes one way, and sometimes another: and of this of the Precedents themselves, when your Lordships come to see them, I shall speak. They would have the King descend so low, as to give them a Reason why he doth it: some Reasons are expressed in the Writ; as *quia periculum imminens, quia pro defensione Regni, tuitione Maris, securitate subditorum, salva conductione Navium, &c.* My Lords, all these are expressed in the Record, 9 Ed. 3. M. 12. Scot. 10 Ed. 3. M. 20. Rot. Alm' 12 Ed. 3. M. 1. Rot. Alm' 13 Ed. 3. M. 13. I find in these Writs the same Matter, Power of Assessment, sometimes Levies by Distress and Imprisonment; nay, Seizure of Lands and Tenements, Goods and Chattels, that are expressed in former Writs: and that it was at the Charges of the Counties, both Inland and Maritime, this appeareth, Rot. Scot. 8 Ed. 2. M. 9. De Navigio providend. Pat. 9 Ed. 2. M. 26. Pars 2. De Navigio providendo pro Custod' Maris. Many more of these, Scot. 10 Ed. 3. That the Wages of the Men that went in the Ships, and guarded the Coasts, were at the Charge of the County; this appeareth 10 Ed. 3. M. 2. dorf. 60. Men appointed and sent to Portsmouth, and they refuse to go without Wages; but a Command came from the King, and commanded the Counties to pay them Wages, 10 Ed. 3. M. 21. dorf. And his Predecessors not to bear any Charge whatsoever, tho *pro defensione*. Rot. Alm' 12 Ed. 3. Pars 1. M. 2. Those of Lynn, who refused to contribute towards the Charge they were assessed by the Commissioners,

VOL. V.

juxta quantitatem, were compelled to contribute; so Rot. Claus. 12 Ed. 3. M. 8. the like *pro Custod' Maritim.* I might be infinite in these Particulars, but I will not trouble your Lordships.

Here they have made some Objections; tho to answer the main Objection, I am not yet come. They say, this Power of assessing the People for Sums uncertain, ought to be no more than Escuage uncertain, and must be assessed in Parliament: And this Assessment for Defence, ought not to be by Commission, or the King's Writ. First, for the Authority, which is Littleton, he saith, fol. 20. *Que communiter dicitur que Escuage serece assesse per Parliamentum*.

I do not find by the Register, where these Writs are; neither do I find them grounded upon any Act of Parliament. Some that are grounded upon Acts of Parliament, do recite them. But what if it be by Act of Parliament? A Service that is to be done by the Tenant to his Lord; what if this be so, that it must be assessed in Parliament? Your Lordships know that the Tenants must do according to the original Duties of them. And if this be, that the Lord shall not assess them but in Parliament, is that an Argument from a Tenant to a Lord in this Case?

This is a Service commanded not by Tenure, but by a King from his Subjects; this is suitable to the Reason of Law in other Cases: For those antient Aids, which the Law doth require for the making of his eldest Son a Knight, or *pur file marrier*; are not those certain at the Common Law? Must there be an Act of Parliament to assess those Aids? The Books are otherwise.

But the King at the Common Law might require an Aid uncertain, and might assess it as he pleased. Glanville lib. 9. cap. 8. Brit. fol. 57. cap. 27. Bract. lib. 4. cap. 16. So as at the Common Law they were uncertain. 11 Rep. fol. 68. D. It is said there, the Statute of Westminster 1. cap. 15. which puts reasonable Aid in certain, doth not bind the King; *a fortiori* we must not bind him to a Certainty for the Defence of the Realm. No Man tell what the Preparation must be, or the Charge thereof. If they can shew an Act of Parliament, that limits the King for the Defence of the Realm, they say something.

But they say the Sheriff is no proper Officer, not sworn to execute this Writ.

This is as wide as the other: for, my Lords, the Sheriff is sworn to execute all Writs that shall be delivered to him for the King's Service. And surely this Writ, if it come to him, he must at his Peril execute it.

First, The Direction of those Writs have been many times as well to the Sheriffs as the Commissioners, Rot. Scot. Ed. 3. M. 13. Claus. 15 Ed. 3. M. 17. The King commandeth the Sheriff of many Counties to furnish Men with Arms, Victuals, and other necessary Provisions, both for Sea and Land. 23 Ed. 3. M. 5. dorf. 24 Ed. 1. Rot. 7. 9. Ex' Remem' Regis. 11. The Lands of the Sheriffs and other Officers, were extended because of their Negligence in doing of their Duties concerning those Writs, 25 Ed. 1. Ex' Remem' Regis. A Commission went out to enquire of the Execution of the Officers in the Duty of their Places.

Besides these Writs at the Common Law, this is seconded by the Authority of the Common Law, Register 122, or 127. The Writs that go out to the Sheriff (for they go out to the Sheriff as to

Bb

Commis.

Commissioners) it is left to the Discretion of the Sheriff or Commissioners, as occasion shall require, *Register* 191. *Bre. de partitione*, before any Statute was made concerning the same, that Writ went out generally to the Sheriff; so that in all Times and Ages it hath ever been in these Cases, where no Certainty, left to the Discretion of the Sheriff and Commissioners.

My Lords, for the Manner of the levying *per Distributiones*, and by Imprisonment of those that do refuse: Is this new? It hath been so in all the Precedents that have been vouched, both by Distress and Imprisonment. For the Distress: If the King makes a Corporation, and gives them Power to ordain for the common Good of the Corporation; and if they make an Order for the Payment of Money, and that those that do not pay the same, shall be distrained; is not this adjudged a good ordinance? 5 *Rep. fol. 64. Clark's Case, Trin. 7 Hen. 7. Rot. 3.* There is a Benevolence granted to *Ed. 4.* for his Voyage into France; one *T. R.* did deny Payment, and he was distrained for his Proportion.

They except to the Penalty of the Writ.

The Penalties of former Writs have gone higher: *Inter Commun'* in the Exchequer, there was a *Mandamus* to assess those that were employed in the Provision for Shipping; and the *Mandamus* was, *sicut nos & honorem nostrum & salvationem Regni diligitis.* In that Roll that is so often remembred, *Rot. Scot. 10 Ed. 3. M. 11. dorf. quod, &c.* their Lands, Goods, and Chattels to remain seized in our Hands. And *M. 2.* under pain of Forfeiture of Life: *11 Ed. 3. M. 2.* to cast those in Prison that did refuse. *Rot. Claus. 12 Ed. 3. M. 18. dorf.* Writs directed to *Henry Hufsey*, and others, to punish those that refused to contribute; and to imprison them; and to seize their Lands and Goods into the King's Hands. *Claus. 13 Ed. 3. pars. 10. M. 36. dorf.* to seize into their Hands the Lands and Tenements of the Refusers. *Rot. Franc. 21 Ed. 3. pars. 1. M. 11.* the King commands Ships, under pain to lose Life, and all their Estate, *Rot. Franc. 10 Ric. 2. M. 23.* to imprison those that are contrary, under forfeiture of all they had. So as your Lordships see *Mr. Holborne* was very far mistaken.

My Lords, in the next place, they have laid hold on the distance of Time: They say, there was seven Months between the Tasse of the Writ, and the Time of the Rendezvous; that the King in that time might have called a Parliament, and there might have been an Aid granted; and the Service performed in a Parliamentary Way. I aid: But they may remember the 40 Days between the Tasse and the Return of the Writ for summoning a Parliament; then the Time spent in presenting of a Speaker; the Solemnity used before they begin their Grand Committee; their Reading of a Bill thrice, the Debate about Passing of it in both Houses before it be granted; and after all this be done, and the Parliament ended, a Time for the levying of the Money must be had, and when it is levied, Time for the Return of it; and when it is returned, Time for the expending of the Money: and the Preparation will go slowly on till the Money be returned. 48 *Hen. 3. M. 4. dorf.* There was a Command for guarding of the Sea-Coasts. *Claus. 23. Ed. 1. M. 5. dorf.* The Port of *Yarmouth* commanded to find Ships for a certain Time. *Rot. Scot. 11, 12, 13 Ed. 2.* They are put down in that Roll, *M. 8.* that there was

a Command for a *Navale Subsidium* for three or four Months.

So as, my Lords, for the Time of Preparation, and for the Time of the Continuance, it hath ever been referred to the Wisdom of the King. My Lords, for the *Spanish* Invasion, that hath been to late in our Memory, I find by the Books that are kept in the Council-Chamber, that the Preparations were in *Octob. 87.* against the coming of the *Spanish* Fleet in 88, which did not set forth till *June*: I find no Parliament called that Year. And by Letters and Orders from the Council-board, those Ships; and Defence that was made, was *ad sumptum* of the Subject.

So, my Lords, by this that hath been said, it doth appear to your Lordships, that there is not any Clause in this Writ, either for the Direction, Motives, Mandates, or Penalties, but are warranted by former Precedents in a higher degree.

My Lords, these are the Precedents that I have collected, and reduced to these several Heads. I shall now remember to your Lordships divers others. And in the first place observe, that *William I.* came not to abrogate any former Law, but was sworn to observe *Antiquas leges Anglicanas*, that appeareth in *Lambert, fol. 125. prole.* So every Man by this Law, that was but a Confirmation of former Laws, must provide *pro viribus & facultatibus.*

I find by the Grant that *William I.* made to his Abbey of *Battel* of his own Foundation, a Charter to be free from *Daregelt & omnibus auxiliis.* If they had not been freed; they had been subject. I find *Pat. 7. Johan. M. 3.* the King authorized *Walter Scot* and others, *quod omnes Naves, &c.* which they should find, to arrest, and command all to assist, as they love us and our Peace in our Realm. 14 *Johan. M. 6.* as your Lordships have heard, all the Ships were arrested, that could carry six Horses, and to be at *Portsmouth, M. 7.* all the Ships in the Port were to go in his Service, without expressing for what, and unlade. *Claus. 12. Johan. M. 7. dorf.* commanded all Ships to be brought into the *Thames* Mouth. So here was not a laying down, but a continuance of it. So in *Hen. 3d's* Time, *Claus. 14. Hen. 3. M. 12. dorf.* all Ships taken that could carry sixteen Horses. *Claus. 15. Hen. 3. M. 17. dorf.* Command for the furnishing of Arms, Men with Victuals, and other Provisions, for forty Days. And here was the like Command to Sheriffs in several Counties. *Claus. 26. Hen. 3.* the King commandeth the Men of *Yarmouth*, to have their Ships ready with Men and Arms; the same Roll, to find ten Ships to go to *Picardy.* *Pat. 48. Hen. 3. M. 3. dorf.* Writs to the several Port-Towns, that no Ships should go beyond Sea, but all to stay at home. *M. 5. dorf.* Those that returned from guarding the Sea-Coasts without Leave, were punished, by seizure of Goods and Chattels. *M. 4.* Same Roll, *dorf.* Provision to be made till further Orders be had. So it was not confined to Time, but Occasion, as need should require. And there be divers others in the Time of *Hen. 3.* upon other Occasions, which I have remembred. In the Time of *Ed. 1.* 21 *Ed. 1. M. 23.* It appeareth there, that all the Port-Towns were appointed by the King and his Council, how many Ships every one of them should set forth. *Rot. Vass. 22. Ed. 1. M. 11. dorf.* The King of England in that Writ styleth himself *Domini Regni Scotie, &c.* And sends his Writ to the King of Scotland, to let him know, the King

of France had taken part of Gascoigne, an Inheritance of the Crown of England, that he should in *fide & homagio*, be at London with Horse and Arms, &c. This Writ is very observable, the King of England is Superior Dominus Scotiæ. A part of Gascoigne was then lost. The King of Scotland was required by this Writ, as well as requested, to give him Aid for the Recovery of those Grounds taken from him in Gascoigne. My Lords, this Power is not confined only to England, but it reacheth, as GREAT LORD, into Scotland. Also into Ireland, *Vasc. 22 Ed. 1. M. 5. dorf.* The King by his Writ commandeth divers Earls, and others, in England and Ireland, to do the like, to send Men to London with Horse and Arms. The same Roll, *M. 13. dorf.* All that claim to be of the Liberty of the Port so commanded. *Pat. 23 Ed. 1. M. 1, 5, 7.* All Ships of 40 Tons were to be furnished and provided for the King's Service. *Claus. 23 Ed. 1. M. 5.* Every Man is compelled to contribute. The same Roll, *M. 4.* those that did not inhabit in Maritime Towns, yet if they had Lands there, they must contribute, resident or not resident, within or without the Liberty, all must contribute.

My Lords, in that Writ, which is *Claus. 23 Ed. 1. M. 5. dorf.* I will observe these things: 1. A Command to all Bishops, Abbots, Lords Spiritual and Temporal, *Quod sint intendentes & respondentes ad custodiam Maris.* 2. In contingent Causes; *Causa, &c.* 3. The Writ saith, *quod omnes ad arma, &c. secundum statum, &c. ad transfretandum cum nobis;* and Possession of Goods and Lands to be taken for the Custody of the Sea, as in former Times they were accustomed: so it is to be done in this manner as in Times past. 4. The Writ was directed to several Sheriffs, *per corpora, bona, & terras*, to distrain.

Next, *24 Ed. 1. M. 15.* the King commanded the Archbishops, Bishops, Barons, and all the Commonalty, to defend the Maritime Parts. *Claus. 24 Ed. 1. M. 19. pro custodia Marit.* There was another of *Symon de Spencer*, which I remembred before. *24 Ed. 1. Rot. 76.* Another of the like. *Ext. Remem. Regis; Claus. 25 Ed. 1. M. 26. dorf.* the King moderateth the Expences of the Country when the Danger ceaseth. *Claus. 25. Ed. 1. M. 12.* The King commanded the Sheriffs of several Counties, and others, to bring all the Ships to be ready for our Service, when we command. *M. 26.* The like Command, *De custodia Marit. Pat. 31. Ed. 1. M. 20.* Power given to *Thomas de B.* to raise Forces in *Cumberland*, to resist the Scots; and those that did refuse, to seize their Goods. In the Time of *Ed. 2. Claus. 2 Ed. 2. M. 21.* the King commandeth divers Towns to set out Ships against the Scots; and after, by special Writs, some of those were discharged. *Rot. Pat. 3 Ed. 2. Pars 2. M. 6. Pat. 16. Ed. 2. M. 11.* A Writ directed to *Sir Thomas Weston* and others, to array all between 16 and 60, or to take their Lands and Goods, if they did refuse; *Pars 1. M. 7.* of the same Roll, *Claus. 20; Ed. 2. M. ...* the King doth there declare that those that stay at home ought to contribute to set forth Ships, and for the Wages of the Men employed. *Claus. 20. Ed. 2. M. 6.* Writs directed to the Scholars at *Oxford*, they were not exempted, but commanded to keep *Southgate* safely. *Rot. Vasc. 18 Ed. 2. M. 18.* The King writeth to the Archbishop and others, commanding them to have Horses and Men in a readiness, as often as need shall require. For the Time of *Ed. 3. Claus. 2 Ed. 3. M. 13. and M. 22. dorf.* to *Southampton*, and to several other Towns, for their Shipping, a-

bove 40 Tons. *Pat. 3 Ed. 3. Pars 2. M. 6.* The King commandeth the Sheriff of *Cornwall* to distrain Knights and others, that abide not upon their Lands in Maritime Parts, and to imprison. Those Years of 10, 11, 12 and 13 of *Ed. 3.* have been remembred. *21 Ed. 3.* The King, concerning the Defence of the Sea and Sea-Coasts, gave special Rules to be observed, both for the Number of the Ships and the Men, and the Quality of their Persons, and for the Proportion of their Wages; as appeareth, *Pat. 21 Ed. 3. Pars 1. M. 26, 17.* where there was special Order taken for the guarding of the Sea and Sea-Coasts at the Charge of the Inhabitants. *Rot. Franc. 21. Ed. 3. Pars 1. M. 11.* Command to the Sheriff of *London* to arrest all Ships in *London* to be sent to *Calais*, to resist the Enemies against us then about to come. *Rot. Franc. 25 Ed. 3. M. 9.* The King reciteth, that France made a Preparation to invade the Realm, and gave a Power to some to raise Forces; and commandeth the Sheriffs to raise the *Possess Comitatus*, to assist the Commissioners. *Pat. 26 Ed. 3. Pars 1. M. 7.* The King, by his Writs to several Counties, commanded all Men between 16 and 60 to be in readiness to resist the Scots. *Rot. Franc. 25 Ed. 1. M. 31,* commanding all Officers and Ministers to assist *Andrew de Gulpbo*, in the raising of Forces for Shipping. So as in that Roll likewise, your Lordships see that the Inland Counties were commanded for Shipping. *Rot. Franc. 28 Ed. 3. M. 6.* the King appointed *Ro. Co.* and *Ro. A.* to arrest all Ships of 20 Tons and upwards, between such a distance, and to bring them to *Southampton*. *Rot. Scot. 29 Ed. 3. M. 13.* Several Writs were directed to the Bishops of *Durham* and *Carlisle*, and others, for the arraying of Men. *Rot. Franc. 40 Ed. 3. M. 37.* The King sent forth divers Writs, commanding *quod, &c.* with all their Forces, they should assist to the safe keeping of the Sea-Coasts, to resist the Malice of the Enemies. *Rot. Franc. 50 Ed. 3. M. 47. dorf.* Command to make Proclamation, that all that have Land upon the Sea-Coasts should repair thither with their Families. So in all Ages, and at all Times, Writs have issued both for the Defence of the Sea and Land by the King's Command. In the time of *Ric. 2. Rot. Parl. 6 Ric. 2. M. 42.* that was objected as a Record against the King, but maketh clear for him: *Que dit que le Roy persons assemblees en Parliament, est desire de vivre del revenue del Corone car Escheats Mariages & Forfeitures sont pur le Defence nostra Royalm.* The King answers, *Le Roy volet de faire in ceo Case come per de advise des Seigniors, &c.*

Your Lordships see they desire of the King, that he would live of his Revenues, that the Profits of Escheats, Wards, &c. might be kept for the Defence of the Realm. The King giveth them this Answer, That he will do in this Case by the Advice of his Lords, as shall be most for his Honour and Profit: So no Reason to make any Enforcement out of this Record, that the Profits of Escheats, Wards, &c. should go for the Defence, because the King maketh no absolute Denial unto it, saying, that he will do as he shall be advised by his Lords. *Rot. Franc. 7 Ric. 2. M. 18.* That the Lords beyond the Seas be arrayed and armed according to their State and Faculties. *Pat. 8. Ric. 2. Pars 2. M. 15.* A Command, that all between 16 and 60 be in a readiness. *Rot. Franc. 10. Ric. 2. M. 23.* Arrays thro' all England. And so in the Time of *Hen. 4. Rot. Parl. 5 Hen. 4. M. 24.* for the arraying of all Men throughout England, and those that were impotent, and could not go, to contribute unto it. *3 Hen. 5. M. 36. dorf. Pat. 13 Hen. 6. M. 10.* General Commissions for the ar-

resting of Ships, without declaring the Cause. *Pat. 14 Hen. 6.* assigned *Job. de N.* to arrest all Ships in the Port of *Southampton*, to do Service as the King shall command, there was no Cause declared. *Pat. 28 Hen. 6. M. 2, 13.* Commissions to array, and those arrayed to keep in Array, with diligent Watches into several Counties. *1 Hen. 7. Pars 1.* The King writeth to Sir *Fitz Hugh*, to array Archers and Horsemen.

So that it appeareth by those Precedents in all Ages, that those Defences which have been made by Sea and Land, are not confined to Port Towns, and Maritime Places, but *per totam Angliam*.

In the next place I shall give a particular Answer to some Objections that have been made, as have not fallen in my way; and to the Acts of Parliament, Reasons, Records and Book-Cases, urged by the other Side.

The Third Day's Argument of Sir John Banks, his Majesty's Attorney-General, before all the Judges in the Exchequer-Chamber, on the behalf of his Majesty.

May it please your Lordships,

THE Matter that I did propose to insist upon this Day, was the answering of the Objections. I shall use no Preamble, no Repetition to introduce what I have to say: but in the answering the Objections, I shall first give answer to the several Acts of Parliament insisted upon, then to the several Records and Reasons that have been urged on the other side. And in the last place, I shall answer the Exceptions that have been taken to the Writ, *4 Aug. 11 Car. Mittimus*, and Form of Proceedings.

The first Act they have insisted upon, is that of *William* the first, call it what you will, an Act or a Charter. The Words of it are verbatim in *Mat. Paris, Volumus & concedimus quod omnes liberi homines sint quieti ab omni tallagio, &c.*

It doth no way trench upon the Royal Power: for as in the beginning of my Argument, I open'd to your Lordships, that this Power was inherent in the Kings of *England* before the Conquest; here is only a Concession that they shall be free *ab omni injusta exactione*. Now this is no unjust Exaction, for it is of common Right. And then the other part of that Law doth explain it; for it doth say, *Quod sumus fratres conjurati, &c.* so for the Defence of the Realm. By the same Law they would urge to take away the Power, by the same Law it is reserved.

The next thing they insisted upon, was the Charter *17 Joban.* or on *Magna Charta* as they call it; which indeed is mentioned in *Mat. Paris*, and may be under the great Seal. The words of that are, *Nullum scutagium vel auxilium nisi per commune Concilium, nisi ad primum filium militem faciend' & maritand' fil', &c.*

This Charter, as it was acknowledged by themselves, was granted at *Running Mead*, where the Banners were display'd, when there was War or Rebellion between the Barons, Commonalty, and the King. It was not assented unto, the King sitting in Parliament: For Parliaments are not called with Arms, and in the Field. It was, in truth, an enforced Act from a distressed King. Shall this bind the Crown? I shall remember the Act of Parliament made *15 Ed. 3.* and there only were things that were in Parliament enacted derogatory to the Crown, as this is; That no Peer

should be questioned but in Parliament; That no great Officer be removed but in Parliament; That no Clergyman shall come before Temporal Judges. These were Things that were much derogatory to the Prerogative of the King, *15 Ed. 3.* That King the same Year, when he was better advised, did make a Charter which is in print, for the recalling of this prejudicial Act of Parliament still in force. It appeareth by the Parliament-Rolls and printed Books, where the King declareth it was drawn from him with an unwilling Mind, and was prejudicial to the Prerogative of his Crown; and therefore by that Charter it was repealed.

But my Lords, if that Charter *17 Joban.* should be in force, why hath there been no Confirmation of it in so many Parliaments since? The Statute of *Magna Charta, 9 Hen. 3.* hath been confirmed one and thirty times; why no Confirmation of the Charter *17 Jobannis*? And why have we not heard of it since that time? The Reason for it is, that it trencheth too much upon the Prerogative of the King and Crown.

But take the Words as they are, what be they? *Nullum scutagium vel auxilium nisi per commune concilium Reg. nostri.* If these were an Act, doth it extend to take any thing away that belongs of common Right unto the Crown? And that hath been the Exposition of my Lords the Judges, of Acts of Parliament; that Aids due of common Right, are not taken away by general Words, *Commune, &c.* And therefore these Aids due of common Right, as this is, are no way taken away.

Besides, for the Statute of *Magna Charta*, it is made *3 Hen. 3. cap. 29. Nullus liber homo capiatur, aut imprisonetur nisi per legem, &c.* The general Words of this Act of Parliament do no ways impeach the Royal Power, for this Royal Power is *Lex terræ*.

Besides, in these Precedents, *14 Hen. 3. 15 Hen. 3. 26 Hen. 3. 48 Hen. 3.* and all the succeeding Kings remembred in all of them, that these Writs went out to provide Shipping at the charge of the Inhabitants; so, surely, if they had been taken away by *Magna Charta*, the Writs after *Magna Charta* would not have used it.

But then there hath been objected, the Statute *de Tallagio non concedendo*. If it be *25 Ed. 1.* as it is printed, or *34 Ed. 1.* or as the Petition of Right doth recite it *temp' Ed. primi*, be it when they will, under favour, there is nothing in that Act doth take away this Power: The Words are thus, *Nullum tallagium vel auxilium sine voluntate Episcoporum Baronum Burgensium &c.* Mr. Solicitor in his Argument, upon probable Grounds, did make question whether this was an Act of Parliament yea or no: 1. In respect it was not inrolled amongst other Acts of that Time. 2. Because by the penning of it, it may seem rather to be an Abstract. 3. Because when the other Acts of those Times were sent over to *Ed. 1.* to be sealed and confirmed, no such Act was sent over.

My Lords, I will not lay hold on this, but will admit with them that it is recited in the Petition of Right to be an Act of Parliament: So I will admit, yet to wave nothing that hath been said, but by way of Admittance I give this Answer.

First, that it taketh away no Aids that are due by the Laws of the Realm; yet the Words are general: *Nullum tallagium vel auxilium nisi assensu Parliamenti, &c.* Here is not in this Act of Parliament so much as any Exemption of an Aid to Knight

Knight the King's Son, or to Marry his Daughter; yet in this the Law is observed, that these Aids are not taken away; and so it is declared, 25 *Ed. 1. cap. 11.* which doth reduce these Aids unto certainty. So as your general Words of *nullum auxilium* will not do it, if this be an Aid due by the Laws of the Land.

Then I say this is not properly an Aid, but a Contribution of King and People for the Defence of the Realm, it is *ad proficiendum cum Navibus nostris*: then I say, this Power is *inter jura summæ Majestatis*, one of the highest Prerogatives of the King, and shall never be taken away from the King. 17 *Hen. 7.* Statute *Quia emptores terrar'* doth not extend to the King to take away his Tenure. If you will have such a high Prerogative taken away, you must shew it in the Acts of Parliament. Nay, my Lords, I say that in the Time of *Ed. 1.* this Royal Power is expressly reserved by Act of Parliament to the Crown; and therefore in after-Times never intended to be taken away.

First, I shall inforce it out of the Statute of 25 *Ed. 1. cap. 5, 6.* that doth recite, that Aids and

*Vide les parols
del Statute.*

Taxes that have been given unto us towards our Wars, and other Business of our own Grant and good Will, howsoever they were made, might turn to a Bondage, &c. We have granted that we shall not draw these Taxes into a Custom, &c. and do grant that for no Business henceforth, we shall take such manner of Aids, but by a common Consent of the Realm, &c. saving the antient Aids due and accustomed.

This Aid is not taken to be an Aid, for this was never given to the King of *England*, but taken by Royal Power: the Statute of 25 *Ed. 1.* speaketh of such Aids as have been given, and excepteth such Aids as have been due and accustomed. And by the Precedents shewn, it appeareth these have been due and accustomed. It hath been desired in *fide legantia*, and with a *Mandamus*. 2 *Ed. 1. cap. 1.* this Statute doth confirm the great Charter, and the Charter of the Forests; but in the End of it in the Parliament-Roll, that notwithstanding all these things before-mention'd, both the King and the Council, and all they present at the making of this Ordinance, will intend the Prerogative of his Crown to be saved unto him.

A further Answer to the Statute *de Tallagio non concedendo*; the Practice that hath been since the time of *Ed. 1.* in the time of *Ed. 2. Ed. 3. Rich. 2.* and the Practice since, doth shew plainly, that it was never intended by the Statute to take away this Royal Power.

But then there was a Thing materially objected, if the Records would have warranted what had been said, and that was, *Rot. Parl. 29 Ed. 1.* and then it was said, That tho there be a Saving, 25 *Ed. 1.* and 28 *Ed. 1.* yet here is no Saving in this Act; so then if not for the Act 29 *Ed. 1.* all was lost.

My Lords, to this I say, *Nul tiel Record*. And therefore I shall desire, that this which they call an Act, 29 *Ed. 1.* I may attend your Lordships with: By this Record it doth appear that it is only a Record of the Perambulation of the Forest, and no repealing of any former Law; neither is any thing enacted by that Law, derogatory to the Crown.

The next Statute objected, is 1 *Ed. 3. cap. 5.* the Words are these: That 'no Man shall be 'charged to arm himself otherwise than in the 'time of the King's Progenitors; and that none

'be compelled to go out of his Shire, but where 'Necessity requires, and the sudden coming of 'strange Enemies within the Realm.'

So this Statute is relative to what hath been formerly done: What hath been found done formerly, appeareth by the Records of King *John's* and *Ed. the First's* Time, that the Subjects were to set forth Shipping at their own charge: then those Writs went out in King *John's* and *Ed. the First's* Time, as hath been shewed. And then this Statute alloweth in two Cases; one where Necessity requireth, the other upon coming of strange Enemies; and this Writ requireth no other, but where there is Necessity in the King's Judgment.

The next Statute is 1 *Ed. 3. cap. 7.* which was objected, where Men at Arms were conveyed into *Scotland* and *Gascoigne* without Wages; the King saith, it shall be done so no more.

The Statute mentioneth *Scotland* and *Gascoigne*, foreign Wars, and so foreign to this Business; for tho *Scotland* was subject to the Dominion of *England*, yet it was a divided Kingdom. 8 *Rich. 2.* Continual Claim. *Com. 376.* That a Fine shall be paid by a Stranger, because he was in *Scotland* at the time of the Fine levied. *Braet. 436.* An Abjuration into *Scotland* is good. 6 *Rich. 2.* Protection. 46. That *Scotland* is out of the Realm; therefore this Statute that speaketh of *Gascoigne* and *Scotland*, speaketh of foreign War, not of Defence.

The next Statute is 18 *Ed. 3. cap. 7.* Men of Arms, Hobellers and Archers, shall be at the King's charges; the Statute speaketh likewise of going out of *England*.

But he that is upon the Defence at Sea of the Kingdom, it is no going out of *England*; for that see 6 *Rich. 2. Protection. 40.* The sending of Men and Ships for the Defence of the Coasts, is no going out of *England*.

The next Statute is 25 *Ed. 3. cap. 8.* no Man shall be compelled to find Men of Arms, Hobellers or Archers, otherwise than those that hold of such Service, without Consent.

My Lords, this Statute of 25 *Ed. 3.* doth not take away former Laws. These three former Statutes of 1 *Ed. 3.* 18 *Ed. 3.* and 25 *Ed. 3.* are recited in the Statute 4 *Hen. 4.* and 'tis enacted, they shall be firmly holden and kept in all Points; so if these Statutes must be kept firmly in all Points, then the Statute of 25 *Ed. 3.* doth not repeal any of these. Now that of 1 *Ed. 3. cap. 15.* reserveth a Power to the Crown where Necessity requireth, and where sudden Enemies come. 26 *Ed. 3.* Those Ships were sent forth, and commanded for the defence of the Realm, at the charge of the Subjects, *Rot. Franc. 26 Ed. 3. m. 4, 5. Rot. Franc. 28 Ed. 3. m. 6.* So as clearly there is no part of this Power impeached by this Statute of 25 *Ed. 3.*

Then they have objected *Rot. Parl. 2 Rich. 2. m. 3.* That upon a Council of a great many Earls, Barons, and Sages of the Realm, assembled by the King's Privy-Council, it was there declared what Danger the Kingdom was then in, and that Money was wanting; they declared they could not remedy these Mischiefs, without charging the Commons, which could not be done, but by a Parliament.

This is no Act of Parliament; it is but a Parly, or Discourse, or Communication between the Lords and Commons; it was 2 *Rich. 2.* in the Non-age of a young Prince who did not assent; for there was no Royal Assent unto it, so no Proof in this Case.

The next Record they objected was, *Rot. Parl. 9 Ricb. 2. m. 10.* there was a Tenth and a half, and a Fifteenth and a half granted to the King, upon Condition contained in the Schedule ; which is, that the King should assent that the great Officers of the Kingdom should be named by Parliament. And Servants appointed for dispende of the Money.

If the King doth accept of the Subsidies and Aid upon condition, doth this take away his Royal Power ? There is no more done in this than was in the Parliament 21 *Jac.* for there the Officers and Treasurer were appointed by the Houses of Parliament.

But then further it doth appear, that this was granted, *pro viagio Jobannis Regis de Castile, &c.* so that it was not granted for the Custody of the Sea, but for that Voyage.

The next Record they insisted upon was, *Rot. Parl. 8 Hen. 4. m. 2.* A Tenth and a half, and a Fifteenth and a half granted with a Protestation, that this should not be brought into Example.

This is nothing, no more than the other. A Parliament grants a Subsidy, with Condition it should be thus and thus employed ; and the Protestation can no ways prejudice the Crown in this.

And 7 *Ed. 4. Rot. Parl. m. 7.* hath been objected ; there the King's Speech is entred upon the Roll, that he will not charge his Subjects but upon great and weighty Occasions.

My Lords, this is nothing but a gracious Speech of the King to his Subjects, that he would charge them but in such Cases as should concern the Defence of the Realm.

The Statute next objected was, 1 *Ricb. 3. cap. 20.* that the Subjects from henceforth shall in no way be charged by any such Exaction or Imposition.

This is no Benevolence, but a legal Due.

Next they object, the Statutes of Tonnage and Poundage granted to the Crown for the Defence of the Realm.

First, In Answer to this, I say, that there is no Act for Tonnage and Poundage that is now in force, neither are any Duties taken to the Crown upon any Act of Parliament. Those Acts for Tonnage and Poundage that have been granted, make for the Crown. And therefore, if your Lordships look the Statute 1 *Eliz.* and 1 *Jac.* it was given towards the King's Charges, for the Defence of the Realm and Safe-guard of the Sea : It was given towards his Charges, it was not intended of extraordinary Defence. So, my Lords, these Acts, when they were in force, did give this but towards the Charges. It is so now ; for this which is done, and those Contributions levied, are but towards his Charges : and that will appear upon account, that his Majesty for these three or four Years, hath expended more upon the Sea, than any of his Progenitors.

Besides, an Acknowledgment in these Acts, that this Defence could not be done without the intolerable Expence of his Majesty ; these Aids are of Necessity, and are not to be lacking at any time.

My Lords, in the next place, they insisted upon the Petition of Right, 3 *Car.*

It was never intended, that any Power of the King, by his Prerogative, should be taken away or lessened by it. I dare be bold to affirm, for I was of that Parliament, and was present at the

Debate, that there was never a Word spoken in that Debate of taking away any Power of the King for the Shipping-business.

Besides, it is declared, assented unto, and denied by none, that there was no Intention by the Petition of Right, to take away the Prerogative of the King. The King thereby did grant no new Thing, but did only confirm the antient and old Liberties of the Subject.

My Lords, these were the Acts of Parliament that have been objected and insisted upon by the other Side.

In the next place, for an Answer to scandalous Objections. It hath been said by Mr. *Holborne*, of these Statutes of 25 *Ed. 1.* and 28 *Ed. 1.* that at the Times of making these Laws they were positive, no such *Salvo* was in them of the King's Prerogative : That the Acts before *Hen. 4.* were penned by the King's Council, and those Clauses of a *Salvo* crept in by the King's Council.

These were bold and presumptuous Assertions of the Acts of Parliament made in that time of *Ed. 1.* that there should be any Clauses added by the King's Council, that should not be added to the Record. I have here the Parliament Record, that these Exceptions are recorded as fully as any part of the rest of the Record, and those Laws confirmed since : therefore to make any such Assertions against Records, ought not to be done ; he may object the same against *Magna Charta*, which is for the Liberty of the Subject.

In the next place they have objected out of the Parliament Books, 33 *Ed. 1.* that upon a Petition made to the King, to have Restitution of Money taken, that the King did ordain the Treasurer should give Satisfaction.

I shall desire it may be read, and you shall see, those Moneys for which direction was given for Satisfaction, were for Goods taken for the King's Use. *Rot. Parl. 33 Ed. 1. fol. 105. dñs. per scrutin' pro guerra, &c. Respons. per Regem, Rex ordinavit per Concilium quod satisfactio fieri tam cito quam poterit.* So this Record was for Moneys taken for the King's Use, therefore Reason Satisfaction should be given, *Perambulat Forest Rot. 20 Ed. 1. de Libertatibus Angl. 18 Febr. Lincoln.* So here is no taking away of any former Act of Parliament ; it referreth to what shall be futurely amended and revoked.

The next they objected was, *Rot. Parl. 8 Ed. 2. m. 8.* the Fryars of St. *John's* at *Jerusalem* did petition to have Satisfaction of 2354 *l.* taken by the King out of their Treasury.

Now, because this Record was vouched two Days together, I desire it may be read ; and upon the reading, it will appear, to be upon another purpose, *Sur' le Roy, &c.* there was Cause and Reason why the King should make Satisfaction.

The next Record was, *Pat. 26 Ed. 1. m. 21.* and that was highly magnified by them : That there were several Commissions went out to enquire of *Gravaminibus*, of Wools, and of other Particulars, *de Custod' maris* ; and in this it was affirmed, that (as all the King's Counsel took their Notes) these Clauses were omitted out of the Writ that concerns the Forfeiture of Lands, Goods and Chattels, or Seizures.

This Commission maketh nothing to this purpose, for like Commissions daily come, where there are Taxes laid upon Men heavier than ought to be. Then a Commission to enquire of Grievances

ances in this kind, wherein an Answer of any thing unjustly taken shall be restored, but not a word to impeach this Royal Power. And, my Lords, for the Penalties in the Writ, 31 Ed. 1. m. 20. power to seize the Lands and Goods of the Refusers, 20 Ed. 2. m. 10. under forfeiture of all their Goods, 10 Ed. 3. m. 5. dorf. Claus. 12 Ed. 3. m. 18. dorf. that the Penalties and Commands were as high in this Commission as before.

The next Objection was, that the Kings of England have always consulted with their Parliament concerning the Defence of the Realm, and that the Aids and Subsidies for Defence have been granted by Parliament.

This is no Argument to impeach this Royal Power; for if in time of War the King will consent to it, shall this take away his Royal Power? In the Times of Edw. 3. and Rich. 2. did that take away the King's Royal Power, that he may not ordain Standards of the Money himself? He may by his Royal Power erect Courts of Justice: Shall that take away this from his Power, because the Court of Wards was erected by Court of Parliament?

Next they objected Rot. Alm. 12 Edw. 3. pars 3. m. 22. That Edw. III. was so penitent for what he had done, that he sent to the Archbishop of Canterbury to pray for him; and that the People would forgive him for laying those Taxes upon them, which his War compelled him unto, and he would never do the like again.

You shall see, it was only to pray for him for his Voyage into foreign Parts, (and he caused the Record to be read, beginning thus; *De excusando Regem versus populum*, and ending, *de gravaminibus*) dated at Berwick upon Tweed. Your Lordships see nothing by this Record, but the desire of a Prayer; first to pray for the King for his Voyage beyond Seas; the other, concerning the Charges and Impositions. Surely this Contribution commanded in the Shipping-business, was none of these Charges, Taillages, or Impositions. This his Desire to the Archbishop was not only in the 12th Year of his Reign, but the like in Anno 25, 26, and 50. so surely those Prayers of the Archbishop were for other Causes, and not for this, which was for the Defence of the Realm.

Next they do object Rot. Franc. 7 Rich. 2. m. 13. That the King assigned Tonnage and Pannage to Henry Earl of Northumberland for guard of the Seas.

My Lords, it doth appear by the very Record itself, that this was only for an ordinary Defence, and not for an extraordinary Defence.

Then they insisted upon the Parliament-roll 13 Hen. 4. m. 43. the Office of measuring of Linen-Cloth, a half-penny upon the Buyer, and as much upon the Seller, and other Fees upon Long-Cloth; the Parliament, 13 Hen. 4. declares it to be a void Office, and that accordingly Judgment was given, 13 Hen. 4. Out of this he would conclude, that therefore there should be no new Office, and that an Office granted with a Fee is void in Law.

For answer to this: First, The Reason why that was a void Grant was this; it appeareth, 4 Edw. 1. that the Office of Mesurage of all Woollen and Linen-Cloths, was one entire Office. If the King will grant that to another Man which did intrench upon the former Office, a void Patent; therefore a strange Conclusion, that because

this Office was void, therefore no new Office to be granted. 22 Hen. 6. fol. 9. The Office of surveying the packing of all Cloth, a good Office. 27 Hen. 8. fol. 28. The King granted to one to be his Surveyor, a good Office? Fitz-Her. saith because it had no Fee, therefore it was a void Office. And now at the Bar it is said, because it hath a Fee, it was a bad Office. If this Reason may hold, all antient Offices may fall. 34 Hen. 6. Office to be Marshal of the King's-Bench; 12 Hen. 7. 15. To be Warden of the Fleet. Nay, it taketh down all Offices that have been erected for the publick Good, and upon just Occasion, as the Office of Subpœnas in Chancery, Star-Chamber, &c. All those within time of Memory must be shaken by this.

In the next place they object, that these Contributions, they are in substance Impositions; and that the King should not impose upon the Subject by his Charter, or by his Writ; but it must be done by common Consent in Parliament.

Your Lordships have observed in all my Discourse, that I have not insisted any way upon any power of Imposition, neither is it the Question in the Business: For no Man's Property is invaded, no Seizure of any Man's Goods, unless they incur it for Contempt; and by a wilful Contempt, the Subject may lose his Property. Therefore, Dyer fol. 16. and 13 Eliz. fol. 296. if the King will command his Subject to come into the Realm, and he will not, he shall forfeit for his Contempt all his Goods; or if he be attached to appear in the Courts of Justice, and not appear, he shall forfeit his Goods, 34 Hen. 6. 49. 9 Hen. 7. 6. If a Man will wilfully contemn the King's Command by his Writ, he may be distrained; this he incurreth not by an Invasion of his Property, but in respect of his Contempt.

Then they alledged Rot. Parl. 50 Ed. 3. m. 24. the Lord Latimer, he was sentenced for persuading the King to lay Impositions on the People.

My Lords, I have looked upon the Record, and there the Case of the Sentence is declared, that he himself laid the Impositions, and did take upon him Royal Power; and therefore he was justly sentenced.

And for the Sentence of Dr. Manwaring, 'tis nothing to this purpose. This Writ denieth not the Property to be in the Subject, but saith, the Subject hath the Property; and therefore commandeth the Sheriff to distrain him if he will not pay.

And for the Commission 2 Car. for the borrowing of Money for the Palatinate, this was for the Recovery of the Palatinate, and not for the Defence of the Realm; and besides, it was called in by special Order.

In the next place, they objected and shewed divers Records, that the King hath paid the Wages of divers Mariners and Soldiers. And I do agree it. Is that an Argument that he may not command the Mariners to be sent at the Charges of the County to furnish the King's Ships? This is against the Records that I have remembered.

So likewise they have cited 21 Ed. 3. Rot. 77. *Ex parte Remem' Regis*. The King commanded the Constable of his Castle of B. to build Ships, and the King to pay for them. So he doth at this Day; he hath built the *Sovereign of the Seas*, and paid for it.

They have objected Dr. Cowell's Book, which was called in. I wish they had read the Proclamation: There are three Causes expressed. First, Because he had writ Things derogatory to the Crown. Secondly, For ———. And, Thirdly, speaking irreverently of the Common Law. Just like to the Men who do not spare to wade into all the deep Mysteries of Princes, who are Gods upon Earth.

For their Objection, that the King hath a Revenue belonging to his Crown, for the defraying of all ordinary and extraordinary Charges, and for the Guard of the Sea, as Tenures by Knights Service, Escuage, Wards, Marriages, ancient Demesne, &c. Tonnage and Poundage, Service of the Ports, and Profits of the Sea.

My Lords, it is not for us that are Lawyers to look into the Secret of the King's Revenue; he hath high Officers, as Treasurer, and Under-Treasurer, that look to the Secrets of his Estate, and they know well whether his ordinary or extraordinary Revenues do answer more than his annual Expence. The Story of *Axtion* might deter Men from looking into the Secrets of Princes.

For his Tenures, that Knight-service Tenure was originally instituted for the Service of Scotland and Wales, 19 Ric. 2. Fitz-Her. Guard. 165. and old Tenure, fo. 10. The Duties of Tonnage and Poundage are not given now to the King by Acts of Parliament; and when they were given, it was for the great Charges of this Defence. And besides, those Acts of Tonnage and Poundage only concern the ordinary Defence: the sending forth of the 75 Ships out of the Cinque Ports, it was but for fifteen Days, at their own Charges. And for the Profits of the Sea by Sturgeons, Whales, &c. is it a proper Defence for a Kingdom? And for the Service of the Ports, you may remember by the Records shewed, they were several times commanded *ultra servitium debitum*.

But then they have granted one Case, and, I think, but one; that the King may ordain a Toll in a Fair or Market, or grant Pontage, or the like, because there is an *ad quod damnum*, and thereupon shall be an Enquiry *si Patria gravetur*.

The King may grant a Fair, without an *ad quod damnum*, if in his Judgment, &c.

Rot. Scot. 1 Ed. 3. m. 8. A Writ directed to the Treasurer to pay for the Shipping at Yarmouth. My Lords, it doth particularly appear in the Record, that J. S. was Admiral, and going into Scotland; so the Defence was for a foreign War.

It hath been mightily insisted upon, that here needeth no Command to furnish Ships, by the King's Writ; every Man, by the Instinct of Nature, will do it, where there is a Necessity; no need of a Royal Power to command it.

Surely this Argument is made by the People, or to please the People. What will the Consequence of it be, but the introducing of a Democratical Government, when every Man shall be his own Defender? The God of Hosts chose Captains and Leaders to go before his People, and command them. But to give the People this Liberty, that every Man shall do as he pleases, and make a Defence by an Instinct of Nature, is a strange Position.

But it hath been said in these Cases, it is better to sustain a Mischief than an Inconvenience: By this Inconvenience every Man's Property is

taken away from him, as often as the King pleaseth, and in what Proportion he pleaseth.

This, tho a Maxim in Law, yet it goeth but to Particulars: But the Loss of a Kingdom is both Loss of Liberty and Estate; this is not to be reckoned among the Mischiefs, for this Mischief destroyeth both Head and Members. Therefore I do marvel to hear the Rule of Mr. Holborne, Suffer a Mischief rather than an Inconvenience.

The next Objection was the Parliament-Roll 2 Hen. 4. m. 22. *Pur faire des Barges*; this was the Petition of the Commons, that the Commissions granted to Burroughs, Cities and Towns, for building of Barges, should be repealed. The King's Answer for the present is, They should be repealed, but for the future, for Case of Necessity he would advise with the Lords.

It doth not appear that these were granted for the building of any Ships for the Defence of the Realm. These are the Objections that have been made out of the Acts of Parliament, out of the Records, and Reasons they have insisted upon.

Now I come to their Exceptions and Objections against the Writs and Proceedings in this Matter. First they say, there was no sufficient Danger represented by the Writ 4 Aug. 11 Car. they say a Supply by the *Mittimus* comes too late; and that the Words of the *Mittimus* are not a good Affirmative, *quia salus Regni periclitabatur*. And it doth not appear there was any Danger, 4 Aug. 11 Car.

For this I have given it an Answer, That it was not necessary to represent the Danger in the Writ. The King hath secret Intelligence, he hath his Spies abroad, his Ambassadors beyond Seas; he knows the Danger, we know not; nay, he knows that which is not fit to be discover'd, and those Dangers by Preparation perhaps diverted another way: It's not fit by a publick Writ to reveal the Danger. But, my Lords, for the Satisfaction of his People, he hath expressed sufficient Cause enough in the Writ; *Quia Salus Regni periclitabatur*. They say there was no Danger represented at this time when the Writ went out. That is mistaken, for the Writ of *Mittimus* doth recite the Writ 4 Aug. and that saith, *quod quidam Prædones, Piratæ, &c.* Which shews the Danger was the Cause of the issuing of these Writs.

Then they except at this word, *Salus*; it is a physical Word, and signifieth Health, and you must have no Metaphors in Writs.

Surely the Grammarians tell us, that *Salus* is taken *pro Incolumitate*, as well for Safety as for Health. Metaphors are usual in Writs; I dare be bold to speak, there are more Metaphors in the Register than in any Book: Register 61. *Turba, &c.*

Then they have left no Stone unrolled in this Case: Now they say the King's Testimony, by his Writ, is insufficient for that. Under favour, the *Teste meipso* is without Exception; we are bound to give Credit to it. 1 Eliz. fo. 105. *Ne exeat Regno*; the King affirms J. S. will go beyond the Sea, saith the Book, this Averment of the King in his Writ is not traversable, you shall not aver against it. The Case remembered by Mr. Solicitor, was mistaken by Mr. Holborne in the Answer, Hil. 20. Ed. 1. *Coram Rege Ret.* 14. He saith, these Words vouched in the Record, were but the Saying of the King's Counsel, and not the Opinion of the Court. Clear otherwise, for it was the Saying of the Judges; and then agreed, *Quod Dominus*

Dominus Rex est superlativum Record' & præexcellens. Will your Lordships give Credit to the Marshal of the King's Host, to the Certificate of the Captain of a Company, if the Men be in the King's Service, as 11 *Hen. 7. fo. 5.* to the Certificate of a Bishop, as in case of Bastardy; to the Certificate of a Mayor and Alderman, by the Recorder, as 5 *Ed. 4. 30.* and will you not admit of the Certificate of the King by his *Mittimus*?

The next Exception was taken to the *Scir' Fac'* that this *Scir' Fac'* ought not to go forth for this Debt; and gave two Reasons for it. First, The Writ of 4 *Aug.* doth direct a Form of levying, which is by Distress, or imprisoning those that are Rebels. Secondly, It is no Debt to the King, and therefore ought not to be levied by *Scir' Fac'*.

My Lords, for this, this Duty is a Duty to the Commonwealth; it is *pro defensione Regni, Thesaurus publicus respicit Regem*; whosoever shall detain any publick Duty, he may be questioned by the King, as the Head of the Body Politick; for that it appeareth, 27 *Aff. Pl. 17.* it was declared that *J. S.* and *J. D.* had levied 100 Marks on the County for the Array of certain Archers; which Money did not come for the Profit of the King. Out of which I observe two things.

First, This Money that was for Archers: The Money was levied on the Body of the County. Secondly, Recover'd by an Indictment at the King's Suit, 27 *Aff. Pl. 17.* 11 *Hen. 4. fo. 2.* The Fees of the Knights of the Shire that serve in Parliament, they are reckoned among publick Duties; therefore the Goods of a Stranger may be taken within the Town to pay those Fees, if the Money be not paid; the Distress may be sold, for it is for a publick Duty, 11 *Hen. 4. 2.* So are the Books: *Regist. 19.* the King may command the Sheriffs to levy these Fees, as well within his Liberty, as *extra. Hil. 23 Ed. 3. Rot. 57. coram Rege. Juratores Hundredi de S.* they make a Presentment that *J. S.* and *J. D.* Chief Constables of *E.* paid Wages to Archers which went not beyond Sea. So as by this Record it appeareth, these publick Duties are recoverable at the Suit of the King, *quia ad opus Domini Regis. Pat. 14 Ed. 1. M. 1. 14.* the King commandeth an Account to be taken of the Murage, and how the Sums levied have been employed. *P. 15 Ed. 1. coram Rege 70. dorf. Rippon* was besieged, they gave Hostages; Promise made by the Town that these Hostages should be redeemed, they were not: Complaint is made to the King, and it came to the *King's-Bench*; and these Moneys being 700 *l.* that was promised by the Town for the bringing back those Hostages, was ordered to be paid, because it was for the publick Service. So for other Things that are *pro communi utilitate, inter Communia Hil. 5. Lib. 4. Rot. 4. Aurum Reginae*, due unto the Queen, may be levied by Process out of the Exchequer in the King's Name, nothing more usual.

This *Scir' Fac'* is grounded upon the whole Matter, the Writ 4 *Aug.* the *Certiorari*, and *Mittimus*; and commandeth that the Defendants shall shew Cause why they should not pay the Moneys assessed upon them for the Publick Service.

My Lords, I have done with the Objections. I shall come to the judicial Records, 24 *Ed. 1. Ad custodiam Maris. Berks*, an Inland County, refused to contribute, the Names of those that made Default, were certified into the Exchequer; it appeareth by the Records, that Process went out of

the Exchequer in the strictest manner, *A capias in manus*, of their Lands, Tenements, Goods and Chattels; and that their Bodies, with Horse and Armour, be sent to *Portsmouth*; for besides the doing of their Service, the Seizure of their Lands and Goods, 24 the same Year, *Ext. Remem. The-saur.* On the other side, *J. de S.* gives Information to the Chancellor of the Exchequer, and Barons, in absence of the Lord Treasurer, of the Preparation of Men in *Flanders*, (this being remembered before to another Purpose.) It appeareth that after Consultation had, they did resolve to send forth two Writs, one was to the Town, the other to *T. H. Custos Maris*, to call all for Defence of the Maritime, &c. *Exc. Remem. Regis, 24 Ed. 1. Rot. 80.* Henry Hussey was seized of the Mannor of *W. in Berks*, he was assessed to find a Horse *pro Custod' Marit.* He complained in the Exchequer, that he had not the whole Mannor, and yet he was assessed to find a whole Horse; he did not come and say, I ought not to be taxed, but submitted to the Power, and desired a Mannorly Contribution. 28 *Ed. 1. Rot. 72.* the Abbot of *Robertsbridge's* Case, remembered on both sides, divers times: under favour, the joining of the Issue in the Record is a very full Proof in the Cause; he brought a *Replevin* against *J. S.* for taking his Goods in an Inland Town in *Kent*; he pleadeth the Contestation between our King and the King of *France*, and *Leighborne* assigned Keeper of the Sea, that the Plaintiff was assessed unto 7 *s. 7 d.* Anno 22. to 13 *s.* Anno 23. to 15 *s.* and the Defendant being Collector did distrain; the Plaintiff did not say in bar of this, that he ought not to be taxed, but that he was assessed *ad inveniend'*, &c. for such Lands: the Defendant saith, the Plaintiff holds other Lands in the County, and for that Land he was assessed. Now this doth admit the Power of Taxing. *Hil. 16. Ed. 3. Rot. 23. coram Rege*: The Jury of *Suffolk* did present that *J. Russell*, and others, 8 *Ed. 3.* were Hobbellers, elected in the Hundred of *T.* and staid at home: They plead, Not Guilty. The Jury finds that *J. Russel* did perform the Service, but *J. S.* did not perform it, therefore committed to Prison, and paid a Fine unto the King. By this Record it appeareth, the Money paid to the Archers and Hobbellers was at the County's Charge. Methinks that the Disclaimer that is by the Commons, 13 *Ed. 3. Rot. Par. 9. & 11.* is in nature of a Judgment in this Case; for there they did disclaim they had no Cognizance, and there likewise upon their own concession, that the Maritime Parts ought to defend at their own Charges, as the Inland Parts, the Inland Counties. This Concession, 13 *Ed. 3.* is a strong Argument, *Parl. 21 Ed. 3. Rot. 20.* when the Commons did petition for a Guard for the Sea: The Answer is, *Soit guard fait*, and that was at the Charge of the Counties, as your Lordships know. 20 *Ed. 3.* divers Ordinances made, which Ordinances made had the Force of a Law: The King and his Council did ordain, *Quod omnes illi, &c.* which have such a Quantity of Land should be assessed to find one Archer; one Hobbeller *decem l.* two Hobbellers *vigint. libr. unum hominem ad arma 25 l.* This appeareth *Rot. Franc. 20 Ed. 3. part 1. m. 17.* in the Counties of *Bedford* and *Bucks.* In the same Year, another Ordinance, that those that did reside with their Families, *cum toto posse*, within six Miles of Maritime Parts, were excused from finding of Men without.

My Lords, upon the Occasion of this Service, there were divers Refusals made, Certificate by *Mittimus* of their Names into the Exchequer; as in this Case, *J. T.* and *W. G.* were certified for Defaulters amongst others: upon this, the Court of Exchequer award Proceſs against thoſe Men and others, which was a *Capias in manus*, Seizure of their Lands and Goods; they came in, and pleaded, they reſided *infra ſex leucas*, with their Families and all their Powers; Iſſue joined; upon this, the Jury impannelled, and it appeared, thoſe that were found within ſix Miles, Judgment *quod ſine die*; but for others, they were imprisoned and fined; for ſo much Land as they had without the ſix Miles, for that they were charged. If I ſhould number to your Lordſhips all the Judgments in this kind, I might ſpeak here till to Morrow-morning. *P. 22 Ed. 3. inter Communia*, in the Exchequer; *P. 25 Ed. 3. M. 27. P. 27. and 28. Ed. 3.* and there is a Number more in other Years, as 29 and 30 *Hen. 4.* And, my Lords, according to thoſe Judgments, *Trin. 31. Ed. 3. Rot. 3.* the Writ went forth for diſcharging of ſuch as have reſided upon their Lands within ſix Miles. 21 *Ed. 1. Pipe Roll*; ſome diſcharged becauſe they were in the King's Service.

So as, my Lords, out of theſe Records thus much may be collected. Firſt, They affirm the King's Power, in aſſeſſing and levying. And Secondly, that they are grounded upon thoſe Ordinances made by the King and his Council. Thirdly, The Proceſs went out of the Exchequer, and in the King's Name. *M. 22. Ed. 3. Parl. coram Baro.* Iſſue joined, whether *J. S.* had Lands to the Value of 40 *l.* to find Hobbellers; if he had, then he was to do it.

My Lords, I have now done with the Judicial Precedents; I have cited ſome few, amongst many others. It is now time, after ſo long Premiſſes, to draw to a Concluſion: wherein your Lordſhips have heard. Firſt, That the King of England, he is an abſolute Monarch; and that by the Common Law of England, all thoſe *Jura ſumma Majeſtatis* are inherent in his Perſon. This *Supremum Dominium* for all the Land that any Subject holdeth, it is derived from the Crown; and, as *Plowden* putteth it, 12 and 13. that there is a tacit Condition in Law annexed to his Grant, that his Officers may do Juſtice to execute Proceſs ſurely upon his Grant. This tacit Condition may be ſubject to a Common Defence. Supreme Jurisdiction, both by Sea and Land, was never yet impeached, and from him lieth no Appeal. And originally, by the Inſtitution of the Laws of this Realm, what was once in his Hand, and was never granted from him, is ſtill in him; he hath abſolute Power of concluding War and Peace: All theſe are in him as he is an abſolute Monarch, and holdeth his Kingdom under none but God himſelf. It hath appeared alſo, that a principal Part of this Kingly Office conſiſts in the Defence of the Realm; that as his Jurisdiction is by Sea and Land, ſo is his Defence. And this hath been made appear to your Lordſhips, both by Precedents before *William* the Firſt, and ſince: *pro communi utilitate*, and, in Caſe of Neceſſity, the Kings of England may ordain, by their Proclamation, Writs or Patents, by the Advice of their Council, or Judges, in legal Matters, That the King is the ſole Judge of this Danger, both for the prevention of it, and for the avoiding of it. Therefore for us to diſtruſt that he will command too great a

Power or Aid, it is a Preſumption againſt the Preſumption of Law.

It hath appeared likewiſe that all the Incidents of Defence are likewiſe inherent in his Majeſty. We cannot build a Fort or Caſtle on our own Ground, without Liſenſe from him. Your Lordſhips have heard the Precedents, particular and general; Precedents which have univerſal Reaſons, *quod omnes ex debito aſtricti ſunt*; Writs awarded by the King's Royal Power, in Times of Parliament, when Parliaments were ſitting, and in thoſe Years when great Aids and Subſidies were granted to the King, many times no Cauſe declared, nor the Occaſion diſcover'd.

There is no Act of Parliament made to take away this Power: And the judicial Precedents which your Lordſhips have heard, have affirmed this Power.

My Lords, if there were no Law to compel to this Duty, yet Nature and the inviolate Law of Preſervation ought to move us. Theſe Vapours that are exhale from us, will again deſcend upon us in our Safety, and in the Honour of our Nation. Therefore let us obey the King's Command by his Writ, and not diſpute it. He is the firſt Mover amongst theſe Orbs of ours; and he is the Circle of this Circumference; and he is the Center of us all, wherein we all, as the Lines, ſhould meet; he is the Soul of this Body, whoſe proper Act is to command.

But I ſhall need to uſe no Perſuaſions to your Lordſhips to do Juſtice in this Cauſe. And therefore I ſhall humbly deſire Judgment for the King.

The Argument of Sir Francis Weſton Kt. one of the Barons of his Majeſty's Court of Exchequer, in the great Cauſe of Ship-Money.

IN Eaſter-Term laſt, there was a Writ of *Scire Fac'* went out of the Exchequer, directed to the Sheriff of *Bucks*, reciting, That whereas divers ſeveral Sums of Money, ſpecified in a Schedule annexed to the Writ, by virtue of the Writ 4 *Aug. 11 Car.* were aſſeſſed upon the ſeveral Perſons, in the Schedule named, towards the providing of a Ship of War mentioned in the Writ, which Sums being ſo aſſeſſed, and not paid, by Writ of *Certiorari* 9 *Martii 12 Car.* under the Great Seal of England, the Names of thoſe ſeveral Perſons and Sums aſſeſſed are certified into the Chancery, and by Writ of *Mittimus* dated 5 *Maii 13 Car.* ſent into the Exchequer, and there to be proceeded upon according to the Courſe of the Law. The Sheriff of *Bucks* is commanded to warn the Parties named to appear, and to ſhew Cauſe why they ſhould not be charged with thoſe ſeveral Sums aſſeſſed upon them.

Hereupon Mr. *Hampden* appeareth, and demandeth Oyer of the Writ 4 *Aug.* of the *Certiorari* and *Mittimus*, and their ſeveral Returns; they being all read unto him, he ſaith that theſe ſeveral Writs, and the Returns thereof, and the Schedules thereunto annexed, do not contain any ſufficient Matter to charge him to pay the 20 *s.* and thereupon demurred. Mr. Attorney-General ſaith, that they do contain ſufficient Matter to charge him. And thereupon the Demurrer is joined.

The Demurrer being joined, the Record was read in the Exchequer; and the Cauſe appearing to be of great Weight, it was adjourned unto this Place

Place in the Exchequer-Chamber, to have the Advice of all the Judges of *England*.

Upon this Record, I am to deliver my Opinion; and I take it there is sufficient Matter to charge Mr. *Hampden* with this 20 s. And so I give Judgment for the King.

Here have been twelve Days spent in the arguing of this Case at the Bar: I will confine myself to two Hours and less, tho not tied unto any time. The way to be short, is shortly to find out the Points.

But I must first observe, in what State this Cause cometh in Judgment before us. There is a Rule in Law, that if a Man shall demur generally to the Writ, he doth confess all other Matters in Fact that are alledged. The Reasons of it are apparent, Because Matters of Fact are to be tried by Jury, and Matters of Law by the Judges. So in this Case all the Danger alledged by the Writ, is confessed; and the Matter in Law is that which we that are Judges are to deliver our Opinions upon.

It hath been objected, by Mr. *Holborne*, That we are tied to the Writ 4 *Aug.* for that Writ is the Ground of all, and upon that doth all the rest depend. It is true, that if he had relied upon the Writ, it had been so. But his Demurrer is this, That the Writ, and the rest of the Proceedings with the Schedules, do not contain Matter sufficient: So that now they have not put to us the Writ 4 *Aug.* alone, but all the rest, to give Judgment upon. For the Writ of *Mittimus*, it is confessed, That in that there is an Expression, that *Salus Regni periclitabatur*, which is not in the Writ 4 *Aug.*

To this he hath taken Exception, that *Salus Regni periclitabatur*, the Danger is at the present Time of the *Mittimus*, and doth not say, *periclitatur*, 4 *Aug.* 11 *Car.* and therefore this Expression now in the *Mittimus* cannot make good the Defect thereof in the Writ of 4 *Aug.*

To this I answer, That the demurring to all, hath confessed all, and yet the Matter in the Writ is sufficient to express the Danger.

Then he objected, That *Salus* signifies Health, and not Safety; and that the Physicians term it so.

But *Salus* signifies Safety as well as Health. So it is englished in *Cooper's Dictionary*, and so it is taken by Poets and Historians for Safety.

The next Objection was to the Writ 4 *Aug.* That if there were a Danger, it must be plainly expressed in the Writ, &c. the Words are, *Datum est nobis intelligi*, &c. How cometh the King to understand it? the Danger must be fully expressed.

For this I hold it more fit for a Statesman than myself to give an Answer to, that the King should discover his Intelligence; whether it is fit to make known to all the World the Danger the Kingdom is in. But yet I find that in the said Writ 4 *Aug.* there is expressed both Danger by Pirates on the Sea, and that the Dominion of the Sea is like to be lost: And that these are Dangers to the whole Kingdom. For the *Certiorari*, I find it is directed to the Shire, and the Writ of *Mittimus* to the Court of Exchequer; and therefore he could not take Exception to these Writs: whatsoever I shall take Advantage of, it must be contained in the Writ 4 *Aug.*

In this Writ, three things, as Dangers, are expressed. 1. The Danger by Pirates. 2. The Danger of losing the Dominion of the Narrow Seas. And, 3. The great Peril in this Time of War.

For the Pirates, I shall not meddle with them; they are but petty Robbers, and still running away: The Ports must defend themselves against these; the Inland Counties are in no Danger of them.

I will not insist upon the Dominion of the Narrow Seas, tho that is considerable; for in the Defence of that consists much the Preservation of the Kingdom. But I shall insist on the Danger of the Kingdom expressed in the Writ 4 *Aug.* thus, *Consideratis etiam periculis undique*, &c. there is Danger, there is Peril round about us; and it is by reason that there are now Times of War, we see Danger on every side.

There are two things trouble this Point. 1. The Subject suspects that this is only a Pretence, and that the Kingdom is not really in Danger.

2. That there being great Sums of Money raised upon this Occasion, this, in the end, will be drawn to be annual and perpetual: But if they were satisfied that the Kingdom were really in Danger, likely they would be content to pay the Money till the Danger be over.

For my part, I answer to these Objections, That it is an unworthy Supposition. I must be satisfied, and I am, that the Kingdom was in Danger for two things: One Reason is, Because it is so expressed in the Writ 4 *Aug.* It cannot be denied, but that the Kingdom may be in Danger. It hath been conquered, and so it may be again, therefore it is necessary it should be foreseen and prevented; and somebody must do it, and who better than the King, that hath the Care and Charge of the Kingdom? He saith the Kingdom is in Danger, and hath so declared it by his Writ; why I should not believe it, when the King hath declared it to be so by his Writ, I know not.

My other Reason that the Kingdom is in Danger is, That it is so *de facto*. It cannot be unknown to any Man, that these three or four Years last past, great Navies have been at Sea, and great Forces on Land. If we should have but an ordinary Defence at Sea by Shipping, no Man can tell or suppose, but that those Navies, being so great, may land where they will, and in as many Places as they will; what Spoil would they make before such time as any Resistance could be made against them?

They objected here, That these Navies at Sea, they are engaged in War one with another; we are safe enough, we need not fear them.

I answer, They are, I think, engaged in good earnest; but who knoweth how soon these Wars may end? They may end by the Mediation of Friends, or the Death of some one Person. And when there is a great Navy at Sea, and Forces at Land, how easy is it to remember an old Quarrel, or to pick a new one?

These things do persuade me that the Kingdom is in Danger, and a very great and just Cause to make Preparation for Defence. And if every Man would be so persuaded, they would not deny the Payment of the Money. An Example of this nature hath happen'd in former times: In *Henry the Seventh's* Time, it appeareth, by a Record on the King's Part, *Pat. 1 Hen. 7. pars 3. duo*; there were Wars between the King of

the Romans and the King of France; they were both Friends to Hen. 7. they ought him no Ill-will; yet by reason of these great Wars, great Forces at Sea, and great Forces at Land, the King would not trust them, but sent forth his Proclamation, to command that Watch and Ward be kept over the Sea-Coasts, and Command was to all his Subjects, that upon short Warning they should be ready for Defence of the Kingdom. So this may well be an Example for the Course that is now taken, for Defence of the Kingdom.

I shall now come to those Reasons, and to the Records that have been objected on either side. I shall begin with the King's side, because that layeth a Charge on the Defendant.

It hath been objected, That some of them are not warranted by the Record. First, say they, there is a Ship commanded to be provided, and Money must be levied: But in the end, when this great Sum of Money is collected, it must be disbursed, no Man knows how. No such thing in the Record.

To this I answer, The Record saith, a Ship must be provided, and the Sheriff is to rate the County, *secundum facultates*, towards the same; not a word of any Money to be paid unto the King. It is a Ship that the Sheriff is to build, and to assess Money towards it.

They have said besides, Here is in the Writ a Command for the Imprisonment of the Party, and that his Liberty, dearer to him than his Life, and his Goods, wherein he hath an absolute Property, shall be taken away. These things, they say, are not warranted by the Writ, nor by any thing in the Record.

I answer, It is not warranted by the Proceedings in this Case; for the *Scir' Fac'* is not to shew Cause why the Party's Goods should not be sold, or he imprisoned, but why he should not be charged with the Money assessed upon him.

They say, That the general Defence of the Sea lieth upon the King; because he hath wherewithal to do it.

I would willingly disburden myself as much as I can of the Objections: A general Answer I shall give to these Particulars.

They say, The King hath personal Service, the Service of Tenants, by Knights Service, Escuage, Castle-Guard, Grand Serjeanty, Petty Serjeanty.

Is the King bound by these to the Defence of the Kingdom? He that doth look on their Originals, will not say so; For these are Tenures reserved upon the several Grants made by the King; and no more Reason is there that the King, by this, should be tied to defend the Kingdom, than there is for the Lords, that are Subjects, and have the like Tenure, that they should be bound to the Defence of the Sea.

They say, He hath besides these, Wards, Mariages, Reliefs, Fines, Issues, Amerciaments, primer Seisin, Fines of Alienation, Respites of Homage, all Fruits of the Tenures; which all must go towards the Defence of the Kingdom.

I answer, These Profits are casual; besides, if he be not bound in respect of the Tenure, as aforesaid, he cannot be bound by the Fruits of them.

It hath been objected, That the King hath the Profit of the Sea, as Royal Fishes, Whales,

&c. Wrecks at Sea, Treasure Trove, Royal Mines, &c.

I answer, These he hath by his Prerogative, and not for the Defence; neither are they fit for a Subject to have.

You say, He hath particular Service from the Cinque Ports and other Places, as from Malden, Colchester, and other Places; and besides, he hath all manner of Customs, and in regard of these he is bound to provide for the Defence of the Sea.

It is true, the King must, for an ordinary Defence, use the Means the Law hath allowed him; but that is not now the Question: It is for an extraordinary Defence. The Question now ariseth, if it were asked any Man, Whether they do think in their Conscience that the King is able of himself, out of these, to prepare a Royal Navy, without help from the Subject? None are so senseless as to think it.

There be some other things, to which I shall give a general Answer.

It appeareth by many Records, that the King hath paid Wages to Soldiers, and sometimes hath hired Ships; and unless there had been a Consideration, the King would not have done it.

To this I answer, It was for ordinary Defence, and he is bound to do it; and if he engaged himself by Promise to repay unto them their Charges, I can say no more but this, That every honest Man that makes a Promise will perform it, and so is the King bound to perform his Promise: for that which Honesty binds others to the performance of, Honour binds the King.

I shall come to those things to which a more particular Answer is to be given. The Charge lieth general upon the whole Kingdom, which I shall divide into three Parts. 1. The Ports. 2. The Maritime Counties. And, 3. The Inland Counties: And to these three I will apply the Records.

1. For the Ports; they are of two Kinds, the Cinque Ports, and the Ports at large. What Services are due from the Cinque Ports, is expressed in *Libr' Rubrico*, in the Exchequer, that they were to find 52 Ships, and 24 Men in every Ship, for fifteen Days; which cometh to 1188 Men.

The Ports at large are tied to no certain Service; it will appear by most of these Records which I shall apply, that the Cinque Ports have been charged with more than their due, and the Ports at large equally with the Cinque Ports. *Pat. 25 Joh. m. 6.* the King sent his Writ to the Cinque Ports, and thereby commandeth, *quod omnes Naves paratae, &c. & homines*; he doth not here tie them to a Number, but all must go. *Claus. 17 Joh. m. 7.* here the King sent his Writ *Baronibus suis de Rye*, a Member of the Cinque Ports, *Quod venire faciatis omnes Naves apud Quinque Portus*; this was general, as the others. All the Ships, not tied to the Number of 52. *Claus. 14 Hen. 3. m. 13.* a Writ went out to *Portsmouth*, being a Port at large, to provide a Galley, *& eam munire faciant cum hominibus, & quod prompti & parati sint ad proficiscend' cum necesse fuerit.* So here is a particular Charge upon *Portsmouth*, not bound unto it, to provide a Galley with all manner

manner of Munition. *Claus. 25 Ed. 1. m. 5. dorf.* A Writ went unto *Guernsey*, a Port at large, to make a Ship ready as often as Need should require, *de contributione faciend' pro Navibus quoties opus fuerit. Pat. 9 Edw. 2. pars 2. m. 26.* A Writ goeth forth, and that was directed, *Ballivis & probis hominibus comit' Southampton*, to make *Provisionem Navigii sumptibus propriis*; no Promise from the King to pay this again. *Claus. 20 Edw. 2. m. 7.* A Writ goeth to the Sheriff of *London*, and that reciteth a Charge formerly laid upon the City, and upon *Kent*, for finding of 12 Ships; *London* to find 9 Ships, and *Kent* 3, and forty Men in every Ship, *ad sumptus illarum. Claus. 20 Edw. 2. m. 8.* A Writ directed to the Bailiff of *Yarmouth*, which is none of the Cinque Ports, and they were charged with two Ships at their own Costs. And the same Command, in the same Roll, for all Ships of 50 Tuns to be ready. *Rot. Scot. 10 Edw. 3. m. 12.* That Writ reciteth the general Obligation that they are bound in to defend the Kingdom, almost in the same words mentioned in this Writ; it reciteth, that every Man should be assessed *juxta statum & facultates*, so there was a Contribution; then cometh in the Clause *ultra illam pecuniæ summam debit' pro servitiis*. It is true, indeed, the King did pay towards this, but it is expressed to be of his mere Grace and Favour. *10 Edw. 3. m. 2. dorf.* A Writ to *Winchelsea*, a Member of the Cinque Ports, and that was *Quod omnes Naves sint paratæ*, both of the Ports & *aliarum villarum*; and the Reason is expressed, Because without their Help the King was not able to defend the Kingdom; and appointeth them, by that Writ, that the Ships should be ready victualled for thirteen Weeks; whereas the ordinary Time was but for fifteen Days. *Vas. 12 Edw. 3. m. 8.* there a Writ goeth forth to the Sheriff of *Kent*, and to the Barons of the Cinque Ports, whereby they were all commanded to look to the Custody of the Sea Coasts; here are the Maritime Towns and Port Towns joined together. *25 Edw. 3. m. 22. dorf.* A Writ to *Southampton*, *ad congregandum Naves*. In the same Roll *m. 8.* more Writs to other Towns. *Pat. 12 Edw. 3. pars 4. m. 3.* there was a Command that all that dwell within the Isle of *Thanet*, from 16 to 60, should be ready to defend the Sea-Coasts, and this was *juxta statum & facultates. Rot. Alm. 13 Ed. 3. m. 12.* *Yarmouth* charged with 4 Ships, and in each Ship 24 Men: whereas usually it was but 21 Men in a Ship, now I think they are come to fixscore Men in a ship. There are an infinite Number of Rolls to this purpose, to charge the Port-Towns.

I come now to my second Division, which is Maritime Towns. *Pat. 48 Hen. 3. m. 4. dorf.* A Writ went to the Sheriffs of *Norfolk*, reciting, That Ships and Soldiers had staid there long, and that they were intending to depart, because their forty Days were past; command was, that they should stay, *donec aliud inde mandatum fuerit. Claus. 23 Edw. 1. m. 5. dorf.* There were Writs directed to the Sheriffs of *Southampton*, *Dorset* and *Wilt*, these three are all Maritime Counties: A Command, that they should raise three thousand Men to defend the Coasts. *Pat. 24 Edw. 1. m. 17.* A Writ directed to the Sheriffs of *Lincoln*, *York*, and *Northumberland*, to assist certain Commissioners to take up an hundred Ships, with a competent Number of Men, these are to Maritime Counties: The like Writs go to the Sheriffs of

Suffex and *Southampton*, and these for the Preparation of Ships, and to take them wheresoever they are to be found. *Rot. Pat. 25 Edw. 1. m. 6.* Writs went to *Southampton*, *Devon*, *Cornwal*, *Dorset*, and many other Places that were Maritime Towns, for arresting of Ships, and raising of Men. But the Rolls, I might most insist upon, are only these; I'll but name them. *Pat. 24 Ed. 1. m. 16. Ex parte Remem. Regis. & Rot. 78. Claus. 25 Edw. 1. m. 26. Claus. 13 Edw. 3. m. 14. pars 1. dorf. Scot. 10 Edw. 3. m. 22.* By all which it appears, not only the Ports, but the Maritime Counties have contributed towards the Charge of the Defence of the Kingdom. And the other Side do hardly deny it, but that the Maritime Towns may be charged.

I will open it plain, that it is for their Ease to bring in the Inland Counties. This Cause is not of so great Consequence, as is conceived; for if the Port-Towns and Maritime Towns may be charged, then it bringeth but in the Inland Counties. In *England* and *Wales* there are fifty-two Counties, thirty-three of these are Maritime Counties; so the Inland Counties are but nineteen at the most, and they contribute but to a fourth Part of the Charge, for the Defence of the Kingdom. And so much to my second Division of Maritime Towns.

3. To the third Division, which is of Inland Counties, that they have been charged; I shall make that appear, that the greater Part of them have been charged formerly for this manner of Defence.

They objected, that the County of *Bucks* is an Inland County, and that Mr. *Hampden* dwells there; and therefore no Reason he should contribute to the Defence, no Inland County ever did it, say they.

There may be two Reasons, why, in former Times, the Writs for the most part went to the Ports and Maritime Counties. 1. Because they have the Benefit of the Seas by Exportation and Importation of their Goods. And, 2. Because they are continually in danger of Pirates and Robbers; and far nearer for a sudden Defence, than the Inland Counties are. But this cannot be held for a sufficient Reason, that they only that are near the Danger should be put to defend the whole Kingdom. I am sure the Inland Counties receive great Gains and Profits by the Commodities from the Port-Towns; and they are the more in Safety, the stronger the Sea-Coasts are kept: and therefore no Reason, but that they should contribute towards the Charge of the Defence of the Sea. For all the Writs, save one Commission, have gone to be for the general Defence of the Kingdom; then no Reason but Inland Counties should be charged. If they say they never did it, it is a strange Prescription, that because they never did it, they never will do it. A man cannot excuse himself, that, because he never paid Tithe to such a Vicar, or such a Parson, that therefore he will never pay it.

I shall go to the Records that charge the Inland Counties. *Claus. 48 Hen. 3. m. 2.* A Writ directed to the Mayor and Bailiff of *Bedford*, an Inland County; it doth recite, that divers of that Town were called to go with the King towards the Sea-Coasts, *contra hostilem invasionem, & nunc necesse est, & causas fortuit' ut levare fac' & expensas*; and appoint at what Rate they should levy it, the Horsemen were to have eight pence per Day, and the

the Footmen four pence. *Clauſ. 48 Hen. 3. m. 7.* A Writ directed to the Sheriff of *Huntington*, whereby the Men of that County were commanded to go to *London*, and from thence to the Sea-Coaſts, for the Defence of the Kingdom. *Rot. Scot. Exc. Remem. Regis 24 Ed. 1. m. 78. dorſ.* A Writ is directed to the Sheriff of *Berks*, and this is to diſtrain Men to make good the Cuſtody of the Sea-Coaſts. *Rot. 26 Ed. 1. m. 5.* The like Writs were directed to the Sheriffs of *Hertford, Eſſex, Nottingham, Derby, Huntington, Cambridge, &c.* and almoſt to all the Inland Counties, *pro custodia Maritima*, all to come to *London*, and to go from thence to the Sea-Coaſts, for the Defence thereof. *Clauſ. 13 Ed. 3. pars 1. m. 14. dorſ.* A Writ goeth out to *Oxford, ad diſtringendum*, for Wages, *pro custodia Maritima*; one Man was diſtrained, and he pleaded he had been charged in *Wilts*, and ought not to be charged in another County, and for this there went a *Superſedeas*. *Rot. Viagii 1 Hen. 4. m. 10.* A Writ was directed to the Sheriffs of *Nottingham* and *Derby*, two Inland Counties, and this was to proclaim *quod omnes homines, inter 16 & 60, parati ſint, &c.* to go with the King, within the Kingdom, where he pleaſed. *Clauſ. 1 Ric. 2. m. 18.* Writs were directed to the Mayor and Bailiffs of *Huntington* and *Cambridge*. This Roll is cited by the Counſel for the Defendant; and in part it maketh for the Defendant, and in part againſt him: The Effect of it is this, the Writ is directed to the Bailiff of *Huntington*, and this recites a former Writ to provide Barges, called *Ballingers*, with forty and fifty Oars a-piece, like to a Galley, at the Charge of the moſt rich Men, and this was *ad cuſtod. Maris*. And the like Writs went to the Towns of *Nottingham, Glouceſter, and Warwick*, and divers other places; theſe Veſſels were not deviſed then, I find them uſed before in *K. Edward* the Third's time. In the Parliament Rolls, *2 Ed. 4. m. 22.* the Commons did complain, that a Commiſſion was gone forth for the making of theſe Barges. True, upon a Petition of the Commons, the King ſaith, he will adviſe with his Lords, there is no more done; but upon this they ceaſe. I have now done with the Precedents on the King's Side.

I ſhall now come to that which hath been ſaid on the Defendant's Side for their diſcharge. And, *Fiſt*, For the Acts and Petitions in Parliament, which are weighty and conſiderable.

Fiſt, For the Statute *de tallagio non concedendo*, which was in the time of *Edw. I.* It hath been doubted, whether this be a Statute or no. I ſee no colour of doubt, but that this is a Statute; it is printed amongſt the Statutes, and ever accounted for a Statute: and in the Petition of Right, it is recited for a Statute. And to ſay it is no Statute, becauſe the Parliament-Roll is wanting; if it ſhould be diſallowed, it would draw a great Inconvenience with it: for private Men might embezzle the Records, and then if the Records were wanting, the Acts of Parliament ſhould be void.

It is an Act of Parliament no queſtion; but the Queſtion is, whether the Proviſion made by this Writ, be within the meaning of this Statute.

And I conceive it is not; for there are two Words in this Statute obſervable, *Taillage and Aid*. By no *Aid* here, will you take away the *Aid pur fils marrier*, or *pur faire Fitz Chevalier*? By no *Taillage*, will you have it ſo, the King ſhall de-

mand no Sum of Money? Then if you will give it this large Conſtruction, you will take away all Fines and Amerciaments that are due to the King, all lawful Impoſitions; and ſurely this was not the Intent and Meaning of this Statute: but it was only to take away all Taxes and *Taillages* that were unlawful. If they were lawful this Statute meddleth not with them.

Now, that no *Taillage* is to be taken, it appears in the Parliament-Rolls, *13 Hen. 4. m. 42.* where an Office was granted by the King, with a Fee, for the meaſuring of Linen-Cloth, that the Subject ſhould pay him a certain Sum of Money for every Piece meaſured; whereupon, at the Parliament, the Commons complain, that this was an unjuſt Impoſition, and they deſire that they might not be charged with this kind of *Taillage*, which, as was apparent, was unjuſt, and ſo they had preſent Relief againſt it.

The next Act of Parliament is *14 Edw. 3.* the ſecond Parliament of that Year, three Parliaments being held that Year. The Commons grant the King a certain Sum of Money, for the great Buſineſs he had as well on this ſide the Sea, as beyond; but after a Ceſſation of the Troubles, then the King is to be at the charge of the future Defence; thereupon the King granteth this ſhall not be had in *exemplum*, and that they ſhall not afterwards be taxed without Parliament: and this is the ſtrongeſt thing that I have heard objected.

It requireth a good Answer; the Words are plain, no Charge no Queſtion; but this is a Charge. I looked into the Petition of Right, and it is not there mentioned, nor amongſt thoſe Acts of Parliament that are in the Margin; but the Reaſon why it was omitted, I know not.

I obſerve in this Act of Parliament a ſubſequent Clauſe, that will go far to the answering of this Objection; for neither in the Acts of Parliament, nor in the Petition of Right, is there any mention made of the Defence of the Kingdom; if the King had been bound to defend the Kingdom, could the Parliament have accepted this as a Kindneſs at his hands? *14 Edw. 3.* This Act was made, yet the Aids continued, none of theſe Writs found till *24 Ed. 3. Rot. Franc. 24 Ed. 3. m. 9 & 26.* there went out Commiſſions to array Men, to the Counties of *Suffolk, Dorſet* and *Somerſet*, for the Defence of the Maritime Parts; within eleven Years after the making of the Statute, *Rot. Franc. 26 Ed. 3. m. 5.* the like Writs to the Earl of *Huntington, Conſiderantes quod omnes incolæ tenentur de jure ad defendend' in periculo*; and that they ſhall array the Men in this County, and to bring them *ad cuſtodiend' mare*; and by this it is recommended for the erecting of Beacons, which is the firſt Direction of that nature: So here is a new Charge, and within eleven Years after the making of the Statute. The ſame Year likewise there went Writs to the Sheriffs of *Nottingham, Derby, Salop, Berks, Middleſex, Bucks, Northampton, &c.* So thoſe theſe Writs go almoſt into every County, and divers other Writs of the like nature, as *Rot. Franc. 28 Edw. 3. m. 34.* yet, as I ſaid, in no Act of Parliament extant, nor in any Writ that ever went forth that I can find, there is any thing appears to charge the King with the Defence of the Kingdom, and in all of them, no Diſtinction made between the Port-Towns, Maritime-Towns, Counties, and Inland-Counties; but that all of them are generally chargeable. And for the reſt of the Acts of Parliament,

liament, they are all mentioned in the Petition of Right, and therefore I pass them over. There is in those Acts, Provision against Loans and Grievances; but this Clause, for the Defence of the Kingdom, I find it mentioned in no Act of Parliament but this of 14 Ed. 3. before mentioned.

I will now come to the Petitions in Parliament. Rot. Parl. 13 Ed. 3. m. 9, 11. It was there declared to the Commons, that the French had invaded the Island of Guernsey, and all this was for Default of a Navy upon the Sea; and therefore it was needful to consider how this might be regained. It was answered by the Commons, That concerning the Right and Guard of the Sea, they desired to give no Advice, saying, they have no cognizance of Things concerning the Sea; but if there be Occasion, the Cinque-Ports are to be charged: and said farther, that in the Marches of Scotland, they were to defend the Kingdom against the Scots: But that this kind of Defence should lie upon them, was never heard of.

I will give you an Answer to your Acts of Parliament, and Petitions of Parliament, by putting of a Case. I will admit you have an Act of Parliament as strong as you can make it, that the whole Charge of the Defence of the Kingdom should lie upon the King, and not upon the Subject, in case of any sudden Invasion. Admit there was a greater Power at Sea, than the King was able to make Defence against; then, I pray, whether should this not give way to the present Necessity, or the Kingdom should be lost? Is it not better to indure a Mischiefe, than an Inconvenience?

If you say, the Acts of Parliament should give way to Necessity, then you have answered all you have objected.

This is not the only Case of Necessity. I shall put you another Case, when Acts of Parliament must give way to Necessity: That if a Man be attainted of Treason, he is disabled to inherit by Act of Parliament; but if the Kingdom should descend to such a Man, then the Act of Parliament should give way to it. And shall not the Acts of Parliament give way to Necessity for Defence of the Kingdom? What tho there have been Petitions in Parliament to have it decreed, that this kind of Charge should not be laid upon the Subject? Admit it had been so decreed in Parliament, yet by the Law of Equity they ought to be charged; and in all Reason they ought to be charged towards the Defence of the Kingdom, and that for three Respects.

1. For the Reason given in the Writ, *Quod omnes tangit, per omnes debet supportari*; which is but Equity.

2. The King is trusted with the Defence of the Kingdom, and therefore 'tis fit he should have Means wherewith to do it.

But you say he may call a Parliament, and they will give him Means wherewith to do it.

'Tis true, this Thing in question, if it had been done by Parliament, it had been done by the happiest Means; but because he might have it by Parliament, must he therefore have it no other ways? The Question now is, whether what is done, may be done without a Parliament or no? What is done, is done by the great Seal, which is the next Authority to a Parliament. What if an Enemy had come before the Parliament had met, or before they had granted any Aid, should the Safety of the Kingdom depend upon such Contin-

gencies? God forbid. Will you have Forces on both Sides, and restrain the King to this Power by Parliament, which may be so dilatory, that the Kingdom may be lost in the mean time?

3. Many Inconveniences might happen both to the King and Subject, if this should be suffered: If the King should be restrained of his Royal Power, it would turn to his Contempt, both at home and abroad. And all this while the Matter is not so great, it is but parting with a little Money, *secundum statum & facultates*.

It is true, as Mr. Holborne hath said, that in former Times they have been careful not to leave too much Power to the King; but you would leave so little as would bring him in Contempt both at home and abroad. The worst that comes to the Subject, is but to yield their Help to the King, in such Times of Danger, with a small part of their Estate; and then it would make foreign Nations that know of it afraid of us, which now by this Occasion have Encouragement to attempt that which otherwise they would not.

It hath been objected, That if the King may raise Moneys in this manner, many Inconveniences would follow, and it would be a Means to keep back Parliaments.

To this Objection I answer, It is no Means to keep back a Parliament; for there are many other Causes of calling a Parliament, besides for the Defence of the Kingdom: as, For making good Laws, redressing of Grievances, &c. The King may be engaged in a foreign War, and the Subject must help him. But to call a Parliament always is not necessary; for when the Kingdom was in the greatest Danger that ever it was, as in 88, and the Rebellion in the North, yet no Parliament was called in either of these Dangers.

Next they object, That if this Course be admitted, the King may pretend a Danger when there is none; or a great Danger, when it is but small: and so may raise a great Sum of Money, and the Subject shall have but little Benefit thereby.

I shall give three Answers to this Objection.

1. If this Power be in the King, and that Power be just and equal, then it is not to be taken from him, because he may misemploy his Power. If he misuse his Power, the Fault is his.

2. This Objection cannot be made, unless you suppose Injustice in the King: Make what Laws you will, if the King be unruly, he will break thro' them.

3. If it so falls out, that the Writ going out upon this Pretence, and that great Sums of Money are levied, and the Monies employed to another Use, it were a great Inconvenience; but in this Case there is no such Fear, for the Writ is expressly to make a Ship; and if they would have taken any Advantage upon that, the Counsel ought to have pleaded it, and the Judgment ought to appear there upon Record. There appears no Money in this Case to be coming to his Majesty's Hands; but it is said in the Writ, *volumus autem*, &c. we will that no part of the Money be converted to another Use than to the building of a Ship.

Then they object, That by the same Reason the King commandeth his Subjects to provide one Ship now, he may command two Ships the next Year.

To this I answer, If the Danger be greater, the Defence must be greater, and then the supply must be greater; and no Man can suppose that the

the King will impose that on his Subjects when there is no need.

I shall now come to the two last Exceptions. *First*, That the Power cannot be given to the Sheriff by the Writ 4 Aug. to tax every Man *secundum statum & facultates*; that this is too great a Power to be committed to the Sheriff.

To that I answer, That I conceive the Sheriff to be the fittest Man, and most indifferent for that Purpose; for if there were Commissioners, or many Men appointed for doing thereof, they might perchance be partial to their Friends: And the Sheriff having all the Freeholders Names, and the Bailiffs for his Ministers, that know the Estates of most Men; therefore out of all doubt he is the fittest Person.

For the Exception to the *Scir' Fac'* it hath been objected, That the King cannot by that Course levy Moneys, because the King having no Interest in the Money, he cannot levy it by *Scir' Fac'*; neither doth it appear in the Writ, to whom this Money is to be paid.

I confess this Point, tho' not spoken to by the Defendant, is of most Difficulty.

Tho' no Person certain is named, to whom this Money is to be paid, and the Sheriff is only to levy it according to the Writ, and the King providing a Ship, I suppose that *Scir' Fac'* may issue for it; for if a common Person claim any thing, or be wronged, or debarred from his Right, he hath, by the Law, a Writ for his Remedy: and shall not the King have the like Remedy for this Ship, being for the Defence of the Realm in general, for which he is intrusted, to prevent a Wrong to be done to this Common-wealth?

But in this Case, the *Scir' Fac'* is not for Mr. *Hampden* to shew Cause, why he doth not pay the Money to the Sheriff; but, why he doth not pay the Money he was assessed towards the making of the Ship; which, for ought I know, when it hath done the Service, is the Subject's again, at whose Cost it was provided, for they might either have hired a Ship or bought a Ship. In *Fitz-Her. Na. Br.* it is held, the King may, for the Good of his People, send forth Writs for removing common Grievances, and for repairing of Bridges, and the like: And why may not the King send forth Writs for so necessary a Service as to defend the Kingdom? *Claus. 1 Ric. 2. m. 7.* A Writ went out to the Mayor and Bailiff of Oxford to repair the Walls and Ditches about the Town; and why not as well to repair the wooden Walls of the whole Kingdom, as the Walls and Ditches of a Town? The King hath Charge and Power over all, to see all done.

But it hath been said, When this Money is gathered, we know not what becomes of it.

I answer them, with the common Roll in *Scac' 24 & 25 Ed. 3.* where a Commission went forth to levy Money for Maritime Defence, but what was done thereupon is not expressed. But at that Time there was a Cause adjudged in the Exchequer, it is a *Norfolk* Cause, where divers being commanded to go to the Wars against the *Scots*, and had thereupon Armour and Wages allowed them; afterwards comes a Counter-command to some of them not to go, and two Men that had Wages went not. Whereupon a Writ went out against them, and the Jury found the one Guilty, and he was ordered to pay back the Money; but the other going to the Wars, afterwards, by a

second Direction, was quit; And the first gave Security for the Repayment of his Wages, being 30 s. and also for the Armour.

It hath, *Lastly*, been objected, That this Taxation ought to be *secundum legem & consuetudinem Angliæ*; and that ought not to be by Writ, but by Parliament.

To this I answer, That from King *John's* to *Henry the Fourth's* Time, there hath been an Usage and Custom to send forth Writs of this Nature, and since that Time till now not the like Command.

About *Henry the Fourth's* Time, began your Tonnage and Poundage; so long as he had that, the Defence was at his own Charge. There is no Act for taking this Charge by Writ away; it is become a general Custom, and the general Custom makes the Law of *England*; and we are to examine and try new Causes by the old Law, and now compare this with what hath been done in former Times.

I shall make an end: For my own part, I am persuaded in my Conscience that there is imminent Danger: I am satisfied in it, both by the King's Writ, and that which is apparent to every one; and there is a Necessity this Danger should be prevented. I do conceive this Writ to be grounded upon this Danger of Necessity; and that the Danger appears sufficiently in the Writ.

Therefore I conceive that the Proceedings are legal, and that there is good and sufficient Cause to charge Mr. *Hampden*, and that he ought to pay the 20 s. assessed upon him.

The Argument of Sir Francis Crawley Kt. one of the Justices of Common-Pleas, in the Exchequer-Chamber, in the great Cause of Ship-Money.

THE Record hath been opened, therefore I shall spare that Labour. I conceive the Case in Question to be this,

Whether the King, by his Right of Sovereignty, may charge the Subject, in case of Necessity, to contribute with him to the necessary Defence of the Kingdom, without the Subjects Consent in Parliament.

Mr. *St. John*, whom I take to be the Mouth of the Defendant's Counsel, confesseth, That this Question is not so much *de re*, of Necessity, but *de modo*, if done without Parliament.

This is one of the greatest Cases that ever came in Judgment before the Judges of the Law. The King's Right and Sovereignty, in a high Point, is concerned, and the Honour and Safety of the Kingdom, on the one Side; and the Liberty of the Subject, in the Property of his Goods, on the other Side.

This is the first Cause, that ever came to Judgment, of this kind, that I know of. Kings have not suffer'd their Rights of Sovereignty to be debated at the Bar, as now it is; for these are *Arcana Regni*, not fit for publick Debate. The Use of Law was to have Causes debated; as saith one, No Man knows what Metal the Bell is of, until he hears it ring. This Bell hath been rung very roundly and laboriously on both Sides.

The Subjects have objected, That they may bring Actions against Officers of the King for Assessments, by virtue of this Writ. But for that I find

find no Precedents, save only one, which is 25 Ed. 1. the Abbot of *Robertsbridge's* Case; and he was taxed double for this Matter of Defence of Sea and Land, in two several Places: and therefore he brought his Action to be discharged in one Place. But in Cases of this Nature, they petitioned in Parliament to the King for Redress, as appears by many Precedents.

In *Bracton*, who wrote after *Henry III.'s* Time, and inclined to those Times, when the Liberty of the Subject was strongly maintained, he saith, *Totum Regnum petatur*, &c. They used to petition the King; but now you have Actions brought against the King's Officers in the *King's-Bench*, *Common-Pleas*, and here in this Court; and it pleaseth the King to bring this *Scir' Fac'* to the end that the Right of this Cause may be tried by the Judges of the Law.

In 11 *Rep.* and *Coke's Comment. on Littleton*, fol. 10. it's said, That the Laws and Customs of the Parliament are obscure: *Lex est consuetudo Parliamenti, querenda est ab omnibus, ignota a multis, & cognita a paucis*. As *Tully* said of one that would define *Anima*, and said it was *Musica Harmonia*, that was a Musician, *Homo non multum recessit ab arte sua*. I, for my own part, will keep myself to my own Art of the Books of the Law and Statutes. And if I use the Help of others, I hope you will pardon me for that.

I will briefly propound my Order and Method, thro'out the Case. 1. I will remove some few impertinent Discourses, which are not in the Record, as being out of the Ring of this Bell.

2. I shall propound, that the sole Care of Defence, at Sea and Land, *jure Regio*, appertaineth to the King, and none other; and that he is the sole Judge of this.

3. That the sole Charge of Defence, in ordinary Cases, regularly and legally appertaineth to the King.

4. That the extraordinary Charges of Defence ought to be supplied by the Parliament, and upon this Rule, *Quod omnes tangit ab omnibus debet supportari*.

5. If the Defence be of Necessity, and the Danger great, and so great as the King's Revenue is not sufficient to supply the Occasion, then the Rule comes to be in Use, *Qui sentit commodum sentire debet & onus*; and if it be general, *Quod omnes tangit, ab omnibus debet supportari*.

6. That in the Defence, where all ought to join, the Sea and Land ought to assist and contribute the one to the other.

7. I say, there are some particular Cases, in which this Charge of Defence cannot be imposed by Parliament.

8. That the King solely is intrusted, by the Law, to impose this Charge upon the Subject.

And, 9. These being my Generals, I shall come to my Minor, and conclude that this Charge is justly imposed by the King, without Parliament.

As to the first Impertinency, you speak of Tonnage and Poundage: Is there any such Grant on Record? Shall we take notice of a Thing that is not in *rerum Natura*? I say, I wish it had been granted, for *Qui adimit medium demit finem*: He that taketh away the ordinary Means of Preservation, is the Author of Ruin and Destruction. You see it is taken, but you cannot tell by what Right. If this were material, you wronged your Client, you pleaded it not: and if it is not mate-

rial, you wronged us, and your Auditors, and yourselves, to talk of it.

You say, This Ship-Money hath been charged for these three Years together: Is this Discourse within the Record? If not, you speak without Book.

You say, The King hath imposed great Sums of Money upon Merchandizes: But what is this to the Business now in question?

Then you talk of a Property the Subject loseth thereby; but this rather to abuse the People, without either Colour or Shadow. It was *ad faciendum*, or rather *inficiendum Populum*. If you at the Bar had not spoke it *Argumenti gratia*, it could not but have proceeded out of the Depth of Malice, or Ignorance, or both. If one be found guilty of Murder, and the Judge knoweth the contrary, what shall be done? He ought to acquaint the King therewith; for it is the King's Right of Sovereignty to pardon, but the Judge hath no such Power. I say, the whole Care appertaineth to the King only, and he is the sole Judge both of the Defence at Sea and Land. *Fitz. Na. Br. fol. 113. Le Roy de droit s'aver & defender son Realme al bien vers la Mare come vers les enemies. Regist. fol. 127. Rex, &c. pro eo quod nos Dignitatis nostræ Regni ad providend' salvationem Regni nostri circumquaq; sumus astricti. Fortescue cap 37. Omnes Potestas Regis deferre, &c. in defensione & tuitione Regni.* I think no Man can well oppose this.

But we will come to the *Third*. The sole Charge of the Defence regularly and legally appertaineth to the King. *Bracton, fol. 1. In Rege, qui recte regit, hæc duo sunt necessaria, Arma & Leges, &c.* with which Words accords *Justinian*, in his *Proæmium*, from whence that is taken in *Plowden fol. 315.* in the Case of Mines. One Reason why he saith Royal Mines belong to the King, is, because he is the Head, and the People his Members. And he is to preserve the Subject two ways: by Arms, to defend them against all Hostility; and by Law, to preserve them from Injuries. 3 *Rep. fol. 11.* The Body, Lands, and Goods of the King's Debtor were liable to Execution; *quia Thesaurus Regis est Pacis vinculum & Bellorum nervi, Rep. 11.* The King's Treasure is the Ligament of Peace, the Preserver of the Honour and Safety of the Realm, and the Sinews of Wars; and is of high Estimation in Law, in respect of the Necessity thereof; that the imbezzeling of Treasure Trove, tho not in the King's Chest, is Treason. And Treasure, and other valuable Things, are so incident to the Crown, that they cannot go from the Crown. He hath on the Land, Wardships, Escheats, Amerciaments, &c. for the Maintenance of his Honour and Dignities Royal. For the Sea he hath Whales, &c. these do little towards an Army to defend the Sea. The Reason why the King hath the Customs, is for the Protection of Merchants upon the Sea, against Pirates and Enemies of the Realm. So I shall conclude this Point, That the ordinary Defence, both for Care and Charge, of Sea and Land, doth appertain to the King.

The next is this, which is my *Fourth* Head: That the extraordinary Charge of Defence regularly ought to be supplied by Parliament, and cannot be done without it. Albeit Subsidies be of Gift and Grant, yet this is of Right and Reason; the King is *Pater Patriæ*. If the Son give to the Father when he wants, it is his Duty. 19 *Hen. 6.*

the Rector of *Cbeddington's* Case, whether the King may grant a Discharge of a Fifteenth? If the King may grant a Discharge to one, so he may do to all. It is against Law the King should not have Subsidies of his People, in case of Necessity and Danger; the same Law that willeth the King should defend the People, tells us we should grant to the King Aids for the Defence. This is to be done in Parliament, regularly; and that this extraordinary Charge cannot be imposed but in Parliament, these are their Objections.

I come now to the Statute *de Tallagio non concedendo*, which without question is a Statute, being in our printed Books; and in the Petition of Right 3 Car. it is recited as a Statute, and established: the Words of that are, *Nullum Tallagium sine assensu Parliamenti*. And 14 Ed. 3. cap. 1. there the King expresses himself, he will not impose any Charge or Aid on the Subjects, but in Parliament. *Portescue* reciteth this to be the Law, No Charge without Parliament. And *Bodinus*, lib. 1. fol. 97. saith, "That the Statutes of England are as a Buckler to defend the Subject against the King, for laying any Charge upon them but by Parliament." And in his sixth Book he magnifieth this Kingdom for the due observing this Law. Other Kings, in this Point, have no more Power than the King of England; for that it is not in the Power of any Prince in the World, at his Pleasure, to raise Taxes on the People, no more than to take another Man's Goods from him. And yet, nevertheless, if the Necessity and Danger of the Commonwealth be such, as it cannot stay for the calling of a Parliament, the King in his Wisdom and Foresight may lay a Charge without their Consent; and this is by the Law of *Jus Gentium*, the Rule of Law and Reason holdeth *quod omnes tangit ab omnibus debet supportari*.

And so I come to my Fifth Head, If the Defence be of Necessity, and the King's Treasure doth not suffice to defray the Charge, then, instead of the Rule *quod omnes tangit*, &c. this Rule succeeds, *qui sentit commodum, sentire debet et onus*. If the Treasure of the King will not defray the Charge, I do not conceive he is bound to sell or pawn his Crown; or his Lands, tho some Princes have been so courteous to do it, and paid it again.

You say at the Bar, He must spend all, and more if he had it. I will put this Case in the 10th Rep. One is bound at the Common Law by Prescription to repair a Wall against the Sea, yet in case of Necessity, in avoidance of publick Mischief, the Prescription ceaseth; yet in this Case, if Reparation must be done, then cometh this Rule, *quando Impotentia excusat, tunc qui sentit commodum, sentire debet et onus*. And if he be not able to do it, the Charge being so extraordinary, shall he not have Contribution? The Law compelleth not Impossibilities. So the King is bound to defend the Kingdom by Land and by Sea: but if the Defence be so great, and the Danger tends to the Subversion of the Kingdom, and the King not able to make Defence, the King and his Subjects ought to contribute to this Charge, in due Proportion. *Ubi est eadem ratio, ibi est eadem lex*. If the Law shall make this Provision for a small Level of Ground, *a fortiori* for the Commonwealth, in the Time of extraordinary Danger and Necessity.

Sixthly, In this joint Charge of Defence, the Land ought to assist the Sea: nay, it is not possible that any Island should be defended without the wooden Walls of the Navy at Sea. *Canutus* the Dane entred the *Thames* Mouth with an Army, and afterwards went and landed in *Dorsetshire*; and again shipped his Men, and entred the *Severn*; then he went into *Worcestershire*, then he sailed back again to other Parts of the Kingdom: so he that is Master of the Sea, may make great Spoil upon the Land at pleasure. The *Netherlanders* having a great Navy, the *Spaniards* fortified strongly; as soon as the Wind served they set sail, and were fourscore Miles off before the *Spaniards* could march with their Forces to make Resistance; the *Netherlanders* presently got a strong Place, and afterwards sailed to another Place, and took that also. These are no new Examples, for Islands to be Masters of the Sea. Our grand Army in 88, at *Tilbury*, what Good had they done, if the *Spaniards* had been Masters at Sea? It is not possible for an Island to be safe, without a Navy at Sea, as appeareth in *Sir Walter Raleigh's History of the World*; and if the Sea must defend the Land, why should not the Land be contributory for the Defence of the Sea and Land? There are several Precedents where Writs have gone to Inland Counties, to charge them to go to the Custody of the Sea. *Claus. 48 Hen. 3. 24 Ed. 1. 26 Ed. 3, &c.* Writs have gone into *Berks, Oxon, &c.* Inland Counties, to command them to contribute towards the Defence of the Sea.

To the Seventh, That in case of instant Danger, the Imposition cannot be by Parliament. I will here consider the Nature of the Danger, as Mr. Solicitor readily pursues it; if it concerns the Essence, Subversion, Destruction and Ruin of the Kingdom, or the Dishonour of the Kingdom, *Quando Hannibal ad Portas*, for the Senators then to sit down in their Robes, is rather a Charge to the Commonwealth, than ought else. It is no Time then to call a Parliament, no well-advised Man will think it fit; here are *Pericula visa*, the Danger is certain, none will say it is fit to call a Parliament.

This Kingdom of England hath been four times conquer'd, and therefore we have Reason to foresee the Danger; first, by the Romans, then by the Saxons, then by the Danes, and last by the Normans.

The Moralists do make three Parts of Providence. 1. *Memoria prateritorum*. 2. *Perspicientia presentium*. And, 3. *Providentia futurorum*. It much concerns the King, the Head of the Commonwealth, to be circumspect in the Prevention of publick Danger; Conjectures and Probabilities are to be regarded. Now put the Case upon a probable and violent Presumption; a potent Enemy is prepared and ready to come. Is it not fit there should be a Defence prepared instantly? Besides, there may be just Reason of State, why an Enemy is not fit to be revealed in Parliament; for if great Preparations be, and very probably against us, then to discover them to be an Enemy, is to give them Occasion to become a Challenger. No Man can know the certain Event of Things. One may be a Friend, in shew, to the Kingdom, or a Neuter, not yet openly discover'd; yet we may be mistaken in our Opinion of them. I leave this to your Consideration, whether it be fit, or no, to discover our Thoughts, in Parliament, of an Enemy?

The Eighth thing is, That in these Cases of Necessity and Danger, the King, *Jure Gentium*, may charge the Subject, without his Consent in Parliament, by his Regal Prerogative; for in the King there are two Kinds of Prerogatives, *Regale & Legale*, which concern his Person, Lands and Goods.

Now for the Prerogatives Royal of a Monarch, they may be resembled to a Sphere; the *Primus Motor* is the King. It is observed, that every Planet but one hath a little Orb by itself, that moveth in its petty Compass: So the Center is the Commonwealth, the King is the first Mover. I will repeat some of these Prerogatives, for they are by all Laws, and by our Laws.

The first Regal Prerogative is this, that containeth all the rest, That the King may give Laws to his Subjects: and this doth not detract from him, when he doth it in Parliament. 2. To make Peace and War, 19 *Ed.* 4. 6. 3. To create supreme Magistrates. 4. That the last Appeal be to the King. 5. To pardon Offences. 6. To coin Money. 7. To have Allegiance, Fealty and Homage. And, 8. To impose Taxes, without common Consent in Parliament. These are the principal, and there are many more of them, and allowed by Law. *Comines*, fol. 179. saith, "That if the Cloud be seen but afar off, the King, without the Consent of the Subjects, cannot tax them; but if the Cloud be over head, the King may call certain wise Persons to him, and tax his Subjects."

You say, That if the King doth move a War Offensive, there's time enough to call a Parliament; if Defensive, the Cloud is seen long before.

But, oh, good Sir! is this always true? Is not the Cloud sometimes even over the Head, before descried? If you read *Comines*, he will tell you, That in times of Peace we ought to fortify. "But in these Cases, where the Danger is imminent, saith *Bodinus*, lib. 1. cap. 47. the King ought not to expect a Parliament, but is to raise Moneys suddenly, and such Impositions laid upon the Subjects are just and necessary." This is the Opinion of those Writers, who wrote not according to the Law of any one Kingdom, but according to the Law of Reason. I could vouch these two Authors, concerning the Right of Sovereignty which they gave to Kings, to impose Charges on the Subjects, without Consent of Parliament, in time of Necessity.

But what if the King will levy Money, upon pretence of Defence, in time of Danger, and dispose of it otherwise, and the Danger not so apparent?

I say, so pious and just a King will never pretend a Danger, if it were not *Re vera*. And if any Man will think the King will charge himself and his Subjects to no purpose, far be it from my Thoughts to think so. This Money thus taxed, is employed accordingly, for the Defence of the Kingdom, together with the King's own Money; which he would not do upon Pretence.

Again, The King is *Pater Patriæ*, therefore, by the Law of Nature, he is intrusted with the Defence of the Kingdom: and this Power to tax his People, is but a Consequence of that.

To say, in time of extraordinary Danger and Necessity, *Boni viri sunt sibi leges*, I say, for every Man to be his own Judge, is for every Man to

do what he listeth. Mr. *Holborne* tells you, That if it rests in the King's Power thus to tax the Subjects, whereas Mr. *Hampden* is now taxed 20 s. he may the next Year be taxed at 20 l. for faith he, "If the King may tax when he will, then he may what he will." It's an ill Consequence you make of it; you magnify Parliaments, great Reason we have for it; let us do so of Kings: let none thing dishonourably of Kings; no question they will regard the Laws of God; and to make such Objections, is not handsomely handled.

Now we come to Precedents, and Acts of Parliament. For Precedents, my Brother *Weston* hath taken pains to repeat them, therefore I shall not.

Two Precedents the Defendant's Counsel have much relied on, *Rot. Parl.* 2 *Rich.* 2. pars 1. I have here the Record; and in truth, it were a great Ease to the Judges, and to the Cause, to avouch them truly. This of *Richard II.* was in his Minority; and no Order being taken for the Defence of the Kingdom against the next Summer, nothing was found in the King's *Exchequer*: a Council was called, and for Conclusion they say, They cannot remedy this Mischief without a Parliament: whereupon a Parliament was called; and in the mean time the King having Moneys lent him, he gave Security to repay it.

Consider this, the King was at this time but an Infant; it was in a very troublesome Time, many of those that were Parliament-Men made Default to attend, excusing themselves, that they had other Business. This then that was done was but a Resolution in troublesome Times; this is no such binding Business, that it should be made so much of.

And *Rot. Parl.* 2 *Hen.* 4. M. 22. a Commission went forth for the providing of Barges; and the Commons petitioned to avoid this Charge, and pray'd that the Commission might be repealed. And the King, upon this, calls in the Commission. Shall this be a Disclaimer of the King's Right? He saith, he will speak with his Lords. This is only a satisfactory Answer. Besides, the King was but an Usurper. Now to say this Answer of the King's is a Resolution in the Case, is a great Mistake.

He that will go thro' this Load of Precedents that have been vouched on both Sides, he had need to have more time than Mr. *Holborne*, who spent four Days.

You have alledged Precedents both before the Conquest and since: that of the *Danegelt*, tho it was a heavy Yoke, yet it was necessary to be borne: whether it was granted by Parliament or no, *non constat*. I say, it is a good Precedent, and I hold it good without Parliament.

Some distressed Kings, as King *John*, *Henry II.* and *Richard II.* they did indeed do that by borrowing, which they might have took of Right.

Now, to give an Answer to the Statutes of 25 *Ed.* 1. and 14 *Ed.* 3. and the Petition of Right 3 *Car.* Admit, I say, there were an express Act, That the King, were the Realm in never so much Danger, should not have Aid from his Subjects, but in Parliament, it is a void Act; will any Man say such an Act shall bind? This Power is as inseparable from the Crown, as the pronouncing of War and Peace is: such an Act is manifestly unreasonable, and not to be suffered; saith *Doctor and Student*, To follow the Words of the Law,

were, in some Cases, Injustice, and against the Good of the Commonwealth; wherefore, in some Cases, it is necessary to leave the Words of the Law, and to follow that which Reason and Justice requireth: and to that Intent Equity is ordained, which is no other but an Exception of the Law of God, or Law of Reason, from the general Rules of the Law of Man: Which Exception is tacitly understood, in every general Law. This Imposition without Parliament appertains to the King originally, and to the Successor *ipso facto*, if he be a Sovereign in Right of his Sovereignty from the Crown. You cannot have a King without these Royal Rights, no, not by Act of Parliament.

Again, These Acts bind not, for that a favourable Construction, in Case of the King, is to be had in all Cases, *Doctor and Student*, fol. 27. 'Tis not possible to make any general Rule in Law, but it shall fail in some particular Case: If a Law were made in a City, That no Man, under pain of Death, should open the Gates of the City before Sun-rising, yet if the Citizens, before that Hour, flying before their Enemies, came to the Gates of the City, and one, for saving the Citizens, open the Gates before the Hour appointed, yet he offendeth not the Law, for that Case of Necessity is excepted from the said general Law by Equity. So for the Statute in *Edward the Third's* Time, not to give any Relief to a sturdy Beggar, upon Pain of Imprisonment; yet if one relieves him with Clothes, in the Extremity of cold Winter, to save his Life, he shall be excused by the same Statute. By such an Exception of the Law of Reason and Equity, as aforesaid, is this Power reserved to the King.

Impossibilities are to be excepted out of all Laws: *Nemo tenetur ad impossibilia*. Poverty and Impossibilities, as one answered, were more mighty Goddes than either Force or Love.

But now you will say, Where is this Danger? How doth this Necessity appear? If you would find it, you need not to enquire for it either by Sea or Land, but in this very Record; the Writ sheweth, and the most favourable Construction is to be had for the King, as in *Plowden's Comment.* 336. the Case of Mines of Gold and Copper.

Now all this while I have been in the General, and in a manner in Propositions; I come now to Application. Before I descend to it, I shall shew upon what part of the Record I shall ground myself. Tho in the *Mittimus* it be *Salus Regni periclitabatur*, which is said to be metaphorical, for that it asketh no great Answer; it is good enough, as in the Writ of *Oyer and Terminer*, *omnes qui habent damnum vel salvationem*, are bound to contribute. Will you bind the King to the Language of *J. S.*? May he not express himself in what legal Manner he pleaseth?

You say, That this Phrase of *Salus Regni* is too general: If it be alledged, and you demur upon it, you confess this for the most Advantage for the King; as in the Case of Mines. It is not alledged in the *Scir' Fac'*; this might have been made a good Question.

But without all these, I conceive the Writ 4 *Aug.* containeth the Causes for this great Preparation, and expresseth them in particular. What if it were no more but this, Lest we should lose the Dominion of the Seas? What is it to be called *Dominus Maris*, and not to maintain it, but to suffer this Princely Honour to perish, and others to become Masters of it? What Havock and

Confusion would follow? And this is the true Intention of the issuing forth of this Writ.

Next, *Consideratis etiam periculis*, &c. that is, The Danger is so evident, and so great, in these warlike Times, that of Necessity Defence must be made, both by Sea and Land.

Next is great Oppression used at this Time, *Datum est nobis intelligi quod Prædones*, &c. that the Pirates do take and spoil our Merchants, carry our Men into Captivity: What will you say to this? Let them take our Men, and let us have a Parliament, and we will bring them home again: The Land was never without Thieves, nor the Seas without Robbers.

Next, *paratum periculum & præparans*, &c. now these Ships go for the Defence of the Sea against this Danger, & *vestrum & vestrorum*. The Writ saith the whole Kingdom is in Danger, both by Sea and Land; and you have confessed this by your Demurrer.

But you complain before you are hurt, because you have seven Months Liberty, a Parliament might be called in that Time: Now in this Time of imminent Danger, it is no Time to call a Parliament.

You say it hath continued for three Years. Put the Case the Danger continueth for three Years, and then ceaseth, and then the King ceaseth to lay a Charge, and the Danger begins again the next Year; what! Shall not the King require Aid as the Danger increaseth?

And now to conclude, without Repetition: It doth appear by this Record, that the whole Kingdom is in Danger, both by Sea and Land, of Ruin and Destruction, Dishonour and Oppression; and that the Danger is present, imminent and instant, and greater than the King can, without the Aid of his Subjects, well resist: Whether must the King resort to Parliaments? No. We see the Danger is instant, and admits of no Delay. Shall we go home, and sit together in careless Security? Not so. But let us resort to our pious and just King, whose Prerogative and Right of Sovereignty is to defend the Realm, and to maintain his Subjects Liberties. And so I give Judgment for the King.

The Argument of Sir Robert Berkley Kt. One of the Justices of the Court of King's-Bench, Feb. 10. 13 Car. 1637. in the Exchequer-Chamber.

The Case.

IN *Aug. 11* of the King's Reign, there issued out of the Court of Chancery his Majesty's Writ, directed to the Sheriff of the County of *Bucks.*, and the head Officers of Villages and Boroughs in that County, & *probis hominibus*, that is, to all the King's good Subjects, *in omnibus Villis, Burgis, & aliis locis in Com' Bucks.*

I may call this Writ, a special Writ, or a Commission upon the Case. It is not a *fic volo*; it beginneth with divers weighty Reasons or Causes, *pro ratione* of the issuing of it; as,

1. His Majesty had Intelligence that certain Pirates, & *maris grassatores*, as well *Mabometans* as others, were *congregati* upon the Sea, *quod ab olim per gentem Anglicanam defendi consuevit*; and did daily rob and spoil the Ships and the Goods of the Subjects of the King, and of his Confederates, and did

did captivate the Persons of those whom they took.

2. His Majesty did *conspicere*, that those Men did *navigia indies præparare, ad mercatores ulterius molestandos, & ad Regnum gravand' nisi citius remedium ponatur.*

3. His Majesty did consider the Perils, *quæ undique illis guerrinis temporibus imminebant, ita quod regi & subditis suis defensionis maris & regni, omni festinatione, quâ poterit, conveniebat accelerare.*

4. His Majesty's Royal Resolution was, *Defensionis regni, tuitioni maris, securitati subditorum, & salvæ conduccioni navium & merchandizarum providere.*

Maxime pro eo quod the King and his Progenitors Domini maris predicti semper hætenus extiterunt, & plurimum læderet Regem, si honor iste regius suis temporibus dispereat, aut in aliquo minuatur.

5. Lastly, his Majesty called to mind a *Regula juris & rationis; Onus istud defensionis quod omnes tangit, per omnes debet supportari, prout per legem & consuetudinem Regni Angliæ fieri consuevit.*

Upon these solid Reasons, as upon a firm Foundation, the *Mandamus* of the Writ is grounded, and followeth in the next place.

The *Mandamus* is,

1. That all they to whom the Writ is directed, should among them, *providere unam navem de guerra*, of such a Burden, and with so many Men, and other Particulars, as are mentioned at large in the Writ.

2. That this Ship, so furnish'd, be ready at *Portsmouth* by the 1st of *March* then following, and from that Time, for 26 Weeks, to go with his Majesty's and other Subjects Ships, and to attend the Direction of those to whom his Majesty should then commit the Custody of the Seas, for Tuition of the Sea, and Defence of the Realm.

3. That all this be performed, *ad custagia* of themselves *tam in victualibus quam hominum salariis, & aliis ad guerram necessariis.*

After the *Mandamus*, an *Assignavimus*, or Commission to the Sheriff and the head Officers cometh, and then Directions to them.

The Commission to the Sheriff is *inter alia*.

That he shall make an Assessment *secundum facultates cujusque*, for Contribution to the Expence of the Provisions aforesaid, shall appoint Collectors, shall levy the Money to be assessed (if it be denied) *per distributiones aliquos modos debitos*, and shall *carceri mancipare* those who shall be *contrarii & rebelles*.

The Directions to the Sheriff begin with a Clause of *Nolumus*.

The King forbids that the Sheriff shall levy more than is necessary for the Expences: That any Money levied shall be appropriate to any other Use, *quovis quæsito colore*: And then, lastly, in case that more be collected than shall be useful, the King commands that Restitution be made of it.

After this Bill, 9 *Martii* 12 of the King (which is above a Year after the Ship should have been ready at *Portsmouth*) a Writ of *Certiorari* issued out of the Chancery, directed to the several Sheriffs *pro tempore* of *Buckinghamshire*.

That *Certiorari* recites the Writ of *August* 11.

And for that the King was informed, that some had not paid the Sums assessed upon them, but refused to do the same; the King commands the said Sheriffs respectively to certify into the Chan-

cery the Names of such Refusers, and the Sums assessed upon them.

The Sheriffs accordingly make Returns in a Schedule annexed to the *Certiorari*. In one of the Schedules there is, *inter alia*, *Stoke Mandevile, Mr. John Hampden, 1 l.*

After this, by Writ of *Mittimus* out of the Chancery, tested in *May* last, the Tenure of the Writ of *Aug.* 11. with these Words, *quod quidem brev' pro eo quod regn' nostr' Angliæ & popul' nost' ejusdem periclitabatur emanari curavimus inter alia brev' ad hujusmodi provisionem, & assessment' faciend' per singulos comitatus Angliæ, &c.* And also this Record of the Writ of *Certiorari*, with the Return of it, and Schedule annex'd, are sent into the Court of Exchequer.

By that *Mittimus* the King commands the Lord Treasurer and Barons, *quod inspectis* those Records, they should *facere ulterius inde pro levatione, collectione & receptione* of the Sums unpaid, *prout de jure, & secundum legem & consuetudinem regni Angliæ fuerit faciend' & non aliter.*

By which (*prout*) but especially by the (*non aliter*) the King's Honour and Care of Justice are singularly eminent; for the levying the Money anew is not commanded, nay, it is forbidden, unless *Jus, Lex, & Consuetudo Angliæ* do warrant it.

After this, and in the same Month of *May* last, the Barons awarded a Writ of *Scir' Fac'* into *Buckinghamshire*, against those whose Names are in the Schedule aforesaid, thereby commanding the Sheriff to warn them to appear in the Exchequer by a Day, to shew Cause, if they can, why they should not be charged with the Payment of the Sums of Money assessed upon them and unpaid.

The *Scir' Fac'* is always a judicial Writ; and certainly the Barons have proceeded very judicially and gravely, in awarding of it. In weighty Cases, especially, if they be not of common Impression, proceeding *lento pede* is truly judicial.

Upon that *Scir' Fac'* Mr. Hampden is returned garnisht.

He appearing, and having heard the several Writs and Records beforementioned, without taking the common or any other Protestation, hath demurred generally.

The Words of his Demurrer are,

That *materia contenta* in the same Records, *minus sufficiens in lege existit ad ipsum onerandum.*

He doth not say, that *materia* is *minus vera*; but, acknowledging the Matter contained in the Writ to be true, he putteth the Cause *de bono & malo*, upon Sufficiency or Insufficiency, in Point of the Law, for charging him.

Mr. Attorney for the King hath joined in Demurrer.

Upon this Demurrer, one main or grand Question, and some other inferior Questions have been started.

Because I have Time little enough for the grand Question, I will not trouble you with arguing, or so much as singling out the other inferior Questions. My Brother *Weston* hath spoken to some of them, I concur with him.

The grand Question is shortly this,

Whether, as this Case is, or in this special Case, (as it is upon the pleading) the Charges imposed by the King upon his Subjects, for Provision of Shipping, without common Consent in Parliament, be good in Law, yea or no?

This is a Question of extraordinary Weight, of infinite Consequence, the greatest that ever came before Judges of ordinary Courts of Justice.

Qui ad pauca respicit, facile pronunciat; but he that will determine in this Question, must *respicere ad multa, eaque magna & ardua*.

Upon the Debate of this Question at the Bar; elaborate, learned, and strong Arguments have been made on either side.

And truly, for my part, I have laid the Question to my Heart.

All the Arguments which have been made in it, I have been present at, and specially heeded.

All the Records which have been brought to the Judges, on either side, I have read over as seriously as I could.

I have likewise considered of the Reasons and Authorities in Law, pertinent to this Case.

And upon my Pains, Deliberation and Study, I have concluded with myself, and in mine own Understanding am satisfied, and think I shall satisfy others, that as this Case standeth, upon the Records in the Pleading, or in this special Case; the Charge imposed is good in Law, and consequently that Judgment ought to be given against Mr. Hampden, *Quod oneretur*.

For my clear Delivery and Expression of my self, I divide all that I shall say into these four Heads.

I. *I will state the Case, and will settle the proper Question of it, as the Pleadings are.*

(The true stating and settling of a Case conduceth much to the right Answer of it.)

II. *I will consider the Policy and fundamental Rules of the common Law, applicable unto that which upon stating of the Case shall appear to be the proper Question.*

III. *I will consider the Acts of Parliament, the Answer to Petitions in Parliament, and the several Magna Charta's of the Liberties of England, which concern the King's Proceedings in this Case.*

IV. *I will answer the material Objections, which have been made on the other side.*

Upon my First general Head.

I Hope that none doth imagine, that it either is, or can be drawn by Consequence, to be any Part of the Question in this Case, Whether the King may at all times, and upon all Occasions, impose Charges upon his Subjects in general, without common Consent in Parliament? If that were made the Question, it is, questionless, That he may not.

The People of the Kingdom are Subjects, not Slaves, Freemen, not Villains, to be taxed *de alto & basso*.

Tho the King of England hath a Monarchical Power, and hath *jura summæ majestatis*, and hath an absolute Trust settled in his Crown and Person, for Government of his Subjects; yet his Government is to be *secundum leges regni*.

It is one of the Questions in the *Furamentum Regis*, at his Coronation, (see the old *Magna Charta*, fol. 164.) *Concedis justas leges & consuetudines regni esse tuendas?* And the King is to answer, *Concedo*.

By those Laws the Subjects are not Tenants at the King's Will, of what they have.

They have in their Lands *Feodum simplex*, which by Littleton's Description, is *hæreditas legitima, vel pura*.

They have in their Goods a Property, a peculiar Interest, a *meum & tuum*.

They have a Birthright in the Laws of the Kingdom.

No new Laws can be put upon them; none of their Laws can be altered or abrogated without common Consent in Parliament.

Thus much I speak to avoid Misapprehensions and Misreports upon that which I shall say in this Case; not as if there were Cause of saying so much, upon any thing challenged on the King's side.

We have in print his Majesty's own most gracious Declaration, that it is his Maxim, That the Peoples Liberties strengthen the King's Prerogative, and that the King's Prerogative is to defend the Peoples Liberties.

Secondly, Tho Mr. Hampden's Counsel have spent all their Poulder in citing a Multitude of Records, beginning with one in King John's Time, and so downwards, to prove,

That the King's Ministers have paid, that the Barons have been by Writs commanded sometimes to pay, sometimes to make Allowances,

Out of the King's Monies or Dues.

In Cases of { Foreign Auxiliary Voluntary } Wars.

In Cases of particular or ordinary Defence of the Realm, as upon Rebellion of Subjects, or Inroads by Enemies, into Parts Marches, or Maritime; such Enemies I mean, as are not greatly formidable, as are apt to run away when they hear of any Force coming against them:

In Cases of setting forth Ships, for scouring the Seas from petty Pirates, so that Merchants may have safe Passage:

In Cases where Victuals, or other Provisions, were taken from particular Persons, by way of Purveyance, for Soldiers, or for the King's Army:

In Cases of borrowing of Money by the King's Officers, for War, or ordinary or extraordinary Defence:

In Cases of taking Money or Goods against the Owner's Consent, by Warrant, for the King's Use, for War, or other manner of Defence:

In Cases where particular Mens Ships, Horses or Armour, were lost in the Wars:

In Cases where private Mens Houses were used in the King's Service:

Lastly, In Cases of general and extraordinary Defence, where the King had sufficient Aids for that Purpose granted to him in Parliament.

Altho I confess it be true, that the King, in all these cited Cases, must pay of his own, without imposing upon the Subject; yet I say, that those Cases come not close to our Case: for every of those Cases hath a manifest, particular, and just Reason; but none of these Reasons are applicable to the Case now in question, as is easy to demonstrate, if a Man would enter into every of these Particulars; which I forbear, for saving of time.

And these Records being taken away, the Multitude of the Vouchers on Mr. Hampden's side will be greatly abated.

Thirdly, The Case of the ancient tribute called *Danegelt*, of which Mr. Hampden's Counsel hath spoken, tho it come nearer than any of the former mentioned Cases, yet it much differs from the Charge imposed in our Case.

It hath been said on Mr. Hampden's side,

1. That

1. That *Danegelt* was not imposed, but by common Assent of Parliament.

2. That after it was so imposed, it was released by *Edward the Confessor*.

3. That it hath been now so long uncollected, that it is scarce known what it was.

To the *First* I answer, That the Proof urged, that it was created by Parliament, is at the best but a Conjecture. It hath been said, that the Words of *Leges Edw. Confessoris*, c. 12. are in one Place, *Statutum est Danegeldum annuatim reddi*, &c. And in another Place, *Danegeldi redditio primitus instituta est*, &c. And *Statutum* is a proper Word for an Act of Parliament, a Statute.

But in my Understanding it is apparent, that it had not Creation by common Assent in Parliament, but only by Regal Authority; or at the most by the King, with his great Lords Assents, which in those, and after Times, was frequent. My Reasons are,

1st, In *Tilburienfis*, or the black Book of the Exchequer, l. 1. c. 28. the Words are express, *A regibus Anglicis statutum est*, &c. no mention of any others who joined in that *Statutum*.

2^{dly}, It appears, by the said *Leges Edw. Confess.* c. 12. that at the beginning of *Danegelt*, *omnis Ecclesia libera erat*; the Reason given, *quia magis confidebant Ecclesiæ orationibus, quam armorum defensionibus*: and yet in the Addition to the said *Leges*, it appears, that *William Rufus* imposed that Tribute upon the Church also, and that without common Assent. For the Words are, *Danegeldum concessum est ei a Baronibus, non lege statutum neque firmatum*; and certainly those Barons by whom it was *concessum*, were not all the Baronage, for it is plain, that the Bishops and Mitred Abbots did not consent.

3^{dly}, In that Clause where *statutum est* is used, in *Leges Edw. Confess.* the *Danegelt* is said to be 12 d. *ex unaquaque hida*; and afterwards it doth appear that it was made 4 s. by *William Rufus*, *ex unaquaque hida, Ecclesia non excepta*; which Increase was most unjust, if no more but 12 d. was limited by common Assent at first.

To the *Second*, I answer, with Sir *Henry Spelman's* Distinction, There were two kinds of *Danegelt*; one, *ad pacandos Danos*; another, *ad arcendos Danos*, and other Pirates. It may be, that the Confessor released that *ad pacandos*, for the *Danes* troubled not this Kingdom in his Time, they had enough to do then at home, and so there was no Cause of Collection of any Taxes *ad pacandos Danos*: And tho it was *de facto* exacted by the *Danish* Kings before *Edward the Confessor*, viz. *Canute*, *Harold*, *Harefoot*, and *Hardicanute*, it was unjustly taken by them, the Cause of Grant of it ceasing in their Time of Sovereignty here; and that might be the Cause of the Confessor's Dream, That he saw the Devil dancing upon the Money collected in his Time for *Danegelt*; which Supposition of a Vision occasioned him to release it, as it is written. But certainly the *Danegelt ad arcendos*, &c. was not released by *Edward the Confessor*; for it appears in *Tilburienfis* before cited, that *Danegeldum sub indigenis regibus solvebatur usque ad tempus Willielmi primi*; if *sub indigenis regibus*, then under the Confessor.

Again, it appears in *Leges H.* 1. c. 16. that *Danegelt* was in that King's Time a Duty to the King: For the words are, *Danegeldum si ad terminum non reddatur recta emendetur*; ergo, not released by his Predecessor *Edward the Confessor*.

I further find in *Ranulphus Cestrensis*, that *Stephanus Rex, Regnum iniens, Danegeldum*, i. e. 2 s. *ad hidam, quos antecessores sui singulis annis accipiebant, in æternum condonavit*: which (*condonavit*) shews that he, as a King *de facto*, had a Right to it, ergo, not formerly released. But for the Validity of such a Release by *K. Stephen*, a manifest Usurper, tending to the Diminution of the Crown, especially if it were of a Tribute granted to the Crown by Act of Parliament, see 9 E. 4. f. 2.

To the *Third* I answer, That it is true, it is obscure what the *Danegelt* was; you have heard by what has been cited, mention of 1 s. 2 s. and 4 s. to be the Sum of it; and truly, I think, it was more or less, according to the Occasion of Money for Defence: the Tribute *ad pacandos Danos*, I believe at first was but 12 d. out of every Hide, yet afterwards increas'd by the three successive Kings, *Danes* themselves, for I find it was at first but about 10000 l. per Ann. it after was raised to 30000 l. then to 40000 l. and, lastly, to near 50000 l. which huge Sum was in these times a Burden insupportable to the People. But however, the Uncertainty of the Sum (especially if you understand that which was collected *ad arcendos Danos*) is a clear Proof, that it was not created by Act of Parliament, for then the Sum thereby certain could not be mounted.

All Historians do agree, that the original time of *Danegelt* was in *K. Ethelred's* Reign. I observe, that *K. Ethelred* shewed himself weak and improvident, in that he looked not to raise Means for Defence of his Realm against the *Danes* in time; but when the *Danes* were Masters, then he began to provide against them. And for that cause divers of our Historians write, that he was called by a Nick-name, *Ethelred the unready*. But, on the other side, we the Subjects of *England*, who enjoy ourselves and what we have in Peace, thro' his Majesty's Royal Care and Providence, have cause to yield to our Sovereign *K. Charles*, the honourable Name of *Charles the ready*, or, *Charles the provident*.

But to return, The Differences between the ancient *Danegelt* and the Charge in our Case, are apparent and many; for the *Danegelt* was,

1. Annual: ours is due only in case of Necessity.

2. It was collected out of Hides of Land, and thence called *Hidage*: Ours is collected out of personal as well as real Estates.

3. It was a Tribute of Money: Ours a Provision of Shipping and Armour in kind.

4. It was against Pirates: Ours is for common Defence of Sea and Land.

5. It was not general; Clergy and Clergymen were originally exempt: Ours is general, upon all without Exception.

Lege the Words of the Authorities under written, from whence many Observations, and good Conclusions may be drawn touching *Danegelt*.

Leges Edw. Confess. c. 12. *Danegeldi redditio, propter Piratas primitus instituta est, patriam enim infestantes vastationi ejus pro posse suo infestabant; ad quorum insolentiam reprimendam statutum est Danegeldum annuatim reddi sc. 12 denarios ex unaquaque hida totius patriæ, ad conducendum eos qui piratarum irruptioni resistendo obviarent. De hoc quoque Danegeldo libera erat omnis Ecclesia, quia magis confidebant Ecclesiæ orationibus, quam armorum defensionibus.*

Hanc Libertatem tenuit Anglorum Ecclesia, usque ad tempus Willielmi junioris.

Danegeldum concessum est ei a Baronibus, non lege statutum, neque firmatum; sed habuit necessitatis causa ex unaquaque bida 4 solidos, Ecclesia non excepta.

The black Book of the Exchequer, written in King Henry 2d's time, in that Part which is Tilburienfis's Work, or the Magister & Discipulus, it is lib. c. 28. not c. 11. as it is misprinted in learned Sir Henry Spelman's Glossary.

Ad Danos arcendos, a Regibus Anglicis statutum est, ut de singulis bidis jure quodam perpetuo duo solidi argentei solverentur in usum virorum fortium, qui per-lustrantes maritima impetum hostium reprimerent.

Quia igitur principaliter pro Danis institutus est hic redditus, Danegeldum dicitur, hic sub indigenis regibus solvebatur usque ad tempora Regis Willielmi primi. Ipso namq; regnante, tam Dan' quam cæter' terræ marisq; prædon' hostilis cobibetur incursus. Cum ergo diu solvisset terra, sub ejusdem Regis imperio, noluit hoc ut annuatim solveretur, quod fuerat urgente necessitate bellicæ tempestatis exactum, nec tamen omnino propter inopinatos casus dimitti.

Raro igitur temporibus ejus vel successorum ipsius solutum est, hoc est cum ab exteris gentibus bellâ vel opiniones bellorum insurgabant.

Verum quocunq; tempore solvatur ab ipso, liberi sunt qui assident ad Scaccarium, ut dicitur, & vice-comites, &c.

Leges H. 1. c. 16. *Danegeldum, i. e. 12 d. ex unaquaq; bida per annum, si ad terminum non redatur, wita emendetur.*

Fourthly, I affirm, with some clearness, under favour, That the Charge now demanded, is not within the antient Acceptation or Signification of the words, Aids, Mises, Prizes, Taxes, or Talliages, which it is to be agreed cannot be exacted by the King, without Consent in Parliament. Neither is it within the Compass of the Word Subsidy, which may not be levied, but upon Grant of it in Parliament.

Aids, if you take the Word in a general Sense, they were of two kinds. 1. Such as were Aids and Services too, as *pur fair fitz Cbevalier, pur file marier*. That kind of Aid, common Persons, who had Seignories, had Right unto, as well as the King. No Colour of comprehending this kind of Aids, within the Word (Aids) pertinent to this Question.

To the 2d kind of Aids, were Sums of Money from the Subject to the King, by way of Help, *ad agendo Regis*; as for making of Castles, building of Bridges, Helps for voluntary or auxiliary Wars, or for the King to do his Pleasure with, and the like.

See Parl. Roll 11 H. 4. n. 45. 20000 Marks granted to the King, by the Name of an Aid, *ent a fair son pleasure*. And Rot. Parl. 25 Ed. 3. n. 12. where the Application of the word Aid to such a Purpose, is distinguish'd from other Payment to the King.

Mises were Presentations in Kind of a Benevolence, upon a King's first coming to his Crown; such are yielded at this Day in Wales, to a Prince of Wales.

Prises are taking of part of the Subjects Goods from them to the King's Use, without Pay, hence Prîsage of Wines at this Day.

Taxes & Tallages, in Quinzim. B. 9. 34 H. 8. Nota per exposition de ceux del Eschecq; que tax et Tallage n'est auter, mes dismes, quinzim, ou auter Subsidie, grant' per Parliament. Et le Quinzim est des Laies, Et le Disme est de Clergie et est d'estre levy de

leur terr', Et le disme et le Quinzim de Laies est del biens, sc. decimam partem bonorum in Civitatibus et Burgis, et 15 partem bonorum des laies in priam que fuit levy in aucuns temps sur leur biens, viz. del aids sur leur terres que fuit vâld troublous, mes ors cest levy, secundum ratum terrarum suarum per verges de terr' et auter quantites, issuit que ore, tout soient leur certenty in cbun vill et pais par tout le realme mes il est encore levy in aucuns lieux sur lors biens, mes inplu-siors lieux, sur lors ters.

Subsidies quid cbun const, se. certaine some sur le pound del rat' de terr' ou biens, come app' in les Acts de Parliament de grant del subsidie.

Fifthly, It cannot be said, that the present Case is to be stated so, as unless the Charge commanded be obeyed, an assured infallible Ruin and Subversion of this Kingdom will happen, and that instantly. In such a Case, *Quid non* is lawful; and happy he who by doing any Exploit, can save the Ship from sinking, the Body from falling.

Sixthly, It is to be observ'd, That the principal Command in the Shipping-Writ, is not to levy Money, it is to provide a Ship; which Ship being to be provided at the Charge of a Multitude, in regard the thing cannot be done any manner of way, but by the Means of that which is *mensura rerum*, namely, Money, therefore the Instructions in the Shipping-Writ, are not only apt, but necessary; that an Assessment be made, whereby proportionable Sums of Money may be collected, for the Provision of the thing commanded: And thereupon it may be said, that the Sum assessed upon every one, and in our Case upon Mr. Hampden, is not a Debt *vi termini*, but is rather a Duty to be performed, as a Means conducing to the principal End: The Refusal of Performance of which Duty, is a Refusal to obey the principal thing commanded, *Qui negat medium, destruit finem*.

And the principal thing commanded, being of a Kind concerning the Commonwealth; the King, who is the Head, the Sovereign of the Commonwealth, and who hath, as incident to his Regal Office, Power of Coercion, is by Law to exercise such his Power of Coercion, to inforce such as refuse to join with others in performance of that which is commanded for the Commonwealth.

And this being the true State and Way of the Proceedings, in the present Case; it is apparent, that tho the *Scir' Fac'* against Mr. Hampden be in the King's Name, yet it is not to have Execution as for the King's Money, or as for a Debt due to the King from Mr. Hampden: But as is manifest, if the whole Contexture of the Writ of *Scir' Fac'* be observed, it is nothing else, but to bring on a Declaratory Payment, That Mr. Hampden ought *onerari* to the Payment of the 20 s. assessed upon him. So that, with his 20 s. together with the other Money of Buckinghamshire-Men, assessed also upon every of them particularly, the Ship commanded from the County of Buckingham may be provided.

Seventhly and lastly, Having declared of what Nature our Case is not, I come now to tell you what the State of it is.

The true State of our Question must be made out of the whole Record, or Pleading of the Case, the Matter of Fact wherein the Detendant hath confessed, (as I noted in the beginning.)

In the Writ of Aug. 11 Car. and in the Writ of *Mittimus*, there are Causes expressed, of the issuing of the Writ of Aug. 11. or the Shipping-Writ; those Causes are several, but not to be severed, all of them are to be laid together into the Ballance.

1. *Pirata congregati*, upon the *English Seas*.
2. *Pirata navigium indies præparantes, ad mercatores ulterius molestandos, & ad regnum gravandum.*
3. *Pericula are Undique regno Angliæ, in his guer-rinis temporibus.*

4. Those *pericula* do *imminere regno, nisi citius remedium ponatur*; where the Word *citius* is a comparative Word, relative to slow Ways of Remedy, amongst which Parliaments is one.

5. *Regi & subditis convenit, omni qua poterint festinatione accelerare, ad regni defensionem, maris tuitionem, & securitatem subditorum.*

Out of all those Positions it appears,

That there is in the Case real and manifest Peril; not *panicus terror*, Fear without Cause; *Tempora are de facto guerrina*, there is *de facto, navium congregatio*.

Again, we must observe, That in this Case,

1. The Command is, *ad proficiscendum cum navibus regis*: So the King himself is to join with the Subject in the common Defence: Here is not a *Quod tibi fieri non vis*: Here is rather a *Contributio*, than a *Tributio*.

2. The Ships and Arms to be provided are to continue the Subjects own in Property: The King doth not assume the Property of them to himself; he only commands them to be made and used for the common Defence. This appears by the Words (*ad proficiscendum cum navibus nostris.*) So the Writ sets a Distinction between *naves nostræ*, (that is, the King's) and the Ships to be provided. See the like of this *M. 28. & 29 E. 1. Communia*, with the King's Remembrancer, for Gallies commanded upon the like Occasion; and *P. 5 E. 2. and P. 13 E. 2.* with the King's Remembrancer, *inter brevia directæ Baronibus*.

3. The Subjects are commanded, in this Case, to be at the Expences, *tam in victualibus, quam hominum salariis ad guerram necessariis*. This I shall prove clearly anon, to be consonant to Law, and warranted by many Precedents, in the like Cases.

4. All the Counties of the Kingdom, that is, all the Kingdom in general, is charged, not any spared; the Clergy, the King himself, are to join in the Provisions.

5. The final End and Scope of all this Preparation is, *Defensio Regni, tutio maris, retentio dominiis maris, securitas subditorum, salus Reipublicæ.*

But Mr. Holborne hath objected, That *Salus Reipublicæ periclitabatur* is not to be taken as part of this Case, because it is not in the Writ of *Aug. 11 Car.* but is inserted into the *Mittimus*, above two Years after; and he saith, That Mr. Hampden could not know *11 Car.* that at that time *salus Reipublicæ periclitabatur*; and therefore he is not to be blamed, for refusing to pay his Assessment, which was before the *Mittimus*, and grounded only upon the Writ of *Aug. 11 Car.*

He further observed, That in the subsequent Shipping-Writ, that Clause is expressly now put out. To this I answer,

1. It is true, that *Salus Regni* is not in express Terms, or in those indentical Words, in the Writ of *Aug. 11.* but it is express'd in that Writ in Words equipollent.

2. If it were not contained in that Writ in Words equipollent, yet it inforces the Words in that Writ, in Matter pursuant, or not new, or different from it; and so is out of the Rules of Departure, wherein if it were, it were a good Exception in strictness of Pleading.

VOL. V.

3. That Clause is in the *Mittimus* by way of Declaration or Signification to the Barons, what the Reason was, that moved the King to issue the first Writ; and the Barons are to take notice of it, as well as of the other Clause in the *Mittimus*, whereby the King signifieth to them, that he had sent the like Writs as that of *Aug. 11.* to all the Counties of *England*: And this is a Declaration of that Meaning which the King had in the beginning.

By *Dowman's Case*, *Co. 9.* after Assessment executed, or a Fine levied, a Declaration may be made, to what Use that Fine or Assessment was.

In a word, the State of our Case is thus:

Dominium maris & salus reipublicæ periclitabatur, convenit Regi & subditis, omni qua poterint festinatione accelerare ad defensionem regni, tuitionem maris, & securitatem subditorum.

Now whether to set the Commonwealth free and in Safety from this Peril of Ruin and Destruction, the King may not, of his own Royal Authority, and without common Assent in Parliament, impose a Charge upon his Subjects in general, to provide such Shipping, as is necessary, in his Royal Judgment, to join with his Majesty's own Ships, and to attend them for such time as his Majesty in his Royal Wisdom shall think fit, and also to injoin them to be themselves at the Expences, *tam in victualibus quam hominum salariis, & aliis ad guerram necessariis?*

I would be loth to irritate any, differing in Opinion from me, with provoking or odious Terms; but I cannot more fully express myself, (and so I desire it may be taken as an Expression, and not as a Comparison) than in saying, That it is a dangerous Tenet, a kind of judaizing Opinion, to hold, That the Weal Publick must be exposed to Peril of utter Ruin and Subversion, rather than such a Charge as this, which may secure the Commonwealth, may be imposed by the King upon the Subject, without common Consent in Parliament. So that the Security of the Commonwealth, for the very Subsistence of it, must stay and expect until a Parliament provide for it; in which Interim of Time it is possible, nay, apparently probable, yea, in a manner to be presumed, that all may be, yea, will be brought to final Period of Destruction and Desolation.

All know, that the Jews were so strict, that they would not use Means for Defence of themselves and their Country, upon their Sabbath. Their Enemies took the Advantage, and ruined their State.

The Second General Head.

I Now come to my *Second General Head*, wherein I proposed to consider of the fundamental Policy, and Maxims, and Rules of Law, for the Government of this Realm, and of the Reasons of Law pertinent to our Case, which are very many. I will briefly and severally point at those which make Impression in me.

1. It is plain, that as originally, even before the *Romans* Time, the Frame of this Kingdom was a Monarchical State, so for divers Hundreds of Years past, upon the *Romans* Desertion of it, and after the Heptarchy ended, it was, and continued, and still continueth Monarchical. And our gracious Sovereign is a Monarch; and the Rights of free Monarchy appertain unto him; and yet still with this, that he must *Leges & consuetudines*

E e

Regni

regni servare, & præcipue leges & consuetudines & libertates a glorioso Rege Edwardo, that is, Edward the Confessor) clero populoque concessas; as appears in the old Magn. Chart. fol. 164. tit. Juramentum Regis quando coronatur.

2. Where Mr. Holborne supposed a fundamental Policy in the Creation of the Frame of this Kingdom, that in case the Monarch of England should be inclined to exact from his Subjects at his pleasure, he should be restrained, for that he could have nothing from them, but upon a common Consent in Parliament:

He is utterly mistaken herein.

I agree the Parliament to be a most antient and supreme Court, where the King and Peers, as Judges, are in Person, and the whole Body of the Commons representatively. There Peers and Commons may, in a fitting Way, *parler leur ment*, and shew the Estate of every Part of the Kingdom; and, amongst other things, make known their Grievances (if there be any) to their Sovereign, and humbly petition him for Redrefs.

But the former fancied Policy I utterly deny.

The Law knows no such King-yokeing Policy.

The Law is of itself an old and trusty Servant of the King's; it is his Instrument or Means which he useth to govern his People by.

I never read nor heard, that *Lex* was *Rex*; but it is common and most true, that *Rex* is *Lex*, for he is *lex loquens*, a living, a speaking, an acting Law: and because the King is *lex loquens*, therefore it is said, that *Rex censetur habere omnia jura in scrinio pectoris sui*.

There are two Maxims of the Law of England, which plainly disprove Mr. Holborne's supposed Policy.

The first is, *That the King is a Person trusted with the State of the Commonwealth.*

The second of these Maxims is, *That the King cannot do Wrong.* Upon these two Maxims, the *Jura summæ majestatis* are grounded, with which none but the King himself (not his High Court of Parliament without leave) hath to meddle, as namely, War and Peace, Value of Coin, Parliament at Pleasure, Power to dispense with Penal Laws, and divers others; amongst which I range these also, of Regal Power to command Provision (in case of Necessity) of Means from the Subjects, to be adjoined to the King's own Means for the Defence of the Commonwealth, for the Preservation of the *Salus Reip.* Otherwise I do not understand how the King's Majesty may be said to have the majestical Right, and Power of a free Monarch.

It is agreed, that the King is, by his Regal Office, bound to defend his People against foreign Enemies; our Books are so, *F. Na. fol. 118. Est a intendre que le roy doit de droit; savor et defendre son realme al bien vers le meere, com' vers enemies.*

Juramentum Regis, cited before, *servabis Ecclesiæ Dei, Clero, & populo, pacem ex integro secundum vires tuas*; if (*ex integro*) then against all Disturbers of the general Peace amongst them, most chiefly, in my Judgment, against dangerous Foreigners.

Bracton and *Glanvill*, in the Front of their Books, published, That the King must have Arms as well as Laws; Arms and Strength against foreign Enemies, Laws for doing Justice at home. Certainly if he must have these two Necessaries,

he must be enabled with Means for them, and that of himself, not dependent *ex aliorum arbitrio*; for it is *Regula juris, Lex est, quando quis aliquid alicui concedit, concedit, & id sine quo res ipsa esse non potest.*

3. Tho I have gone already very high, I shall go yet to a higher Contemplation of the fundamental Policy of our Laws: which is this,

That the King of mere Right ought to have, and the People of mere Duty are bound to yield unto the King, supply for the Defence of the Kingdom.

And when the Parliament itself doth grant Supply in that Case, it is not merely a Benevolence of the People, but therein they do an Act of Justice and Duty to the King.

I know the most solemn Form of Parliament, and of the humble Expression of the Commons, of their hearty Affection, and good Will to their King, in tendering to him their Bill of Subsidies or Fifteenths.

Rot. Parl. 9 Hen. 4. n. 7. There is a notable Record of the very Right of the Commons in the Form of Grant by Parliament of Supply to the King: Archbishop *Arundel*, then Lord Chancellor, in his Speech to the Houses, took for his Theme (*Regem honorificat*) it being then a time of instant Necessity.

The Commons, in their Grievances, complained of the Default of Safeguard of the Sea, towards which they had granted a Subsidy before; *Et pour tant (Note this for the Reason, it was not spoken simply, as Mr. St. John urges) but pur tant que ils ne sont obliges a cel guerre susteyner, mes sont discharg de re exant*; and they petitioned, That accordingly it would please the King to discharge the Commons, but the King did not discharge them, *Quod nota.*

After this (the Record goeth) that there was a Conference between the King and Lords, of the State of the Realm, and of the Defence of it. And in that Conference, the King asking the Lords Advice, they answered, That a Tenth and half a Tenth was necessary from the Boroughs, and a Fifteenth and half from the rest of the People. This Conference and Advice being reported to the House of Commons, the Record is, *Ilz fuer grandement distorbe en dist' ceo desire en grand derogation de leur liberties.* The Disturbance was so great, that the King himself took pains to pacify them.

Upon this Record it appears, and I confess, that the Commons offering up of the Bill of Fifteenths, and so of Subsidies, to the King in Parliament, is a most material Form, and serves to make good and happy Expressions of Love and Unity, between the Head and Members, the King and his Subjects. But still I say, that it is the King's Right to have Supply; that Supply is a Duty, not merely a Benevolence from the People, in case of necessary Defence of the Kingdom.

And this is not my single Opinion.

19 H. 6. 64 B. Hody Ch. Baron, *La roye est inherite*, that is, hath Right of Inheritance to have Fifteenths in his Court of Parliament: for the same Law which wills that the King defend his People, wills also, that the People grant to him of their Goods, in Aid of their Defence.

Besides, I prove mine Opinion (if any Man deny it) unanswerably, out of the very Writ of Summons of Parliament: in it, *Ardua & urgentia negotia, Regem, statum, & defensionem regni Angliæ & ecclesiæ concernentia*, are mentioned to be the Cause of Parliament.

Now I pray you observe.

In the Writ of Summons to the Peers of the Kingdom, the Words are, *Super dictis negotiis tractaturi verumq; Concil' impensuri*; but in the Writ for choice of Knights and Burgesſes to ſerve for the Commons, the Words are, *Ita quod milites pro ſe & Communitate Comitatus prædicti, ac dicti Cives & Burgeſes pro ſe & Communitate Civitatum & Burgorum plenam poteſtatem habeant* (what to do?) *ad faciendum & conſentiendum his quæ tunc ibidem de Communi Concilio regni noſtri contigerint ordinari ſuper negotiis antedictis.*

So the Words are, *facere & conſentire*, to Matters agreed on concerning the Defence of the Kingdom; there are no other Matters mentioned in the Writ for Summons of their representative Body: no ſuch Words as are in the Peers Writs are in theirs; yet I cannot ſay, and ſo I deſire to be conceived, but that according to the Record of 9 Hen. 4. the Commons may alſo humbly offer their Advice to the King; they may ſhew their Grievances, and the State of the Commons: but it is plain, that the principal Duty belonging to the Commons is, *facere & conſentire*, otherwiſe there would have been in their Writ, as well as in the Peers, *ſuper dictis negotiis tractaturi, verumque Conſilium impensuri.*

Upon this I put the Caſe, and argue thus: the Kingdom wants preſent Provision, neceſſary for preſent Defence, to be in readineſs; this Provision (the Caſe ſo falling out) muſt be ſo ſpeedily made, as that it would be dangerous, in regard of what may happen, to ſtay for an Aſſent in Parliament. Well, in this Caſe there is a Duty from the Subject, and a Neceſſity that the Thing muſt be done, but the neceſſary Form for the Subjects Aſſent in Parliament cannot be purſued; I demand what muſt be done, or what may be done in this Caſe, without Breach of Law?

Is the Duty loſt for want of Time to obſerve the Form?

For my part, I underſtand not any Reaſon that the Duty, in ſuch Caſe, ſhould be loſt; but I ſhould agree, that were not this a Duty, *vi termini*, which is to come from the Subject, in ſuch a Caſe, but only a mere Benevolence, then that ſuch Benevolence could not by Law be exacted without the eſſential Part of it, *viz.* the Subjects Aſſent in Parliament.

4. I confeſs, that by the fundamental Law of England, the Parliament is *Commune Concilium Regis & Regni*, that it is the greateſt, the moſt honourable and ſupreme Court in the Kingdom; that no Man ought to think any diſhonourable thing of it: yet give me leave to ſay, That it is but a *Concilium*; to ſay ſo is no Diſhonour to it: The King may call it, prorogue it, diſſolve it, at his Pleaſure; and whatſoever the King doth therein, is always to be taken for juſt and neceſſary.

We muſt conſider, that it is a great Body, moves ſlowly; ſudden Diſpatches cannot be expected in it.

Befides, tho the Parliament cannot err, Parliament-Men may *de facto*: every particular Member of the Houſe hath his free Voice, ſome of them may chance to make Scruples, where there is no Cauſe; it is poſſible that ſome of them may have ſiniſter Ends; theſe things breed Delays, ſo they may Diſturbances. (I would to God, the late woful Experience of this Kingdom, had not verified theſe Speculations.)

VOL. V.

Yea, there have been, in former Times, Cenſures of Parliaments themſelves: the good Parliament, *Temp. Ed. 3. Parliamentum indolentum*, *Temp. Hen. 4.* and in the ſame King's Time, if we believe my Lord Coke, 11. f. 113. *Brangwit, id eſt*, the White-Crow Act. Theſe Matters are conſiderable in ſuch Caſes as ours is.

Wherein apparently *Mora trahit periculum*, and to follow the Rule, *Festina lente*, is moſt dangerous.

5. The Point of *retentio Dominii maris* (which is in the Caſe) is not of an ordinary Conſideration; for, beſides the antient Inheritance and Right which the Crown of England hath in it, it is obvious to every Judgment, that in the Continuance or not Continuance of it to the Crown, not only the *bene eſſe*, but even the *eſſe* itſelf of the Commonwealth doth conſiſt; and therefore it becometh the Subjects *accelerare* to the Tuition of it: ſlowneſs is an Argument of Stupidity, or want of that Senſibleneſs of the Diminution of that Right which every Subject ought of Right, and hath a concerning Reaſon, to propoſe to himſelf.

Notable are the Words in the *Scotch Rolls*, 10 Ed. 3. numb. 3. In a Writ by the King to a great part of all the Kingdom; *Conſiderato, quod progenitores noſtri Reges Angliæ dominii maris & tranſmarini paſſagii, totis præteritis temporibus extiterunt, & plurimum nos læderet, ſi honor noſter regius noſtris temporibus in aliquo læderetur. Quodque omnes homines de regno pro deſenſione ejusdem, contra hoſtium invaſiones, tenentur exponere ſe & ſua.*

The Writ wherein theſe Words are, was a Command or Charge laid upon the Subject, without any Warrant of Parliament for it.

It was a Writ directed to all Earls, Barons, Knights, and others, *ab ore aquæ Tameſis verſus partes occidentales*, which included divers Inland Counties.

It iſſued upon Occaſion of David de Bruſes having a great Navy afloat, and therewith having entred *Jerſey* and *Guernſey*.

The Writ is a Command to thoſe to whom it is directed, *Tantis & tam gravibus periculis imminentibus debite ponderatis*, to treat with the Archbiſhop of *Canterbury*, and other great Men aſſigned by the King, *ſuper deſenſione regni & populi.*

The Writ concludes thus, *Scire vos volumus, quod ſi rebelles aut difficiles fueritis in præmiſſis, in tanto & tam grandi neceſſitatis articulo*, the King will repute thoſe *Rebelles, aut difficiles, tanquam ſuos & regni inimicos.*

6. Not to ſpeak of Neceſſity in general, which is of itſelf a Relaxation of Laws, and ſerves for a Diſpenſation, even by the Equity of the Law itſelf: in our Caſe there is a Neceſſity in point of Government.

I ſhall put you a Caſe, where an expreſs Clause in an Act of Parliament hath been doomed void, becauſe it was againſt a Matter of Neceſſity in point of Government.

2 H. 6. 6. *The Earl of Northumberland's Caſe.* *Nota*, 28 Ed. 3. & 42 Ed. 3. Penal Acts were made, That none ſhould exerciſe the Office of Sheriff above a Year, altho that he have a *non obſtante*; that Clause of (*alib*) is void, and a *non obſtante* may be of that *non obſtante*: no Reaſon can be for this, but becauſe it takes a neceſſary part of Government out of the King's Hands.

7. *Salus Reipublicæ*, by all Laws, is *ſuprema lex, & ſummè neceſſaria*. It is, where it inter-

poseth, *Lex legis*. It takes away particular Interests, before itself give place for that Cause.

8 *Ed. 4. 36 Hen. 8. Dyer*. A Bulwark for Defence may be built upon another Man's Ground, *invito domino*.

No Dover or Thirding to a Woman, of a Castle of Defence; it may indanger *Salus Reipublicæ*, by dividing such a Piece.

An Alien Merchant takes a Lease for Years, of a House for his Trade: this is a good Lease, so long as he tradeth, and there is no Enmity between his King and ours; but when he ceaseth trading, or if War happen, the King shall have the Interest of the Lease. The Reason, It is possible, that *Salus Reipublicæ* may be concerned, if the Alien's Interest in it should continue.

8. If there were not *Salus Reipublicæ* in our Case, yet there is in it at least *Bonum publicum* intended.

I will put a Case, where Subjects are bound without their Assent, for the *Bonum publicum* sake. 44 *E. 3. 19. Chamberlain of London's Case, Coke 5. f. 63.* Inhabitants of a Town, without any Custom, may make Ordinances or By-Laws of any thing, *pro bono publico*; and in such Case, those who are absent, and so unconsenting, are bound, the *Bonum publicum* is the Cause.

9. Prevention of further general Mischief, which may ensue, trencheth, even by Construction of Law itself, upon other Mens Rights. For that Cause, pulling down a House which is on fire, to save other Mens Houses, is lawful. *Higbley's Case, Co. 10. 139.* One is bound by Prescription, to make or repair Walls, Damms, or such like against Waters: This Man is not able to do it, a small Breach happens, which either must speedily be made up, or a general Mischief will happen. In this Case by Exposition of the Statute of Sewers, and by an Equity out of the Letter of the Laws, grounded upon *Salus pop.* all those who are within the Level are to be tax'd, and to contribute for present; the Ability of him, whose the Right of the Burden is, *non expectata*.

10. I find a Writ in the Register *de reparatione facienda*, which is cited in *Bowles's Case, Coke 11. f. 82. b.* whereby, if two Joint-tenants be of a House, the one shall have a Writ of *de reparatione facienda*, against the other; and the Words of the Writ are, *Ad reparationem & sustentationem ejusdem domus tenetur*; where the Word (*tenetur*) is observable. Every Man hath an Interest in the Commonwealth, but the King's Interest is incomparably beyond other Mens; therefore the King may, by a like Reason of Law, call upon his Subjects to join in Contribution with him, towards the Reparation and Sustentation of the Fabrick of the Commonwealth.

11. In the great and common Vouchee's Case, 13 *H. 4. 14.* in the Debate of this Cause of the new-erected Office of the measuring of Cloths in London, which was brought to Parliament; it is a memorable Saying of *Gascoigne* the chief Justice, "The King may charge the People of his Realm without special Assent of the Commons, to a Thing which may be Profit to the common People."

This Saying is cited and allowed in the Case of Monopolies, *Coke 11. f. 86. b.* and so it is very commonly, upon Arguments concerning such Questions.

12. I observe, that tho the Precedents of Writs and Execution of them; for assessing the Subject

by the King's Command, without Warrant of Parliament, are very many in several Kings Reigns; yet there is not any Precedent of any civil Action brought for any thing done in former Ages, upon such Commands of the King as is in our Case, but only that one of the Abbot of *Robertsbridge's* Case, which hath been often cited; and in the pleading thereof it is acknowledged, that the agisting of Mens Lands and Tenements to contribute, *ad custodiam maris* by the King's Commands, without Tax by Consent in Parliament, was good in Law.

And I note, that that Case happened and was in Agitation, and gave fair Cause of Demurrer, in an opportune Time in demurring, if the Law had been otherwise; for it happened at that very time, when the Statute *de Tallagio non concedendo* was made, or in hammering.

If only one Action brought heretofore, *una hirundo*, it were not to be regarded, tho it had been against the King's Power; but when that one is assertive of the regal Power, it is to be respected more than as a single, I mean, as a *singularis probatio* of it.

Lastly, I observe, that upon Grievances, or Complaints in Parliaments which have been almost infinite, and upon all Occasions in former Times, no one Record hath been, or I think can be cited, that in case when Charges have been imposed without common Assent, for the necessary Defence of the Kingdom in an instant Article of Necessity, any King hath ever answered, or assented, That such Charge hath been against the Laws or Liberties of the Subject.

Neither the Reclamation of the Subject alone on his side, nor the single commanding Rescripts of the Sovereign alone on his side, are of Authority to preserve the Law; but if there be a Concurrence of King and Subject, that is it whereby a Judge may ground his Resolution.

As for that one of 2 *R. 2.* which cometh nearest in that Kind, but hath not the King's Acknowledgment; I note, that it was upon a Deliberation, before the Charge imposed: And truly I think that if the Charge in that Case had been first imposed and collected, upon Complaint against it afterwards, it would never have been adjudged for unjust.

Many things are questioned, and sometimes denied to be lawful, before they are done, which *facta valent*, which being done, are good and valid in Law. If a Question be made of that which of itself is lawful, the very making the Question, makes it questionable, and may draw on an Opinion that it is not lawful.

Rot. Parl. 4 H. 4. num. 28. & Rot. Parl. 6. H. 4. num. 9. you shall find, that the Commons having considered of the Wars of Scotland, the Rebellion of Wales, the Safeguard of the Sea, & especialment the Defence of the Realm, they granted a Subsidy, but with Protestation that it should not be an Example to charge the Commons hereafter with any manner of Subsidies, for the Wars of Scotland, or Wales, or the Safeguard of the Sea, or the Marines of Galais or Ireland, without Consent in Parliament. I observe, that there is not a Word in this Protestation, that the Subjects should not be charged without Consent in Parliament for the Defence of the Realm, tho there were a little before an express mention of it, and that with an especialment. On the other side, there is a Cloud of Precedents of imbarking of private Mens

Mens Ships, in case of Necessity of Defence of the Realm, and Safeguard of the Seas, Command of making Gallies and Ballingers *sumptibus propriis*.

Arraying and Apparelling of Soldiers, and victualling and conducting them in this Case of necessary Defence, *propriis sumptibus*, of several Towns and Counties, as well Inland as Maritime; the express Words of the King's Commands in such Cases, by his Writs directed to the respective Sheriffs and Head Officers, are, That they should *levari facere expensas de comitatibus*, sometimes *comitatum*, sometimes *villarum*, as the Case was: wherein note the Words, *levari facere*; and in what manner the Sheriffs Levies are, *viz.* Assessment by himself, and Collection by himself and Ministers, I think few are ignorant.

Amongst which kinds of Writs, some of 48 H. 3. are remarkable for these Words in them, *Cumque adhuc necesse sit propter casus fortuitos ad securitatem & defensionem regni, defensionem habere promptam, contra Alienigenarum adventum, &c.* Inter alia sic Rot. Claus. 48 H. 3. mem. 2. A Writ to the Town of Bedford. So still the Pressure is according to the Occasion, instant Provision raised, whereby a Promptitude may be not staying a Provision by Parliament, which Cunctation might be opposite to Promptitude.

Also the French Roll, 21 E. 3. Pars. 2. mem. 9. Co. 11. shews, that whereas a Subsidy out of the Wools had been granted to endure for a certain time only, yet the King, *necessitate compulsus, de consilio Prælatorum, Magnatum, & aliorum de concilio suo*, (not *per commune concilium*) did ordain *quod subsidium prædictum levetur usque a further Time*.

Closa Roll, 1 R. 2. m. 18. many Writs were directed to the Bailiffs of the several Towns of Cambridge, Huntingdon, Nottingham, Derby, Lincoln, Gloucester, Worcester, St. Edmonds-bury, and Thetford, reciting a former Command of the King to these several Towns, to provide several Ballingers, *ad custas validiorum et magis divitum hominum*, of those Towns. Now by those Writs the King declared to them, that *videbatur* to the King and his Council, that they who had 10*l.* and upwards in Goods, should contribute, and not others; and commands those Bailiffs to compel Men of that Ability to contribute, *per distinctionem si necesse foret, & aliis viis & modis, quibus melius viderint expedire*.

I spare Iterations, I conclude my Second General Head with my Subscription again proved by my Judgment, by what I have said before:

That when the Good and Safety of the Kingdom in general is concerned, and the whole Kingdom in Danger, the King may, by Writ under the Great Seal, command all the Subjects of the Kingdom at their Charges to provide and furnish Ships for the Defence and Safeguard of the Kingdom, and may by Law compel the doing thereof.

And that in such Case the King is the sole Judge of the Danger, and when and how the same is to be prevented.

And how many more have subscribed to this Tenet it is not unknown; the Records of the General Courts of Justice of the Kingdom, manifest to such as will look into them.

The Third General Head.

I Have done with my Second General Head, and come now to my Third; which is, To consider the Acts of Parliament, Answers to Petitions in

Parliament, *Magna Charta* Laws, which concern the King's Proceedings in this Case.

1. St. Edward's Laws have *Danegelt* mentioned in them; see *cap.* 12. but not another Syllable pertinent to this Case, saving that the Church and People are free, have Liberties and Customs belonging to them of Right, which is not by any denied.

2. I find that there was a *Magna Charta Libertatum Regni* made by K. Henry the First, the *Beau-Clerke*, in which is this Clause, That *Milites possiderent terras dominicarum suarum quietas ob omnibus Geldis* (*Guilt* signifieth a Sum of Money.) And yet amongst the Laws of his Time, as appeareth by *Leges Hen.* 1. c. 16. this is one which I cited before, *Danegeldum i. e. 12d. de unaquaque bida per annum, si ad terminum non reddatur vita emendetur* (which signifieth an Amerciament.)

3. The *Magna Charta* of K. John, made at *Running-mead*, hath been cited by Mr. Hampden's Counsel, and urged to be an Act of Parliament; the Words inferred out of it are, *Nullum scutagium vel auxilium capiatur in regno nostro, nisi ad corpus nostrum redimendum, & primogenitum filium militem faciendum, & ad primogenitam filiam nostram semel maritandam; & ad hoc non fiat nisi rationabile auxilium, &c.*

The Words pinch'd upon are (*Nullum auxilium*) a general Negative; I have touch'd before the Signification of the Words (*Aid, auxilium*) I will answer the Words farther anon, together with other Statutes, which have as general and further negative Words.

Observe, But there is no question but *Running-mead Mag. Ch.* was no Statute, nor ever was taken for one, saving in those Parts wherein it and *Mag. Ch.* of 9 H. 3. do concur: to give but one Reason, tell me when, after K. John's Time, were 25 Barons appointed, according to that which is contained in *Running-mead Magna Charta*. If there were any great matter in *Nullum auxilium*, it is observable that those Words are not in *Magna Charta* of 9 H. 3. and that is the *Magna Charta* which hath the frequent Confirmations

In *Confirmatio Chartarum* 25 E. 1. there is mention of that *Magna Charta* of K. Henry 3. by Name, and none of that K. John's *Magna Charta*.

Certainly there were some *Iniqua* in the *Magna Charta* of King John; the Barons did in that King's Time *iniquum petere ut æquum ferrent*, otherwise that *Magna Charta* would have been also confirmed, as well as his Successor Henry the Third's.

And I pray you note, That after the *Nullum auxilium* there follows on, *Nisi ad corpus nostrum redimendum*: If for that, then certainly much more for the redeeming of the whole Body of the Commonwealth, which is our Case.

4. The *Magna Charta* of 9 H. 3. which is the often confirmed *Magna Charta*, tho it allow all the Liberties of the Subjects then claimed, hath no special Words pertinent to our Question, which is a Matter observable; for Charges for the Defence of the Kingdom commanded by the King out of Parliament, were frequent both at and before that time.

In it there are only general Words of *Habeant libertates suas*; out of which Word (*suas*) I do observe, First, A Right of the Subject in his Liberties, they are (*suæ*). Secondly, Those Liberties which the Subjects must *habere*, must be (*suæ*) that is, such Liberties as are fit for a Subject, as are compatible with the Relation between a King and

and a Subject. The Words are not *omnes libertates*, all manner of Liberties, but (*suas*.) that is, Liberties proper for them, or such Liberties as they are, in good construction, capable of.

And indeed *Quicquid recipitur, ad modum recipientis recipitur*.

14 H. 7. f. 11. The Abbot of St. Bartholomew's had a Charter from King Henry 2. that he should be as free in his Lands, as the King was in his Crown; yet these general Words pass for no more than a Subject is capable of; he must notwithstanding those swelling Words, pay Fines for Alienation without Licence, admit the King's Valet to a Corody, and such like.

But in that *Magna Charta* of 9 H. 3. cap. 20. there is this Clause, (*Et si nos adduxerimus vel miserimus eum in exercitum, &c.*) which proves the King's Right, even by that Statute, to dispose of the Bodies of his Subjects for his Army.

Also Cap. 30. there is a Clause, that *omnes Mercatores* shall have safe Conduct, and Liberty *ad emendum vel vendendum, sine omnibus malis tolneis, per antiquas & rectas consuetudines, præterquam tempore belli*; which shews, that in *Tempore guerræ mala tolneia* might be set up, they were not then *mala tolneia*. *Dominus opus habet*, made them *tolerabilia & toleranda*; in our Case, we have *tempora guerrina*.

5. *Confirmatio Chartarum*, which was 25 E. 1. is the next Statute whereof there is any Colour for Mr. Hampden, the Words thereof are,

Que pur nul besoigne tielx maners de aydes, mises, ne prises, ne prenderomer forsque de com' assent de tout le realme, saves les anc' aydes & prises dues & accoustomes. But this Statute hath not been stood upon, because of the *Saves les anc' aydes, &c.* That which is saved or excepted is clearly out of the Body of the Law.

6. But then comes the Statute *de Tallagio non concedendo*; which of what Time it was, *non constat*. It was between 25 & 34 E. 1. I do agree that to be a Statute or an Act of Parliament: The Recital in the Petition of Right, 3 Car. binds up my Judgment to affirm otherwise.

The Words of that Statute are general, without any saving or Exception, *Nullum Tallagium vel auxilium, per nos vel hæredes nostros in regno nostro ponatur seu levetur sine voluntate & assensu Archiepiscoporum, Episcoporum, Comitum, Baronum, Militum, Burgensium & aliorum liberorum communiae de regno nostro*.

These Words indeed are general; but for a true and just Exposition of them, the Occasion of the hard pressing to have that general Statute is to be considered.

K. E. 1. had Right to Dukedoms and Earldoms in France, and great Wars he had with the French King about them.

Great Troubles also he had out of Wales and Scotland.

He was in Flanders about auxiliary Wars against the French King, both at the making of *Confirmatio Chartarum*, and of *Tallagio non concedendo*.

He had a little before, in the 22d of his Reign, caused Scrutinies to be made throughout the Kingdom, to raise Moneys for Supply of his great and pressing Occasions for these Wars, which in truth did not immediately concern the Defence of his Kingdom; for if he would have let those Wars alone, he might have had Quiet enough for his Kingdom of England.

Upon the said Scrutiny Search was made, where and in whose Treasuries or Hands Moneys were, whereby the King might be furnish'd; and indeed, the King's Ministers took the Moneys they found upon the Scrutiny as borrowed for the King, tho it were against the Owners Wills to lend them: And amongst others, for the most part, they lighted upon the Treasurers of Religious Houses, many of which had Coffers well stored. The Religious Men being thereupon oppressed themselves, incensed the Great Men against the King; and by that means, and the Palpableness of the Injury, the great Lords, especially the then Constable and Marshal of England, Bobun and Bigott, stood out against the King with a great deal of Stiffness; and at last the King being in a Streight, and to pacify one Extremity with yielding to another, passed the Act *De Tallagio non concedendo*, without the exception or saving of the antient Aids, which was in *Confirmatio Chartarum*.

But it is plain, that these general Words were never meant, either on the King's, or on the great Lords and other Subjects sides, to be absolutely general for all Cases: for notwithstanding those Words, the Aids *pur faire fitz Chevalier & pur file marier*, continued, and so did the King's Power to array and send Soldiers, *sumptibus villarum & comitatum*, into remote Parts of the Kingdom, out of their proper Counties, for the Defence of the Realm, as appeareth in the continual Practice in that King's and his Successors Times; as, if I had time, I could make good by a long Succession of Precedents, appearing upon Records.

See a notable Apology or Remonstrance publicly made by King Edw. 1. m. 25. enrolled, concerning his Proceedings at that time in this Business, whereby that is made good, which I have before alledged.

But besides this Answer, I shall give a further Answer to this and the other Statutes, when I shall have perused all of them.

7. The next Statute urged is 14 E. 3. in the second Parliament of that Year; in which Statute there is a Recital of a Grant in the same Parliament, of the ninth Part of the Goods of the Commons for two Years: the King, willing to provide for the Indemnity of the Commons, willeth and granteth to the same Prelates, &c. (wherein note the word, the same) that the said Grant which is so chargeable, shall not be another time had in Example, nor that they (which must be construed the same Prelates, &c.) be from henceforth charged, nor grieved, to make up any Aid, or to sustain any Charge, if it be not by common Assent, and that in Parliament: And that all the Profits rising of the said Aid, and of all Wards, Marriages, Customs and other Profits rising out of the Realm of England, shall be spent upon the Maintenance of the Realm, and of the Wars in Scotland and France, and in no Place elsewhere, during the said Wars.

Note, that the general Clause which is urged to be in this Statute, cometh in the middle part of the Statute, and is coupled with other Matter, which was but temporary; and therefore in my Judgment that general Clause was meant to be but temporary, viz. during the Continuance of the Wars which were then on foot; and was never meant to be a perpetual Discharge for ever of all manner of Charges and Aids, as appeareth, for that, notwithstanding that Clause, K. E. 3. did shortly

shortly afterwards, and during all his Reign, as frequently charge the Subjects for Defence of the Kingdom, as ever he had done before: He had also his Aids *pur fair fitz Chevalier et pur file marier*, after that; which if the Words were to be expounded generally and perpetually, neither he nor his Successors could have had.

And it is worth the Observation, that this Statute is never mentioned in the Petition of Right, as *Tallagio non concedendo*, and 25 E. 3. by Names are; and yet if this had been a perpetual Statute, there was as great Reason to have mentioned it as any other Statute.

8. The next Statute urged is the Petition of Right, 3d of the King's Reign.

This Petition reciteth the Statute *de Tallagio non concedendo*, and the Statute of 25 E. 3. against Loans and other things: Then cometh the Petition itself, which is an humble Prayer to his Majesty, by his Subjects, That no Man hereafter be compelled to make or yield any Gift, Loan, Benevolence, Tax, or such like Charge, without common Consent by Act of Parliament: And his Majesty's gracious Answer in Parliament is, *Soit droit fait comme est desire*.

After this, his Majesty, that knows his own Heart and sincere Meaning best, in his second Speeches to both Houses, amongst other things, saith, and that most justly and truly, 'That it must needs be conceived that he had granted no new, but only confirmed the antient Liberties.'

I observe, there is no express Clause in any of those Statutes which I have before cited, that no Charge shall be imposed without common Consent, no, not for necessary Defence of the Kingdom: And if such a Clause had been offered to have been express, besides that I doubt of what Validity it had been, I certainly believe, that neither K. E. 1. nor K. E. 3. nor our Sovereign, would ever have yielded to so dishonourable and unjust an Expression.

But all these several Statutes being general, and having no particular Expressions, I conceive that according to all Rules of Law for Exposition of Statutes, those three Statutes, *de Tallagio non concedendo*, 25 E. 3. and the Petition of Right, must have a reasonable Intendment, and that by a common and just Equity, for Exposition of those three Statutes, Aids and Charges, for so necessary a Purpose as the Defence of the Kingdom; and *Salus Reipublicæ* will be clean out of the Law, as fully as if they had been precisely excepted: and if other Exposition be made according to the Letter only, it might truly be said of such a literal Exposition, That *Litera occidit*, that Laws made for the Good of the Commonwealth, will prove the Bane and Ruin of it.

I will give you a Taste of some Expositions of Statutes, with Restrictions of the Generality of the Words of them, tho they be general Negatives. The Cases I could put are very many, but I will cite only a few, and those such as are applicable to the Reason of our Case.

Dyer 361. The Statute of Gloucester saith, That Tenants for Lives or Years, *nullum facient vastum*; yet a Waste, whereby the Land leased *melioratur*, is no Waste within that Statute.

The Statute of Westminster the second saith, That Tenant in Tail shall not *per factum, vel seoffamentum*, do any Act to the Prejudice of his Issue: Yet 43 E. 3. *Octavian Lambert's Case* is, Tenant

in Tail of Lands whereto a Stranger hath Title of Entry; to gain a Release of this Title, and for Defence of his Estate, by his Deed granteth a Rent Charge out of the Lands intailed; this Grant bindeth his Issue, so that he shall hold the Land charged, notwithstanding the general Words of the Statute.

There was a Statute made 14 E. 3. That for every Sack of Wool carried out of the Realm, the Merchant should find Surety to bring into the Kingdom Bullion, that is, Silver, to the Value of 2 Marks, and to take for it 2 Marks in Coin. 36 E. 3. an Act was made, That whereas the Commons had granted a great Subsidy out of their Wools to the King for three Years; the King granted, that after those three Years, nothing shall be taken of the Commons, but the antient Custom of 1 Mark, for a Sack of Wool. And 45 E. 3. another Act was made, That no Imposition or Charge shall be put upon Wools, others than the Subsidy and Custom granted to the King, *sans Parliament*.

Upon long Debate adjudged, That notwithstanding these two latter general Statutes, yet the finding of Sureties for bringing in of Bullion, enjoined by 14 E. 3. was not taken away by either of those two latter Statutes. And in that Case, besides the former Rule of Equity put by me for Exposition of general Statutes, another Reason is given, applicable also to our Case, namely, That every Statute shall be taken the most beneficially for the King.

Passb. 13 Jac. In the Star-Chamber; whereas the Statute of 1 R. 3. c. 2. saith, That the Subjects shall not be charged, by any Charge, Executions or Impositions, called a Benevolence, nor by such like Charge; yet one Mr. Oliver St. John, a Wiltshire Gentleman, being brought to the Bar, *protenus* for writing a Letter to the Mayor of Marlborough, against a Course then holden, for trying what Money rich and able Men would give unto King James, of their voluntary free Will, it was resolved by the whole Court of Star-Chamber, with the then Chief Justice's Advice, That a Commission to treat what Men would give voluntarily to the King, was not within the Statute of 1 R. 3. tho the Words were general; and Mr. St. John was grievously censured for his inveighing by his Letter against the awarding of the Commission.

I conclude this Matter, with an Answer by Mr. Solicitor, aptly given to Mr. St. John, who urged this Clause out of the Laws of King W. 1. c. 55. *Volumus ut omnes liberi homines regni nostri habeant terras suas, bene & in pace, liberi ab omni exactione injusta & ab omni tallagio, ita quod nihil ab eis capiatur vel exigatur nisi servitium suum liberum, quod de jure nobis facere debent, & prout statutum est & a nobis eis datum & concessum jure hæreditario per commune concilium totius regni.*

You see here are general Words referring to a general Act of Parliament; yet afterwards, c. 59. are these Words, *Statuimus ut omnes liberi homines totius regni sint fratres conjurati ad monarchiam nostram & ad regnum nostrum, pro viribus suis & facultatibus, contra inimicos pro posse suo defendendum & viriliter servandum.* This latter Clause shews the Intention of the Act of Parliament formerly set down, that notwithstanding the general Words of the Act, it extendeth not to Cases of common Defence of the Kingdom, or where *Salus Monarchiæ Regis* or *Reipublicæ periclitatur*.

I have now done with the general negative Statutes, strongly urged; and I think I have exempted the Question of our Case from the Purview or Intention of those Statutes.

But besides those Statutes, Mr. Hampden's Counsel hath urged some Statutes that no Soldiers, or Men at Arms, should be enforced to go out of their proper Counties, without Wages from the King.

I will not let those, because urged, tho pertinent in the Generality only of the Peoples Liberties, pass unexamined.

The Statute of *Winchester* 13 Ed. 1. c. 6. was cited for that Purpose. The Words are, 'Every Man shall have in his House Harnes to keep the Peace, after the antient Assize.' And sheweth what the antient Assize was. And then there is a Clause for fresh Suits after Felons, from Country to Country; and indeed, in case of fresh Suit after a Felon, none is bound to go out of his County. But as to the point of going without Wages out of the Counties for Defence of the Kingdom, not a word in my Book in that Statute.

Then cometh 1 E. 3. c. 5. the second Parliament; the Words are, 'The King wills that no Man be charged to arm himself, otherwise than he was wont, in the Time of former Kings of England; and that no Man be compelled to go out of his County, but where Necessity requireth, and sudden coming of strong Enemies into the Realm; and then it shall be done as hath been used in Times past, for the Defence of the Realm.'

Nota. That before this Statute, the use was for Men to go in such Cases, *propriis sumptibus*, as appeareth by many Precedents.

In the same Year, 1 E. 3. c. 7. the Commons complained of Commissions to prepare Men at Arms, and to convey them to the King into *Scotland*, *Gascoigne*, or elsewhere, at the Charge of the Shires; and that the King hath not before this time given any Wages to the Preparers and Conveyers, nor Soldiers, whereby the Commons have been at great Charge. To this the King's Answer is, The King wills that shall be so done no more.

Nota. But note by the very Complaint, that neither the Complaint nor Answer are applicable to Case of Necessity, for Safeguard of the Kingdom.

Then 18 E. 3. c. 7. That Men of Arms chosen to go in the King's Service out of *England*, shall be at the King's Wages, from that Day that they depart out of the Counties where they were chosen, till they return.

This Statute extendeth not to Case of necessary Defence. Besides, the Provision is against going out of *England*, which is not in our Case.

Then 25 E. 3. 8. No Man shall be constrained to find Men of Arms, other than those that hold by such Service, if it be not by common Assent and Grant in Parliament.

This extendeth not to Defence of the Kingdom. Besides, it is a Provision for particular Men, specially required. Likewise it is only against finding the Bodies of Men of Arms. But pressing of Soldiers or Men of Arms, to serve in all manner of Wars, hath been always so frequent, both in old, late and modern Times, that it were a needless Labour to prove that which every Man knoweth.

All these Statutes of 1, 18, and 25 E. 3. are confirmed by Parliament, 4 H. 4. c. 13. and yet

Rot. Parl. 5 H. 4. numb. 24. (which is observable for the Time, being presently after 4 H. 4.) it appeareth, that there had been Commissions directed to Gentlemen of the Country, for arraying, arming, and conducting of Soldiers to the Coasts of the Sea, and elsewhere, in divers Counties; and that there were many Forfeitures and Clauses comprised in those Commissions: The Observation of which was perilous to the Commissioners.

The Commissions were brought into the Commons House, and by them entertained as Grievances. The Commons upon Deliberation, did obliterate certain Clauses in those Commissions, and prayed the King, that from thenceforth no Commissions of Arrayage should issue, otherwise than was contained in an amended Copy, which they humbly offered ready drawn.

And that Copy was agreed to by the King in Parliament, after Conference with the Judges, and Advice with the Lords thereupon; and the Tenor of the said Copy was enrolled.

And in the Precedent thereof, appearing in the Parliament-Roll, and being as for the County of *Bucks*, fifteen Gentlemen of the Country are made Commissioners, amongst them I find the Name of *Hampden*, I believe an Ancestor of Mr. *Hampden*, the Party in our great Cause.

But to return: In that Commission there is a Recital of Invasion and Burnings, which had been by Enemies: And that to resist them if they should again invade, *ac pro salvatione & defensione regni & ligeorum*, the King assigneth Commissioners *ad armandum & triandum omnes homines ad arma, & ad armari faciendum omnes illos qui de corpore sunt potentes, qui de suo proprio non habent, unde seipfos armare possint, viz. quilibet eorum juxta statum & facultates suas, & ad distringendum omnes illos qui in terris & bonis sunt potentes, & pro debilitate corporis impotentes, ad irroveniendum armatos pro illis qui non sunt habiles*, (where, by the way, I note, that in Case of common Defence, the People, not the King are to be at the Costs.) And the Commission directs further, That the Commissioners shall train and divide the Soldiers, and shall *conducere eos tam ad costeram maris, quam alia loca, ubi & quoties necesse fuerit*, (here is sending out of the County of *Bucks*, I am sure) and shall muster them; and that the armed Men shall be armed with their own proper Arms, and not with the Arms of others, upon pain of Forfeiture of them, (note the Clause of Forfeiture) *& ad arrestandum & capiendum omnes qui fuerint rebelles seu contrarii, & prisionem committendum, ibidem moraturi quousque pro eorum punitione aliter duxerimus ordinandum*, (here is Power of Imprisonment.) That Commission commands likewise the Commissioners to array themselves, *& insuper* to make Beacons, whereby *gentes patrie de adventu inimicorum poterint congruis temporibus prae muniri*; and a further Clause, that the Commissioners shall *ducere* the Soldiers *cum periculum advenierit, ad costeram maris & alia loca, in defensionem regni & patrie; ita quod pro defectu armationis & ductionis damna patrie non adveniat ullo modo*.

The Commission I have taken, and now repeat at large, because offered by the Commons themselves in Parliament, instantly after the Confirmation of *Edw.* the Third's Laws, 1, 18, and 25 of his Reign beforementioned, and all by the Judges Advice.

All Powers of Command imply the Duty of Obedience. I say no more, but as Arms and Travelling by Land are necessary for the Defence of Land, so Ships and Sailing, Ordnance and Tackling, and the Necessaries mentioned in the Shipping-Writ, are most requisite for Defence at Sea.

And thus I have passed all the Acts of Parliament cited or pertinent to our Case; I confess they are *leges ligantes*, and I think that in my Answers to them, I have not broken the Bonds of them, with the which I acknowledge both my Conscience as a Judge, and my Estate as a Subject, obliged.

The Fourth General Head.

I Come now, in the Last place, to my Fourth General Head, which is, To answer the Objections made by the Counsel on Mr. Hampden's Side.

The Objections were of three sorts: some grounded upon Reasons of Law; some upon Authorities and Inferences upon Records; some upon Mischiefs and Inconveniences pretended.

Object. 1. 2 R. 3. f. 10 & 11, was objected; where, upon the Distinctions of *potestas in Curia*, & *potestas in Camera*, concerning the assessing of Fines, it is said, that *Justiciarii Regis per eorum discretionem assideb' finem*, & *non dominus Rex per se in Camera sua, nec aliter coram se, nisi per Justiciarios suos*; & *hæc est voluntas Regis, viz. per Justiciarios suos & Legem suam unum est dicere*. And it was said, that in the present Case, the King hath not proceeded *per Justiciarios*, but *per se* or in *Camera*.

Ans. I answer, That in our Case there is not any thing done in *Camera*, the Shipping-Writ issueth out of the Court of Chancery: besides, we are not now in the Case of assessing a Fine.

It is true, that if a Presentment, Indictment, or Information, be depending in the King's Court, and so far proceeded in, as that Judgment of a Fine is to be given, this is not to be assess'd by the King in *Camera*, but by the King's Justices in *Curia*.

Howsoever, if we go to Distinctions, there is *potentia absoluta*, and *potestas ordinaria*: I hope none will deny, but that the King hath *potestatem absolutam*, in many Cases.

Stat. Westm. 1. It appears a Man may be committed *per speciale præceptum domini Regis*, and is not in that Case Bailable.

20 Hen. 7. The King is *Capitalis Justiciarius Angliæ*.

I put you the Case of Hil. 2 E. 3. p. 6. One having Money of the King's wherewith to pay Soldiers, misused it, and committed may Outrages in Lancashire; a Writ issued to the Sheriff of Lancaster to attach him; being by virtue thereof attached, and brought to the King's-Bench, he was there discharged; the Reason given by Scroope the Chief Justice was, Because the Attachment being grounded upon a Suggestion, was against the Law: no such Writ ought to have issued, unless there had been some Indictment, Presentment, or Information depending. But I doubt not, if the King had by his absolute Power made a special Precept in his Chamber for Commitment of this Man, he could not have been discharged.

The Truth is, The Objection upon the Distinction of *Curia & Camera*, is not rightly applied to this Case: it might as well have been urged against

a Commission of Sewers, issuing at common Law, out of the Chancery. The Matter is, what the Law is concerning the King's Power, for Provision towards necessary Defence.

Object. 2. It hath been said, that divers Payments and Promises of Payments have been made by the King in all Ages, upon Occasions of his Wars and Provisions for the Defence of the Realm and Sea: and many Records have been vouched to that Purpose.

Ans. I answer, First, It is true; but more Payments have been made by the Subjects also in the same Cases; as will appear, if we go to vie by Records: Multitudes have, to that purpose, been cited on the King's Side.

Secondly, In some Cases, as of Borrowing, Purveyance, or the like, Payment by the King was of Right; but in the Cases merely for necessary Defence, his Payment, or Promise of Payment, was of Courtesy and Grace, and is not binding in Precedent, no more than in the Case of Mines Royal. It appears by many Precedents, cited in the Case of Mines common, That many Subjects, Owners of Land, wherein were Mines of Silver, shared with the King; some had a twentieth, some a greater, some a lesser Part: and this was objected against the King's sole Interest, which notwithstanding was adjudged, and the Answer made to those Records was, That it was of the King's Courtesy and Grace, not of Right: one may do with his own what he pleaseth.

But I will put you at large one of the Records which hath been cited, and let it be considered for whom it maketh.

23 Ed. 1. Rot. 77. *Ex parte rememorator' Regis*. There Writs issued to divers Mayors and Bailiffs to make Gallies, ordained by the King, and *Concilium suum*: It doth not say, *commune concilium*, to be made *pro defensione regni & securitate maris*; and in the Record there is a Clause, *Custum quod ad hoc posueritis, cum illud sciverimus, vobis in exitibus ballivæ vestræ allocari faciemus*. But note, that here is a Command they shall first lay out the Money: and note, that there is this further Clause in the same Writs, *Volumus autem quod bordas & meremium, quæ ad hoc competunt, ubicunque ea inveniri contigerint, & cujuscunque fuerint in villa prædicta vel extra pro galeis illis faciendis capiatis*. I pray you note that Clause, for the express Words of *Magna Charta* are, *Nos non capiemus boscum alicujus ad castra, vel ad alia agenda nostra, sine voluntate ejus cujus boscum fuerit*: and yet it is commanded, that they should take *boscum alienum* in this Case, and I think warrantably; for the Words in *Magna Charta* are, *ad agenda nostra*, but the making the Gallies commanded, was not *agendum regis* within, but *agendum regni*, without the Meaning of *Magna Charta*.

Obj. 3. Disusage, or no Precedent for many Years of this Course now attempted, hath been objected.

Ans. I answer, as it is said 11 H. 4. 7, & 38. upon that Objection against the Force of the Statute of 14 Ed. 3. about the King's Presentations to lapsed Churches, that an Act of Parliament disused may be put in use, and so that Law disused may be put in use, especially in the King's Case, for *Nullum tempus*, &c.

Also, the Thing hath been done, tho not this particular Way, Supplies have been made otherways; sometimes by Collection of Moneys, and Means without Warrant of Parliament; sometimes by liberal Provisions and Grants in Parliament, in late Kings Reigns by Benevolences, be-

fore Richard III.'s Time, in a Manner commanded, and after treated.

Object. 4. The several Means and Incomes, which the Crown hath, have been distributed; as that it hath Tenures and Escuage for Wars, Customs and Tenures for Defence at Sea, Fines in the Hanaper for the Charge of his Justice: and thereupon it hath been said, there is no Cause, if these Incomes were well employed, to raise Moneys thro' new Ways.

Ans. Utinam those great Means and Incomes could serve the turn.

My Brother *Weston* made a Computation what the five Ports Service cometh to, and thereby it falleth short to be to any Purpose.

As for Escuage, it is Attendance out of the Realm, but for forty Days, and that in case of mean Tenures, if the Tenants proper Lords attend the King, for therein every one is to defend his own Seigneur for that Time. Alas! What is that for a Kingdom? Besides, are we sure the Occasion of Defence will press but for forty Days? Again, What if the mean Lords themselves go not in Person?

But since I have Occasion of Speech of Escuage, I must put you in mind of two sorts of Escuage, by the Law.

The first is that before touched, and is commonly called *forinsecum servitium*: And it is only for *Wales, Scotland*, and other the King's foreign Territories.

The second is of another kind, and is applicable to this Case, in regard of charging the Subjects, without their Parliament-Consent. It hath not been called for these many Ages; but in the black Book of *Tilburienfis*, l. 1. c. 26. you shall find concerning it in these Words: *Fit interdum, ut in imminente vel insurgente in regnum hostium machinatione, decernat Rex de singulis feodis militum summam aliquam solvi, marcham scilicet vel libram unam, unde militibus stipendia, vel donativa succedant: mavult enim princeps stipendiarios quam domesticos, bellicis apponere casibus. Hæc itaque summa, quæ nomine scutorum solvitur scutagium nuncupatur; ab hac autem quieti sunt ad scaccarium residentes.*

Object. 5. This is a general Charge; it appears by the *Mittimus*, that every County in the Realm hath the like Writs, amongst which many, as this of *Bucks*, are merely Inland Counties, they have no Places to make Ships in, no Means to convey their Ships (if they could make any) to the Sea: they have no Mariners, nor Tacklings, &c. and so an Impossibility, or, at least, an improper Charge is put upon them; the Cinque-Ports, the Maritime Towns and Counties are furnish'd, and are aptest to be put to this Service.

Ans. I answer several Ways.

The Inland Counties may provide all those Things which they have not of their own, with their Money; *Pecuniæ omnia obediunt, nummus is mensura rerum.*

Also there is great Reason they should join, by the Rule of *Qui sentit commodum, &c.* I am sure if Defence be not made, they may *sentire incommodum.* So by the Rule, *Quod omnes tangit, &c.*

11 H. 7. *Sir Will. Herbert's Case.*

The Reason in Law of charging Heirs in Gavel-kind, and of Contribution to Charges upon Land, equally liable, cometh to this Case.

Also the whole Realm is but one Body; the Division of it into Counties, was by King *Alfred.*

The King may make a County *de novo*; by taking out of another; may make two Counties of one, or one of two, if he please.

Then take the whole as one Body, the several Members center in it; if one Member suffer, every Member of the same Body suffereth with it.

But methinks there is more Reason to excuse, than to charge the Ports and maritime Parts; in this Case they stand between the Enemy and the Inland Parts, they are the next Door to Danger; and it is fit they should not be let Blood, but should keep it all, to serve themselves and the Inlands, and not have Means taken from them, whereby they may be disabled.

Besides, I refer myself to the several Precedents, single and at large, cited by my Brother *Weston*; by which it appears, that the Inland Places have heretofore been charged with Provisions of Gallies, Bailingers, &c. for the Seas.

By the Commission of Sewers, it appears, that this Course agrees with Proceedings in like Case, by the common Law.

F. Nat. Register. All who are within the Level of an Inundation, rich or poor, without respect of Persons, are to be proportionably assess'd, upon that Commission.

P. 15 E. 2. Rot. 70. in bk. w. The Case of *Rippon in Yorkshire*, is notable upon this Reason; by it, it appears, that the Law was, that all that had Salvation by the Plaintiffs being Hostages to the *Scots*, were by Law compellable to bear their ratable Shares, to raise Moneys for the Plaintiffs Ransom.

23 Ed. 1. cl. Rot. 1. memb. 4. dorf. In a Writ to the Archbishop of *Canterbury*, the Words and Matter are notable also to this Point: *Sicut lex iustissima, provida circumspectione sacrorum principum stabilita, hortatur, & statuit ut quod omnes tangit ab omnibus approbetur; sic & innuit evidenter, ut in communibus periculis per remedia provisa communiter obviatur.* As to the Objection out of the Records, (*per remedia provisa communiter*) that should be by Parliament; I think the contrary is apparent out of the Writ: for the Writ requires the Archbishop, with the Clergy of his Diocese (not Province) by their Proctors, inasmuch as the King of France, *Classe maxima & bellatorum copiosa multitudo congregatis, proponens linguam Anglicanam omnino de terra Anglicana delere*, to come, by a short Day ensuing, to *Westminster*, *tunc ibidem ad tractanda, ordinanda & facienda nobiscum, & cum cæteris prælatis & aliis incolis regni qualiter sit periculis hujusmodi obviandum.* Note, here is no mention of *Proceres*; and besides, Clergymen have no Capacity of Knights or Burgeesses Places in Parliament, therefore this was not a Treaty appointed or intended in Parliament; which is further enforced upon the Words (*ad tractanda, &c. nobiscum & cæteris prælatis & aliis incolis regni.*) If a Treaty in Parliament should have been, it had been readier to have expressed in Parliament, or in *Communi Concilio*, and not to have used the other improper Expression.

Besides, I do not find that any Parliament was holden at that Time, nor at any Time between 21 E. 1. and 24 E. 1. whatsoever was said by Mr. *St. John* to the contrary.

But if this Treaty had been, or were intended to have been in Parliament, it is not concluding; for it could not be but in Parliament, as hath been urged.

Object. 6. This Way draweth on many ill Consequences; for it stirs Murmurings and Grudging of the People, by reason of the Burdens upon them.

Answer. The Consequence would be worse, if the Kingdom should be lost, (which I cannot mention without a *quod absit*) and *de malis minimum*.

Besides, popular Grudgings are many, if not most times, causeless; they are not to hinder doing of Right.

Object. 7. This is to become an annual Charge upon the People; there is Cause of thinking so, because since 11 Car. we have had every Year new Shipping-Writs.

Answer. If the Necessity continues, the Charge must continue. The same Reason serves for the Continuance as was for the Beginning of it. Yet I deny that of itself it may be annual.

Cessante causa, cessare debet effectus; but *continuante causa, continuandus effectus*.

This must be left to his Majesty's Justice, which God forbid that any should think he will abuse.

Object. 8. It hath been agreed, that if there were *flagrans bellum*, if we had (*quod absit*) a *Hannibal ad portas*, then this Course without Provision in Parliament, were not against the Law. But it hath been said, that we have neither *flagrans bellum*, nor a *Hannibal*, in our Case.

Answer. Let us consider what the Reason is, why it is not against the Law in case of *flagrans bellum*, or *Hannibal ad portas*. It can be no other but to avoid a further Mischief. The same Reason holdeth in our Case, wherein there is apparently an *initium malorum*; and in such Times as we now live in, or *rebus sic stantibus*, no Man of Understanding, but must acknowledge that Security is dangerous.

Object. 9. Tonnage and Poundage, which was used in former Kings Times to be granted by Parliament, for a Provision of a Stock, for those Purposes for which the Shipping-Writ now issueth, is taken *de facto* by the King's Majesty, tho it be not yet granted him.

Answer. Read the Words of the Statute 1 Jac. 2 ult. at large. In them observe, 1st. a Confession by the Commons, That Tonnage and Poundage hath been paid to the Kings of England Time out of mind: I say, it is so confess'd; I do not say, that in Truth it was so.

2^{dly}, Observe the Word (*Towards*.)

3^{dly}, A Confession that the Tonnage and Poundage are not sufficient for those Purposes, for which it was commonly granted. The Occasions are now for vaster Expences than were requisite at that Time; and what Tonnage and Poundage will not now suffice to perform, must be raised some other Way.

Also it is to be known, for an Answer to the Objection against the taking of it, as if it were not taken *de jure*, that Tonnage and Poundage hath been always taken, with a *continuando* upon the Change of a King, before such time as a Grant came of it by Parliament; upon the Demise of the King, the payment or taking of it never ceased, or was discontinued, until it came to be due by Grant of Parliament.

Object. 10. It appears that a Parliament might have been holden; there are about six Months between the *Teste* of the Shipping-Writ, and the 1st of March ensuing.

VOL. V.

Answer. This receiveth an Answer in itself; for if the King had been pleased to have called a Parliament, to have had Provisions granted, and by or before the 1st of March 11 Car. Provision had been granted, yet the thing commanded by the Shipping-Writ in August, to be ready in March, could have but begun in March to have been then prepared, and so a whole Year apparently lost; in which time, God knows what might have become of this State.

Object. 11. But what if the King surmise only, that there is such Danger as must be prevented; when in truth there is no such Matter?

Answer. Hath not the King a Conscience?

The Law believeth his Affirmations, and for that Cause they are not traversable, as appeared by my Lord Dyer upon the *Ne exeat regno*.

Rex est recordum superexcellens. Teste meipso, is his Language; it is against the Duty of a Subject to contest with him.

Again, it is a Rule of Law; *Cuilibet in arte sua credendum est*; it is the King's proper Art, to have Intelligence of foreign Intentions, to foresee publick Dangers, to conclude and put in Execution what is necessary for the Preservation of his Estate and People.

Tu regere imperio populos, Rex summe, memento: Hæ tibi erunt artes, &c.

Also Mr. Hampden, by his Demurrer in this Case, hath confess'd all the Matters in Fact, which moved the King to issue this Writ, and are mentioned in the Writ.

Object. 12. 26 E. 1. Pat. Roll. mem. 21. hath been urged: there it appeareth that the King, desirous to amend *gravamina populo nomine suo facta*, sent Commissioners to hear and determine what Takings had been from the Subjects made in the King's Name, but without his Warrant; and to punish it presently, and to do right to the Parties: but as for that which should be found to have been taken by the King's Warrant; *Le Roy voit que soit certifie, et il eut ferra tant que ils se tiendr' apais per reason*.

Answer. Note the Distinction in this Case between the Repayment and Satisfaction by the Parties for that which was taken without Warrant, and the Repayment, if it were taken by Warrant of the King. For in case that which was taken by colour of the King's Warrant was against the Law, it was as tortious to the Subject, as that which was taken without the King's Warrant; and in all Justice, the Subject ought to have been restored to his Right, with as much Expedition in one Case as the other.

Also, as hath been already answered, the Words are not (*they shall be paid*) but *le Roy ferra tant que ils se tiendrent apais per reason*; that is, as I conceive it, The King will give them a reasonable Answer.

Object. 13. Upon the Words *Requirimus & Rogamus*, in Writs to the Bailiffs of divers Towns, when they were sent unto to array and send Men at the Expences of the Towns, it hath been urged, *Ergo* the Thing required is a Matter of good-will, and not of Right; in which Case it would rather have been a *Mandamus*, or a *Præcipimus*, than a *Rogamus*.

Answer. Note the *Requirimus* precedes.

Also the Word *Rogamus* signifies as properly a Commandment, as a Prayer. *Linwood*.

Also the Words are, *effectuose requirimus & rogamus*.

Also *Cum princeps orat, precibus præcepta colorat*.

But since those Writs are urged, let them be read; and it will appear, that in the Matter of them, pertinent to this Question, they make directly for the King. *Vid.* for that purpose, *Rot. Sco.* 12 E. 2. m. 7. *dors.* but chiefly *Rot. Sco.* of the same Year, m. 13. *dors.* In the Writ to London there, the King reciting that the *Scots fines regni Angliæ cum ingenti armorum multitudine ingressi*, had taken the Castles of the King, and of his Subjects, and did still hold them; and had besieged more Castles; and that the King, by the Counsel of the Prelates, Earls, Barons, and the Peers of the Realm, had ordained (not a word of the Commons) to be at York such a Day, with an Army; and they had promised to be there with him *sumptibus suis cum toto posse suo: nos considerantes quod pro tanta necessitate, fideles & subditos nostros, ut in præmissis manus apponant adiutrices decet requirere & rogare, ac de vobis specialiter confidentes, vos effectuose requirimus & rogamus quatenus ad præmissa considerationem debitam habentes*, they should instantly array 500 Footmen, and send them to the King, *sumptibus suis*.

Nota, All this done without Warrant of Parliament; and more court-like Words, certainly, were of purpose used in such a Time as that was, of instant Necessity, *ad faciendum populum*, than either needed, or might have been used, if it had been so thought convenient.

Object. 14. Out of *Paſ.* 26 Ed. 1. *Rot.* 35. *Commun' ex parte Rememoratoris Regis*. Reginald Gray being commanded by the King to levy and conduct to the King 1000 Men out of Bromfield and Yale; he, by his Letter to the King, answered, That he durst not chuse 1000 Men there, without Warrant; and that he would not *mewer* (that is, move) in those Parts without Pay.

Ans. His writing that he durst not, is not to the Right, but in his Judgment it was not safe, or might be dangerous.

Also, he durst not without Warrant, it may be, he thought the King's Letter, without his Great or Privy-Seals, no sufficient Warrant.

Also, it appears in the Record, that the King had sent him word before, that the Treasurer should ordain Payment; but it seems Pay came not; and then it is likely Soldiers would not stir without Money: They commonly cry *Guelts*, and if they have it not, are apt to disband.

Object. 15. Repayments commanded by the King (*ut consensientia Regis exoneretur*) *Ergo*, the King could not take of Right in these Cases.

Ans. The Record is 29 E. 1. *Commun' ex parte Rememorator' Regis*; there is a Command for Repayment, *Quia pro urgentissimis negotiis & pro utilitate & defensione totius regni*; the King had received of the Abbess and Convent of Canonliegbe 612 l. and had promised Repayment; note those Words: And also, for that the Abbess had petitioned the King in Parliament for Repayment. So here was a Promise originally for Repayment also in this Case; a very great Sum of Money it was which was taken from one single Corporation, more than was proportionable for them; and therefore just and conscionable, that Repayment should be: this great Sum was taken upon a Scrutiny, 22 Ed. 1. in Places where it was thought that Money might be had. And upon that the aforesaid Sum was borrowed (unwillingly, God

knows, as to the Lender) of this Abbess, and of divers other Religious.

The like Scrutiny was made, *temp.* E. 2. and the like Course for Repayment, as appears, *Rot. Parl.* 8 E. 2.

And indeed, it had been before those Times, and so continued, a usual thing, for our Kings to look into the Treasure of the Religious, when they had Occasion of Money; and sometimes to take their Silver Plate, and rich Offerings, for Supply of instant Wants. And the Religious would not fail to press upon the King's Conscience, until they had Restitution.

Object. 16. 12 E. 3. *Ro. Aiman.* m. 22. *dors.* A Letter to the Archbishop to move all the People to pray and give Alms for the King.

Ans. I say no more, but will read what the Record is, itself loquitur.

Pater, &c. *Cum populus regni, variis oneribus, tallagiis & impositionibus hætenus gravetur, quod dolentes referimus, sed (note this but) inevitabili necessitate compulsi, de eisdem oneribus ipsum relevare non valeamus*; (so no Wrong confes'd; Necessity excused it, and Continuance of a Wrong cannot be justified.) The King desires the Archbishop to move the People, *ut tantam necessitatem humiliter, benigne, patienter & charitative sustineant*: note those Adverbs, especially *humiliter*. And they would have a good Opinion of the King, and would pray and give Indulgences, to the end he might prosper in his Wars for Recovery of his Right in France. (Note, *To the end, &c.*) *Oneribus prædictis (quæ non ex malitia vel præsumptione voluntaria, ipsos gravant) non obstantibus*.

Object. 17. Out of the *Parl. Roll* 13 E. 3. m. 9. & 11. The Remembrances of the Parliament.

One of the Points to be considered and proposed by the King, was for Course to be taken for a Navy at Sea, and for Recovery of Jersey, which the French then had conquered.

Ans. In this Proposition the Words of the King are, *Et per tant ferr' les Comons discharges del guard del mere*; by which Words it is evident, the King conceived, that the Commons were by Law charged with the Guard of the Sea.

It is true, the Commons answer, They pray *in drt. del guard del mere*, that they be not charged to give Counsel, it being a thing whereof they have no Cognizance; but they give their Advice, that they think the Barons of the Ports should do it, and therein they confess, that the guarding of the Land belongs to the Commons, *sans gages de-maunder ou prender*. They could not deny but that the Sea must be guarded. They put not the Charge of that Guard upon the King, but would place it upon the Ports. Of what Strength or Power the Ports were in those Times, I know not; but in our present Age, it is apparent, they are not by many Degrees, near able to defend the Seas, which must notwithstanding be defended, and that Defence can fall upon none but the whole Realm.

Object. 18. Upon the *Parl.* 15. *Paſ.* 2 R. 2. *pars* 1. where the Speech of Scroope then Chancellor is set down; he therein declared the Cause of the Summons of that Parliament, whereby it appeareth, that a little before there had been a Parliament at Gloucester, and no Provision for common Defence was there agreed on; that after the Departure of that Parliament the King had assigned some Prelates and Lords to be of his continual Council, for the Year following; the said Council treating and having before their Eyes, the great Michiefs

Mischiefs and Perils, with which the Realm was on all Parts invironed, and the Summer approaching, and no Ordinance made in Parliament for Salvation of the Realm, and Resistance of the Enemies. And the said Council durst not take upon themselves alone the Ordinances of so perilous and high an Act; but it was advised by them, after Christmas to assemble a great Council, of all the great Lords of the Realm, Prelates and others: and upon a second Warning there came well near all the Prelates, as well Abbots as others, the

Sages here
are sad
Men, not
Judges, as
was objected.

Earls, Barons, Bannerets, and other Sages of the Realm; and then there the great Perils and Mischiefs to the Realm being disclosed, by reason of the great apparent Wars by Land and Sea, whereof no Ordinance was provided; and moreover, it being declared before them, by the Officers of the King, and Treasurers of the War, as to the State of the King, and of the Realm, that nothing remained in the Treasury for the War; it was said, in the same Council, *Pur conclusion final, que ils ne soient cet mischiese remedier, sans charger le Common del realme, que charge ne puit estre fait ne grant sans parliament; Et per tant per assent de eux le parliament ore este somon' Et in le meane temps que suffic' army ser' ordeine al mere in defence, et salvation del realme et del navie, et del Coasts del mere a quel costages tous les Seignors apprompterant voluntairement al roy, divers grand sommes del money. Et issint font bon gents de London, et d'autres vills, as quod le roy per assent fuit in dit grand Counsell, aurit envoy pur ce cause. Et ad done a eux son royall grt, pur repayment.* It hath been said, that the present Question is fully answered.

Ans. I confess that this Record hath a great Shew of Proof, that tho there be an apparent and instant Time of Danger to the very *Salus Reipublicæ*, yet no Charge upon the Commons may be made, or granted, without Parliament. And indeed, this is the strongest Proof upon any Record, that hath been urged on Mr. Hampden's side. But I think it will receive an Answer with indifferent Affections, if these Things be observed.

1. That this Consultation and drawing in question of the using of Means, was before any Charge actually imposed: Which now I insist not upon, because I have formerly touch'd upon it.

2. The King was then in Minority, the Law was not then clear and settled concerning an Infant King's Power. You see it was debated, and not resolved, until the time of K. Ed. 6. *vide* the Case of the Duchy of Lancaster, *Plow. Com.*

3. The Example of Latimer was then fresh; and the Lords, it may be, were over-wary, upon his Precedent, tho it could not parallel with theirs, if they had undertaken, upon so urgent Occasions, to have charged the Commons, without their Consent in Parliament.

4. Note the Words of the Record, That the Lords, appointed Counsellors, could not advise or find any Means; and it is certain, that no Counsellors, none but the King himself could command so high a Matter. The King then was not there; he was at that time scarce out of his Nurser's Care.

5. The People at that time were wavering, and full of Discontents; they had withdrawn themselves from Parliament. Alice Peers had a little before plaid her Pranks, and the young King was not fortunate in his then governing Servants.

Lastly, The thing necessary, *viz.* Security of the Kingdom, was done by another way, *viz.* by lending of Money, as in the Record: But put the Case it had not been done one way or other, then of Necessity the People must have been charged, tho without, yea, tho against their Consent; for the Kingdom must not be lost, an *ultimum refugium* must be found out, rather than so fatal and final a Mischief and Misery must be endured.

Object. 19. *Rot. Parl.* 2 H. 4. n. 22. Concerning Barges and Ballingers, commanded to be made without Assent of Parliament. The Commons Petition saith, That this had not been done *avant ceux heurs*, and pray'd that the Commissions might be repealed. The King's Answer was, That the Commissions should be repealed.

Ans. It is plain that those Commissions, before that time, ceased of themselves; for they were made in Richard the Second's Time, and died with him. All Commissions from the King are but Authorities which end with that King from whom they issue.

Also note, that the said K. Henry the Fourth's Answer in Parliament goeth further, *viz.* But for the great Necessity which the King hath of such Vessels for Defence of the Realm, in case the Wars should hold, the King would commune with the Lords of this Matter, and after shew to the Commons for their Advice. Which Words are notable to this Question. It cannot be denied, but this Answer to the Commons said Petition in Parliament is, in effect, a *Roy soi avifera*.

I note that *Rot. Parl.* 1 R. 2. m. 52. there is a Gratification by the King, in confirming of Franchises to those Cities and Towns, *que sont ore* (that is, now in this Time of Parliament) charged with the making of Ballingers in Defence of the Realm. Here in this Parliament just Occasions were given to the Commons to have complained of this Charge, with the making of Ballingers, charged upon them before the Parliament, if it had been a Wrong: but they complained not of it, for ought appears; and the King's Gratification is no Proof that it was as by way of Recompence for a Wrong; but it is plainly an Argument of the King's Grace to them, by way of Encouragement of them in their Services for the Commonwealth. The like appears, *M. 3. 2. Cheqr. K. Rem. inter brevia directa Baronibus*.

Also it is to be known, that in all Kings times, some Matters have been preferred in Parliament, from the Commons to the King, as Grievances, which in themselves have not been Wrongs, or against the Law: We find in our Books, there may be *damnum absque injuria*.

Object. 20. *Parl.* 7 Ed. 4. n. 7. In the beginning of the Parliament, the King himself spake to the Commons, and, amongst other things, promised the Commons, He would live of his own.

Ans. The King's Speech stayeth not there, but goeth further, the Words are these: 'I purpose to live of mine own, and not to charge my Subjects but in great and urgent Causes, concerning more the Weal of themselves, and the Defence of them and the Realm, than mine own Pleasures; as heretofore by the Commons of this Land hath been done, and borne, to my Progenitors, in time of need.' Which Words are remarkable: not a Syllable in them of doing this only by common Assent in Parliament, but relatively, as heretofore, &c. which how it hath been

de

de facto, you have heard; namely, sometimes in Parliament, and sometimes out of Parliament.

The last material Objection to be answered by my Memory, is the Authority of *Fortescue* in his *de laudibus legum Angliæ*, where he saith, *Cap. 13.* 'That the King of England is *Rex politice regens*; and not *regulariter*, to do what he please.' This needs no Answer, it is agreed. But he further saith, *Cap. 9.* That the King may not *populi substantias proprias subtrahere, reclamantibus eis vel invitis*; that he may not *Tallagia & cætera onera eis imponere ipsis inconsultis*; That he may not *subiectum populum renitentem onerare impositionibus peregrinis*.

I answer, That 'tis most true *regulariter*, & *regula non facit jus, & nulla regula quin fallit*.

Cases of Necessity, Cases of *Bonum publicum*, Cases of *Salus Reipublicæ*, are not to be comprised within ordinary Rules. I have spoken so much hereof already, that now I will say no more, but conclude, That in Cases of Necessity, *pro salute Reip.* every Subject must (even by Rules of Law) bestir himself; must contribute his best Abilities; must set to both his helping Hands.

Rich Men must expose their Treasures.

Able Men of Body must put on Arms.

Great Counsellors must give their best Advice.

Women must not be idle.

Old Men and Clergymen (if they have no other Powers) must attend their Prayers.

And Judges must press and enforce the Laws upon the Subjects, to compel them to contribute.

And so I have done at this time: And what I have said, I have spoken to the best of my Understanding, and in discharge of my Conscience in a Case of *salus Reipublicæ*.

And it being high time now for me to give over, I conclude upon all my Reasons and Authorities cited, That as this Case is upon the Pleading of it, the Charge of 20 s. imposed on Mr. *Hampden*, towards the Provision of a Ship, commanded by the Writ of *Aug. 11 Car. Regis*, is consonant to Law; and consequently, That Judgment ought to be given against him, *Quod oneretur*.

The Opinion of Sir George Vernon Kt. one of the Justices of his Majesty's Court of Common-Pleas at Westminster, deliver'd in the Exchequer Chamber, in the great Case of Ship-Money.

THIS is a Cause of great Consequence, and is one of the greatest that ever came in question in this Kingdom, and the Records are infinite that have been cited on both sides; but by reason of want of Health, and Disability of Body, I have not been able to peruse the Records as I intended, and to have prepared myself, in which I am to argue; and therefore I would desire Time until this Day Sevensnight, to peruse Records, and compare my Notes, wherein, as you may see, I have taken great pains, [*Producing his Notes to the Court*] that I may be the better prepar'd to deliver my Opinion in this weighty Matter: And then, God willing, I will not fail.

But it was answered by the Court, That in regard certain Days have been peremptorily appointed at first for their Arguments, it could not be altered now, nor could they give him any further Time.

Whereupon he said, 'Seeing I may not have any further Time, I must therefore deliver my

Opinion in brief, according as I have conceived it in my Conscience to be, which is as followeth, viz.

'That the King, *pro bono publico*, may charge his Subjects, for the Safety and Defence of the Kingdom, notwithstanding any Act of Parliament; and that it is warrantable by *Gascoigne, 13 Ed. 4. 14.* and moreover, that a Statute derogatory from the Prerogative doth not bind the King; and the King may dispense with any Law in Cases of Necessity, *2 Hen. 7. 11.*' And so concluded for the King.

A few Notes of the Argument of Sir Tho. Trevor Kt. one of the Barons of his Majesty's Court of Exchequer, in the great Case of Ship-Money.

After he had opened the Record he said, The Question upon it was, Whether Mr. *Hampden* should be charged with the 20 s. imposed upon him, as this Case is?

This Case, by reason of the Weightiness of it, is adjourned from the Exchequer hither to be argued, and the Advice of all the Judges is required herein; many Days have been spent in the arguing of this Case, as it well deserves; six Days by the Defendant, and six Days on the King's side.

It is some Labour, in a Case of this Extent, to contract myself, according to my Conscience and best Knowledge: I shall seriously ponder the Weight of this Case, and digest it, as by the Law is warrantable, and so grounding my Judgment accordingly. And the Judgment which I shall give, in fine, is, That Mr. *Hampden* ought to be charged with this 20 s. and is to give Satisfaction for the same. My Lord *Coke* saith of a short Case in his *11 Report*, That tho it be as short a Case as ever was argued, yet the weightiest in any Court for Consequence: So it may be affirmed of this Question, for the Sum is but 20 s. but the Weight thereof is of far greater Extent: it concerneth the whole Kingdom.

Mr. *Hampden* hath demurred, and thereby hath granted all Matters of Fact to be true. The Defendant's Council have taken much Pains for their Client; and, without Flattery, so have the King's Council.

I acknowledge, the laying of a Charge upon the People by Parliament is a safe way, if Time and Occasion will permit. *Anno 1588*, when the *Invincible Armada*, so termed, came into England, the provident Care for the Prevention thereof was out of Parliament. Alas! it is not Parliaments can keep us safe. Was not that detestable Gunpowder-Treason *3 Jac.* devised to have been executed in the Parliament-time? The Wisdom of the Parliament did not discover this utter Ruin and Destruction, that had like to have happen'd to the King and Kingdom, and to the Overthrow of Religion; but it was the great Mercy of God that did it.

This Kingdom hath been always Monarchical: A Democratical Government was never in this Kingdom. In the Time of the Britons, 500 Years before the Birth of our Saviour, when *Brute* came from Troy into Britain (as one writes) it had a politick and regal Government: This is confirmed by the Letter from the Pope to King *Lucius*. And our King hath as much Power and Prerogative belonging to him, as any Prince in Christendom hath.

hath. It is the King's Prerogative to appoint the Beginning and Ending of Parliaments. So great a Body can move but slowly. A great part of the seven Months would be spent, or the Parliament ended; and then we were but to begin to rig and trim our Ships, to provide Powder, Shot, Cables, &c. many of these, perhaps, to be had in foreign Parts; Masters and Gunners, &c. to be got: Ready Money must be had for the providing of all these; this will require convenient time before this can be done. What Hazard may the Kingdom run all this while? What Policy is there to make State-Affairs known to the People? They may thank themselves, they would not make a Ship for the Service, and then they might have had it for their own Use afterwards. When the Kingdom is in Danger, the King may command a Supply for Prevention thereof; and who can tell better than the King how to prevent the Danger? *Necessitas non habet Legem*. The King then must not forbear. The common Law doth regard the common Good above particular; as in Pontage, Murage and Paveage.

The Provision of Shipping hath prevented us from Danger hitherto, and I hope it will still. It hath increased the Honour of the Kingdom. It's known not only to ourselves, but to other Princes, that our Ships are of far greater Burden, Strength, and better furnished, than ever was before. All which redoundeth to the King and Kingdom's Honour. The Ship, called *The Sovereign of the Sea*, may be termed *The Sovereign of all Ships*.

To conclude: The Sum assessed for this Business, I wish it may be paid by all cheerfully, for it is for a general Good, for the Safety of the whole Kingdom: The Subjects are not prejudiced by it, either in their Dignities, or Properties in their Goods: The King's Prerogatives protect the Peoples Liberties, and the Subjects Liberty the King's Prerogative: 'Tis proper for Kings to command, and Subjects to obey. We that are the Judges of the Kingdom have paid it, and therefore it is fit our Opinions concur with our Actions in this Case. And so my Advice is, That Judgment ought to be given that Mr. Hampden ought to be charged with the 20 s. assessed on him.

*The Argument of Sir George Crooke Kt.
one of the Justices of his Majesty's Court
of King's-Bench at Westminster, in the
Exchequer-Chamber, in the great Case
of Ship-Money.*

THIS Case of Mr. Hampden's stands upon Record, and what Judgment may be upon this Record is the Question. I find no Party in this Case but Mr. Hampden. A *Scir' Fac'* is brought against him, to shew Cause why he should not be charged with the 20 s. assessed upon him, towards the finding of a Ship.

The Occasion of that was the Writ of 4 Aug. which is the Foundation of all; and that is directed to the Sheriff of Bucks, as to other Sheriffs, to prepare a Ship of such a Burden, for the Reasons mentioned in the Writ, *Quia prædones*, &c. because the Kingdom is infested with Pirates, &c. *Quod datum est nobis intelligi*, &c. for that they do seek to draw Men into Captivity; and also, lest we should lose the Dominion of the Sea; and for these Reasons these Writs are sent forth. For the Time that they were to continue abroad, it

is twenty-six Weeks, so long the Payment of the Men to be at their Charge: *Et quos Rebelles*, &c. and if any do rebel, that they should be imprisoned. And so the Record setteth forth further, that upon this Writ a *Certiorari* went forth, and Mr. Hampden was certified not to have paid it.

Now upon all, Mr. Hampden hath demanded Oyer of all the Writs, and hath demurred.

I must confess, this Cause is a very great Cause, and the greatest Cause that ever came in question before any Judges. And for my own part I am sorry it should come in question in this Place; more requisite it was to have it debated in a publick Assembly of the whole State: for on the one side, it concerns the King in his Prerogative and Power Royal; and on the other side, the Subject, in his Lands, Goods, and Liberty, in all that he hath, besides his Life.

For my own part, I am sorry that I am enforced to dissent from my Brothers that have argued before me; a fitter Course it were for me to have argued with them privately, who have argued so learnedly and well. I have studied all that I could to have concurred with them; but, speaking according to my own Heart, (for we are to give Judgment upon our Oaths) in respect of my Reason and Conscience, I cannot concur with them; it makes me at a stand with myself, because of the Arguments of so many learned Men before me, and to suspect my Judgment, whether it be erroneous or no. Yet I must set down my own Reasons, and upon them leave them to my Lords that come after me to judge on.

Judgment is of the Lord, the Hearts of Men, and also their Judgments, are in the Hands of God; and when Judgment is once past, we have done. For my own part, I know in this Case we cannot do so well as we should, but to satisfy ourselves in our Consciences and our Understandings; and in this Case we are to give Counsel to the King according to our Oaths, whether this Charge be legal or not. If legal, the Subject ought not to complain: If not legal, then not in the King's Power thus to charge the Subject.

The King's Counsel have maintain'd this Writ to be good; and the Judges that have argued, in their Judgments have maintained it. Then the King is advised by his Judges, Whether this be legal, or no? If legal, it is well; if not, then the Burden lies upon us. For the King doth nothing but what he is advised.

The Case hath been excellently, learnedly, and well argued on both sides; for that which was pressed by Counsel, on either side, did not much move, for they argue as Counsel; and we are to give Judgment upon our Oaths, on what they have said.

But the Judges Opinions already deliver'd do much trouble me. When I have been of Counsel, I have argued one way, and have thought myself very clear; when I have come as a Judge and argued, I have thought clear otherwise of the Case. I desire to give Judgment in this Case according to God's Direction, and my own Conscience, and that is the best. And so I do not doubt but all my Brothers have gone according to their Conscience, which makes me suspect myself. But every Man standeth or falleth to his own Master, I desire God to guide me to a true Judgment; and tho, for the Reasons aforesaid, I doubt myself, yet I am not of the same Opinion with my Brothers; but according to my Conscience, I think that

that Judgment ought to be given for the Defendant : For which my Argument shall stand upon these Points.

1. I hold that this Writ is not allowable by the Common Law, but is a Writ absolutely against the Common Law.

2. Admit it was good at Common Law, yet it is against divers Statutes.

3. I hold, that no Necessity, nor no Pretence of Danger, can give this Cause for the Writ : For if the Writ be against the Common Law, no Pretence of Danger can warrant it.

4. There is no Warranty by Prerogative of the Crown, nor Power Royal, for this Writ.

5. That this Writ is the first Writ that ever was devised in this Kind, and first put in Practice, either in Inland Counties or Maritime Parts.

6. That there is not any one Precedent, nor any one Record Judicial, or Judgment in Point of Law for the Writ ; if not, then I hold it not fit to be maintained.

I come now to the Writ itself. 1. I hold the Motives of this Writ to be insufficient to warrant the same.

2. The Commands of the Writ are merely against the Law ; because the Commands of the Writ are, to charge the Subject to find a Ship, with Men, Munition, &c. against the Words of the Common and Statute-Law.

3. If they were, yet the Assessments of the Writ are not warrantable by the Law, and so no Assessment : And if no good Writ, then the *Scir' Fac'* will not lie.

4. I come to the *Certiorari* : And, whether it be well-grounded, or no, is the Question. And I hold, it doth not well issue, as this Case is.

1. For the Point of Law. We that are Judges are bound, according to the Law, not according to our own Imaginations, both to judge according to the Law, and the Law of this Land, either of the Common Law or of the Statute-Law : and I see no Book, nor know of any Authority that doth maintain this Writ ; but contrariwise, there are Books and Authorities in Law, that say, This Writ ought not to be maintained. It is a Rule in *Littleton*, that *That which was never done before, cannot now be done.*

I say, there cannot be produced an Example of the like Writ, I mean the Writ 4 Aug. 11 Car. that ever went unto the whole Kingdom, to make Ships, &c. nor unto all the Maritime Counties, at one time ; but it is the first Precedent, either for Inland Counties, or Maritime Parts ; and if no Precedent before, then not by the Law to be maintained.

2. It is against the Common Law of the Land, which gives a Man a Freedom and Property in his Goods and Estate, that it cannot be taken from him, but by his Consent in Specie, as in Parliament, or by his particular Assent : for the Law puts a difference between a Freeman and a Bondman. A Bondman's Goods may be taken without his Consent ; but not so of a Freeman.

Then thus stands [the Case, and the Question] ariseth, Whether this Writ to command the Subjects in any Inland County, to prepare a Ship, and provide Men, Munition, &c. went out by their Consent ? And whether allowable or no, if without their Consent, for this is a Charge upon the Subject. And I say, no common Charge upon the Subject ought to be but by a common Consent, or in a Parliamentary Course. Mr. Lambert saith,

that in the Conqueror's Time the King could charge the Subject with no unjust Taxation, nor Taillage, *sed per commune concilium*. And that was a Law not given by the Conqueror, but allowed by him, as to be the Law of the Kingdom.

In the *Charta* in King John's Time, it is plain, the Liberty of the Subject is there confirmed, *Nul-lum scutagium, nullum auxilium nisi per commune concilium*. It appeareth plainly by the Books, that this cannot be done but by Consent in Parliament. *Fortescue* Chief Justice setteth down what the Law of *England* is in that kind, as Instructions for the young Prince. Saith he, 'The King governeth his People by Power, not only Royal, but also Politick.' If this Power over them were Royal only, then he might change the Laws of his Realm, and charge his Subjects with Taillage, and other Burdens, without their Consent. Thus the King can change no Laws, nor yet charge them with strange Impositions against their Wills. He setteth down, as the Head is the chief of the Body, so the King is the Head of his People : He cannot take any thing from them, without their ordinary Consent ; the common Consent it is in Parliament. *Cap. 3.* an expresse Clause there, *hoc individuo*. Shew me any Book of Law against this, That the King shall take no Man's Goods, but he shall pay for it, tho it be for his own Provision ; or lay any Burden upon his Subjects, but he must do it by their Consent in Parliament. If this be the Privilege of the Subject, then it is expresse, the Subjects ought not to have this Charge imposed upon them, but by their common Consent. Tho it be said, A Statute is the Act of the King, the Lords and the Commons only give their Consents ; I say, it is the Act and Grant of the Commons, as well as of the Lords ; for what Consent is given there, is given by every Man of the Kingdom, by the Power of the Voice which they gave in chusing the Knights of the Shires and Burgeffes. There is a Book Case, 13 Hen. 4 fol. 14. expressly, That no Man shall be charged without his Consent in Parliament. *Gascoigne*, Chief Justice, gave it as a Rule. *Coke's Reports*, *Clark's Case*, No Man to be charged in *St. Albans*, but with their Consent.

In the Chamberlain of *London's Case*, to put a small Sum upon a Merchandize, &c. when it is for the Good and Benefit of the People, is a thing to be allowed thro' a common Ordinance to be Good, so they have no Loss by it ; as in case of Murage, Pontage, Pavage, and Tolls of Markets : Taxes upon the People for these are allowed, because they are Matters for Use of the People, and are not as a Matter of Charge imposed upon the People.

Fitz-Herb. Na. Br. The King hath the Government of the whole Kingdom, both in time of War and Peace. None will deny but that he may command, that no Man can doubt of ; and therefore, in that kind, in point of Inundation, the King, by his Writ, commandeth, That that shall be stopped, and be done by those that have Benefit or Loss by the Inundation ; and those only are to be charged, as come unto *Kent* : If an Inundation be in *Kent Marshes*, shall the County of *Middlesex* be charged therewith ? no ; but those that have Profit by it, or have Loss by it. *Vid.* the 10th Report.

Then here standeth the Case ; if that be so, the Question is not now, Whether a common Charge may be levied upon the Subject, without Consent : No question but a common Charge may, if occasion, and every Man ought to obey it.

But the Question is, Whether, upon the Allegations in this Writ, there shall be a charge to impose Money upon them in the mean time, without their Assent? I say not, but by a parliamentary Course: in that kind the Common Law doth not allow it. A notable Case in 14 E. 2. *Banc. R. Rot. 60. Heb. and Lever's Case in Durham*; an Action of Trespass was brought against *Lever* for taking away the Chest of *Heb's*, with Goods and Money in it; he pleaded not Guilty; the Jury gave a Special Verdict, That the Defendant took the Money; but it was upon this Occasion: The *Scots* had invaded *Durham*, and burnt divers Houses about *Durham*; upon which the Inhabitants of *Durham* assembled together to consult about their Defence; and took an Oath to obey the Ordinance to be made by Consent amongst them; whereof the Plaintiff was one that swore, and gave his Consent: Whereupon, they made an Order to give the *Scots* a Sum of Money to depart, but they would not be gone without ready Money; whereupon they made a second Ordinance, That every Man's House should be searched, and where they found Money, to take it: Thereupon the Defendant took the Money out of the Plaintiff's House. The Judges asked the Jury, If this last Order was done with the Plaintiff's Consent. They said it was done by reason of the Occasion. Thereupon Judgment was given for the Plaintiff: That because it was not with his Consent, that therefore they ought not to be charged. It came into the King's Bench, and they seeing of this Special Verdict, the Judges of the King's Bench reversed the Judgment; for why? what was done, was done by his own Consent and proper Act, because of his Consent upon his Oath; and therefore (said the Judges) he had means to help himself against the Commonality of *Durham*, and they to pay him again to his proportionable Part. This proveth, that no Man ought to part with his Goods, but with his Consent.

That of *Rich. 2.* which is not a Statute, yet doth shew, that the Law was at that time, as it is the same at this Day. Advice was taken in a great Assembly how to charge the Commons: And it was answered, That they could not be charged, but by common Consent in Parliament. And it was the Declaration of *Scroope* in the Parliament-House, That without Consent in Parliament, the Commons ought not to be charged; because the Commons have a Consent in parting with their Goods. It is said in *Doctor and Student*, That the Subject hath such a Property in his Goods, that no Man shall meddle with them, but by his Consent; which is the Reason they recover Damages when they meddle with their Goods, not by their Consent.

Another Reason why the Common Law looketh into it, is, because of the Inconveniencies that might insue, if this should be allowed; To charge one Ship, by the same Reason there might be ten Ships charged. We have a pious King, and tho he will not do it, yet the Law looketh into this Inconvenience. That of *Danegelt* began in the Year 991. The first Composition was 10000 *l.* The second 16000 *l.* The next 24000 *l.* The next 36000 *l.* And in 10 or 11 Years, by five several Risings, it came to 48000 *l.* And so, for ought that I do know, this may come to forty hundred thousand Pounds. Therefore the Law looketh to make certain the Charges. The first double Subsidy that ever was, was 31 *Eliz.* and the Chancel-

lor of the Exchequer said, It did make his Heart to quake to move for a double Subsidy, one Subsidy being granted so lately. The Reason of it was, because the *Spanish* Invasion was foreseen.

After the *Spanish* Invasion was past, then came the second Grant of a double Subsidy; and he said, he hoped not to live to see a Subsidy granted again. 33 and 39 *Eliz.* It came to three Subsidies, and four Subsidies, but if there had been ten Subsidies, what was done, was done by Parliament; and the Law alloweth it because of the greater Inconvenience. Then it is in the Judgment of the Parliament for the appointing of those Subsidies, as the Occasion requires.

The Statutes of Tonnage and Poundage, as appears by all the Statutes made in *Rich. 2.* and continued till *Hen. 4.* 5, 6, 7. and so downwards to King *James's* Time, are to the end the King might have Money in his Coffers for the Defence of the Realm, and for the Safe-guard of the Sea, that he might not, upon a sudden Occasion, be unprovided; because it is Reason and fitting that Kings should ever have Money ready against any Occasion. But now it is not granted, yet it is taken, the same Profit is made still: And I do not doubt but the King doth employ it for the Defence of the Kingdom, and Safeguard of the Sea. The difference between a Charge and Defence is much; for the First there is no Law to compel the Subject unto it, but by Parliament: For the Second, which is the Defence, every Man's Person is bound in Defence, *Exponere se & vitam ipsam*, upon Peril thereof; but he is not bound to any Charge without his Consent. So in this kind I hold, as the Law standeth, that no Charge ought to be imposed, but by their common Consent; for you will make it all one to take away the Property of the Goods, which you do *quodam modo*, tho not *in specie*. Power is given to distrain the Goods, and to sell them; and every Man is liable to the Discretion of the Sheriff.

But admit this Charge might be imposed by the common Law, yet I do conceive it is prohibited by the Statute; for I hold, as now my Brothers the Judges have held, that the Statute *de Tallagio non concedendo*, is a Statute, notwithstanding what hath been argued at the Bar to the contrary. It is apparent in our printed Books; and in one of our Books, the express Time is mentioned when it should be made, *viz. 25 Ed. 1.* then it is said to begin. *Taillage* is an antient Aid, and so is *Purfile marier*, and *pur faire fitz chevalier*; but no *Taillage* without a common Consent in Parliament; so I agree with my Brothers, that it is a Statute.

Next this Statute of 25 *Ed. 1.* which is said to be no Statute, the Kingdom of *England* hath ever held it for a Buckler for them, That no Charge (without common Consent) should be laid upon them. And the Reason wherefore this Statute was made, was in respect of the great Taxes imposed on the Subject without Consent, in time of War.

The next Statute is 14 *Ed. 3. cap. 1.* A great Subsidy was then granted. What was then done? the King doth grant for him and his Heirs not to put them to any Charge hereafter, unless it be by common Consent in Parliament.

Oh! but this is but for that King himself alone!

I answer, it is perpetual. If the King doth grant for him and his Heirs, it doth go to all his
G g Posterity,

Posterity, and is a good Act of Parliament; so that is the second Act of Parliament in the Negative, That no Charge shall be laid on the Subject, but by common Consent in Parliament.

That which is stood upon by my Brothers, is 21 *Ed. 3.* That Statute was made to grant a Subsidy upon every Sack of Wool; and also Taxes upon Merchants Goods transported, 6 *d.* in the Pound. This Statute thus made, the King afterwards, because few of the Sacks of Wool were carried over before *Michaelmas*, sent forth a Proclamation, that 6 *d.* in the Pound should continue till *Easter*, and no longer: but half a Year after this was complained of to the King, and the King (by Proclamation out of Parliament) did take away the 6 *d.* in the Pound. 22 *Ed. 3.* in the *February* then next following, an express Act of Parliament (this Subsidy so granted) to continue till *Michaelmas* and by Proclamation to continue till *Easter*. They confirm all till *Easter*, and no further continuance of it to be.

By this appeareth, that for so small a thing as 6 *d.* in the Pound for such a Time, as from *Michaelmas* to *Easter*, that it was a Charge not to be borne but by Consent in Parliament.

4 *Hen. 4. m. 28.* A Subsidy granted, That this should not be drawn into Example to charge the People, but by common Consent, and that in Parliament.

13 *Hen. 4. m. 10.* There it is said, Where a Subsidy is granted, it shall not be granted henceforward for Defence of the Kingdom, or Safe-guard of the Sea, but in Parliament.

Then came a Parliament. What did they complain of? The Patent of the Office of Alnerage, tho it was but a small Charge, yet they set down that this was contrary to the Law, That no Taxes, nor no Aid should be imposed on the People, without Consent in Parliament: The Commons were then very zealous in small Matters.

2 *Hen. 4. m. 22.* *Hoc individuo.* At that time a Commission went forth to divers Towns in the Kingdom, to provide, &c. When there came a Parliament, 2 *Hen. 4.* they complain of those Commissions that inforced them to do that which by the Law they ought not to do; and pray'd those Commissions might be repealed: The Answer is absolute, *Let it be done. Soit fait.*

The next is 1 *Rich. 3.* True, the King was an Usurper. Benevolences were granted; but that was no Charge, as ours is, and therein the Commons claimed their Liberties.

Lastly, The concluding Law is that of 3 *Car.* the Petition of Right, That no Person shall be taxed without Consent of Parliament: And when the King was informed of the former Statutes how they were; Thereupon this Statute 3 *Car.* was made, which reciteth the Statute *de Tallagio*, and divers other Statutes; and it was referred to my Lords the Judges (most whereof are here) whether this Law doth give more than formerly from the King. And we were all of Opinion, that this Law did give no more than what was formerly, and was only but a reviving of the antient Privileges of the Subject; it added no more, but only revived what was formerly granted.

I do conclude, that no Charge can be imposed upon the Commons, without their Consent in Parliament. We that are Judges, must go according to the Intention and Meaning of those Laws. The Meaning of the Laws in this kind was, that no

manner of Charge, Aid, or Tax should be laid upon the Subject, but by Consent in Parliament. The Judges are to expound them according to their Intention.

But they say, the Practice hath been otherwise.

We say not now what *de facto*, but what *de jure* was done; and we, as Judges, must not allow *de facto*, *sed quid de jure factum fuerit.*

To answer the great Objection, It is for the Defence of the Kingdom: Here is such a Necessity and Danger, as will not admit the Delay of a Parliament.

I hold, for my part, that no Necessity nor Danger can allow a Charge, which is a Breach of the Laws. I hold it absolutely, that for a general Charge of Money upon the People, it cannot be upon any Pretence of Danger or Necessity. Mens Persons may be used in the case of Necessity or Danger; for every Man is bound to defend the Kingdom, but no Necessity can procure this Charge without a Parliament. The Law provideth a Remedy, in Case of Necessity and Danger; for then the King may command his Subjects, without Parliament, to defend the Kingdom. How? By all Men of Arms whatsoever, for the Land; and by all Ships whatsoever, for the Sea, which he may take from all Parts of the Kingdom and join them with his own Navy; which hath been the Practice of all former Kings: In their Necessity they have taken Ships from all Parts of the Kingdom. 10 *Ed. 3. M. 2. Scot. 10 Ed. 3. M. 16.* when there was a great Navy of Scots and French appeared, and intended to come and invade the Kingdom, the King appointed two Admirals, one towards the North, the other towards the West, and to meet together at what Place he pleased; and, *m. 16.* sent into North-Wales and South-Wales to maintain one Ship, either of them upon their own Coasts of the Sea, for the Defence of the Kingdom. And in *Rot. Alm. 12 Ed. 3.* Writs went for the arresting of Ships in all Parts of the Kingdom. *Rot. Viag. 1 H. 4. m. 12.* Writs issued to all Archbishops and Bishops, shewing imminent Danger, that they should be ready in Arms, to come and assist *ad custodiendum mare*, whithersoever he should appoint them. But in that Time, when the Danger, was such, yet no Ships appointed to be prepared throughout the Land. And 5 *Hen. 4.* that all the Men of all Parts should come together in such a Place: This was only an arraying of Men to be in readiness. 3 *H. 5.* to the same purpose. And 1 *Hen. 7.* which was much stood upon, of a Rumour of Wars between the King of the Romans and the French King, which might, perhaps, in the End, tend to an Invasion of this Kingdom, there was an arraying of Men, from 16 to 60, and gathering of Ships, and taking Order for Watch and Ward upon the Sea-Coasts, but no Command to make Ships. 4 *Hen. 8. pars 2.* there the King by Proclamation saith, That *the Enemy is ready to enter, Ships are furnished with Men of War to invade the Kingdom.* What then? What was done then? It is no more, but that every County in England have Men in readiness to assist, from 16 to 60, to defend the Kingdom, and to have good Watches and Wards upon the Sea-Coasts.

But, I pray you, in all these Times of *Hen. 8. Hen. 7. Hen. 5. Hen. 4.* were there ever any Writs went forth for Ships into any County? It doth not appear that any County was to prepare or make any Ships; but only Men in

Arms:

Arms : So the Law makes Provision, in Time of Danger, by help of their Persons, and with Ships, not with a pecuniary Charge ; for that cannot hold for any, nor can be done without Parliament. And if new Ships must be made, it must be made by Parliament. If so be the Writs be to make Ships, then let the Sheriffs make them, and shew for their Discharge upon Record, that they are made and prepared. But to appoint by Writs Ships to be made, and by their Directions appoint the Sheriffs to levy Money to pay off some of the Ships, was never yet done, this being a Precedent of the first Impression. The Law did always account the Parliament able to provide and to give sufficient Aid, and most fit to consult *de arduis Regni* ; and there is a Consent of and Grant of the Commons to what is done, they are Actors in it.

By the old Law of *Alfred*, Parliaments were to be held twice a Year ; and by express Statute made 4 *Ed.* 3. 14. an express Law was made, That every Year a Parliament should be held, especially if Need required. And by another Statute, for avoiding of Grievances that daily happen'd, a Parliament shall be held once a Year. Then it is to be conceived, a Parliament may be called, and Things may be charged that way.

And for the Objection, That a Parliament is not the speediest way to prevent the Danger ; the Imagination of Man cannot invent a Danger, but Course may be taken for Defence, till a Parliament be had. So, for my part, I hold this Point of Necessity, or Danger, cannot be held a sufficient Ground for this Writ.

The next Thing is this ; Yea, but this is maintained by Prerogative and Royal Power. I say for that, by my Oath I am bound to maintain all the true Prerogatives of the King ; and we that are Servants to the King must maintain his Prerogatives, and, to the best of our Skill, not suffer them to be diminished. But I hold there is no such Prerogative in this Kind.

The Prerogative is, that which the Law presumeth, *That the King can do no Wrong* : And so it is in *Bracton*, *Rex potest facere quod de jure potest facere*. 11 *Rep.* Magdalen-College Case, 246. *Plowden's Comment*, The King can do no Wrong, nor any Act to wrong the Subject. *Bracton*, *hoc non potest agere quod non potest agere juste*. Therefore if this Charge be against the Law, so much to the Prejudice of the Subjects, as I conceive it to be, the King will never do it ; for it is done by Misinformation that it hath been usually done, and may be justly done. 21 *Ed.* 3. a Patent is made, which is a Wrong to the Subject, the King, *de jure Regis*, ought to revoke the Patent ; for the Law hath that honourable Conceit of the King, *That he can do no Wrong*. A King, therefore, to have a Royal Power or Prerogative, to do that by his Writs, to command any thing to be done that is against the express Laws of the Kingdom, to the infringing of the Liberties of his Subjects, is not admitted by the Law : The Royal Power is to be taken away ; for as it is before said by *Fortescue*, he can change no Law, nor charge his People, but by common Consent in Parliament. So, for my part, I hold that this same Charge upon the Subjects, by his Royal Authority, it is not allowable.

The King, we know, is a most just and pious King, that he will do nothing against his Laws ; if he did know it to be against Law, he would

never desire it. When a Judge of the Land was called in question, in Queen *Elizabeth's* Time, about denying some Loan, delivering his Opinion against the same, he said, It was against his Oath, and against the Law, to advise her Majesty to it. With which she rested satisfied. If the Judges say, by Law the King may do this ; he may do it : If they say no, but by Act of Parliament, he will never do it.

But it is said, The King taketh the Course, *More majorum*. There is not any Precedent especially maintained, by any judicial Record, that warranteth this Course : and if there were any Precedents, we are to judge according to the Law, and not according to Precedents ; not to judge what hath been done, but what of Right hath been done. 11 *Rep.* Magdalen-College Case, tho there be many Precedents, that maintaineth not a Right ; the Question is still, Whether a Right or not ?

But admit that Precedents could make it to be lawful, yet I hold there is not any one Precedent to maintain this Case.

For, *First*, I say there is no one Precedent goeth to Inland Counties all over *England*, before now. I say, to Maritime Counties to prepare, as my Brother *Berkley* confessed, that he knew none for any Inland Counties, but 1 *Rich.* 2. 11, 52. there Writs went out to divers Inland Towns, but not to Counties, to make Ships ; and besides, these were not any to Inland Counties.

To this I say, Those Writs that went out at that Time were done by Conveyance in Parliament : for an Order was made in Parliament, That all that had any Charters, the antient Cities, Boroughs and Towns, that had any Charters of Liberties, should there be examined ; and appoints how, and by whom ; and have their Liberties confirmed without Fine, if they would produce Ships for the Defence of the Kingdom. But yet in this Record not one Inland County or Maritime County is charged, nor no Inland Town, but those that would have their Liberties confirmed.

Now to look upon the Precedents of *K. John's* Time, 6 *Johan.* 9 *Johan.* 14 *Johan.* &c. here be the six Precedents in Court ; and I have looked into every Precedent on the King's side, to satisfy myself ; and all those Precedents are only for arresting of Ships, that they should not go forth of the Realm ; and 15 *Johan.* all Ships to be ready as the King shall have Occasion.

Then we come to *Hen.* 3. Time : 13 *H.* 3. m. 5, 13, &c. there are six of these Records, I have read them all ; they are no more, but only to Port-Towns, to arrest Ships, and the rest to have Men at Arms, in readiness upon the Sea-Coasts, and that but for forty Days.

Then for the Precedents of *Ed.* 1. Time, all of them being examined, not any one of them go to the Counties. 13 *Ed.* 1. 77. divers Ships are appointed to be made, but it is *ad sumptum Regis*, and only unto Sea-Towns ; the Record shews, that by the Barons of the Exchequer they have an Allowance for it. 23 *Ed.* 1. m. 5. same Roll, a Writ to the Sheriff of *Norfolk*, to compel them to maintain their Sea-Coasts. 14 *Ed.* 1. a Writ *ad Congregandas centum Naves paratas*, and armed Men to be put in them. So to command in that kind the King may, and we must obey ; he commands Ships ready made, not to make them. Afterwards, 14 *Ed.* 1. *Rot.* 17. several Writs to the Archbishops and Bishops, to

attend with their Arms in readines, to maintain the Coasts. 14 *Ed. 1. Rot. 78.* a Writ to the County of *Berks*, a Thing much stood on; it is only for Matter of Array, if it be well looked into, and no Matter of making or finding of Ships; and divers other Writs in this King's Reign, for maintaining of Armies in their proper Counties: and no Man can deny but that every Man in his proper County is to go to defend the Kingdom. And also for having of all Ships of above 40 Tuns in readines: But to make new ones, in any Inland County, is not warranted by any Precedent, that I can see; tho I have looked over all the Records that have been brought unto me; no, not in Maritime Counties, to make Ships.

For the Precedents of *Ed. 2. Time, 9 Ed. 2. &c.* to put them all together, they are only to congregate Ships to be in Readines, but not to make new Ships.

To come to *Ed. 3. Time, 7 Ed. 3. m. 9.* Command is to assist the Admiral with their Ships, as Occasion shall require. 10 *Ed. 3. 11.* a Precept to Port-Towns only, to bring their Ships to *Portsmouth*, for 13 Weeks, furnished with Victuals, &c. 2 *Ed. 3. 16.* not to depart without Licence. 10 *Ed. 3. 12 Ed. 3. Rot. Alm.* Writs only to Port-Towns, *ad custodiend' Mare.* 12 *Ed. 3. m. 12.* a Command to *Henry Hufsey, &c.* *ad congregand' homines*, and to attend on the Sea-Coasts. But these were the Causes of making the Law, 14 *Ed. 3.* that there should be no further Charge laid on the Subject: so that all before that Statute do not prove our Case. 15 *Ed. 3.* A Custody of the Ports commanded, and Warrants to arrest Ships. 16 *Ed. 3.* Command to the Earl of *Dover, &c.* to prepare Ships against an Enemy that intends to come to subvert the Kingdom, and to set up Beacons; which is the first Original of Beacons that I observe. All these Precedents in *Ed. 3. Time*, were but to keep Men and Ships in readines, and to bring them to the Sea-Coasts. 46 *Ed. 3. m. 3.* that the *French* made great Preparation, whereupon they are commanded all to array, both Clergy and Laity, to guard the Sea-Coasts. And in those Times, when there was more likelihood of Danger than now, no Writs came out then, but only to array Men, and keep them in readines. 50 *Ed. 3.* to array Men in *Norfolk* to defend the Coasts. 29 *Ed. 3.* Command to the Bishop of *Durham*, and into *Cumberland* and *Northumberland*, to have their Men in readines. A Number of these Precedents in that King's Reign.

For *Rich. 2. Time*, it doth not appear by any one Record there is any thing for Ships, but only for the Custody of the Sea.

And for *Hen. 4. Hen. 5. Hen. 6. Time* until 2 *Eliz.* they are all concerning Matters of Arms, not to make Ships. And when the Rebellion in the North was in the Queen's Time, then by Writs Men were commanded to be in readines, for Defence of the Kingdom.

The next Thing we come to is the Writ itself. For my part, I hold it to be illegal; mark the Recital of the Writ, it is no more but *Quod datum est nobis intelligi, &c.* not a plain Affirmation, as Apparency of it. Then the Motives are, Because the Pirates do infest the Seas: Such Motives as never were in any Writ before. All former Writs were not to provide great Navies in respect of Pirates; there is no such great Danger of them. 15 *Ed. 1.* it is there set down, when Pirates infested the Seas, they took Order that there

should be only 10 Ships to scour the Coasts. 16 *Ed. 3, &c.* Command that Men should be arrayed, lest the Enemy should invade the Kingdom; but no mention made of Pirates, for they will be removed with a few Ships. Mark the Times when great Pirates were upon the Sea, they would be glad to sculk away when the King's Navy came towards them. Now that this should bring the King's Navy to Sea, is against the Law of the Land, and are not Motives sufficient to induce a Charge of this Kind.

Secondly, The very Commands of the Writ it self are unlawful, in respect of the Inconveniences to an Inland County; whereas there was never any Inland County charged in that kind before, as Coast-Towns that have been heretofore charged with Soldiers, and had none, were discharged. When *Bodmin* in *Cornwall* was charged with finding of a Ship, they shewed they never had Ship nor Mariners there, and that divers of them were imprisoned for not finding such a Ship; whereupon Commission issued to the Admiral to examine the Truth thereof: And because it was found they had no Mariners, they were discharged.

But Mr. Solicitor answered, This was done by the Admiral, beyond his Commission; but 13 *Ed. 3.* the same Year, there was a Writ awarded to *Chichester* in the County of *Suffex*, to find a Ship, and they complained, they had not any Ships used to arrive there, nor Mariners therein inhabiting; and thereupon they were discharged, upon a Writ out of the Chancery: So I say, Inland Counties that are not wont to have Ships, the Law doth not appoint them to do that which they cannot do, nor will not expect from them that which is impossible.

The Pursuance of this Writ is against Law; it appoints them to provide a Ship, hire Men, and provide Victuals and Wages for them, 26 Weeks, &c. I say, this is against Law plainly, and against divers Statutes, and no Law doth warrant it; for Soldiers, which are the King's Servants, ought to have their Pay from the King, at the general Rendezvous. 15 *Johan. m. 3.* Ships commanded to be at the Ports upon the King's Pay. Tenants by Knight's Service, after forty Days, were to be at the King's Charge. 17 *Ed. 1. 16 Ed. 3.* it appeareth there, the King, upon the Invasion of the *Scots*, many Men being lost, appointed Soldiers, and their Wages paid, and what to *Durham*, and what to *Newcastle, &c.* 31 *Ed. 1.* in the Exchequer, Writs went out to levy Men to resist the *Scots*, and they would not stir without their Wages. 16 *Edw. 3.* to pay Soldiers Wages. 2 *Edw. 3. Rot. 16.* there it is set down in Parliament what Soldiers have received for their Wages. 26 *Stat. 18 Ed. 3. cap. 7.* Soldiers are not to go out of their Counties without Pay. 10 *Ed. 3.* the Men of *Bucks* stood upon it, and would not go out of their County to the Coasts of *Southampton*, without Wages. *Rot. Alm. 12 Ed. 3. m. 12.* A Writ to compel all Men to make Munition for Ships, for the Town; and thereupon *H. and B.* they were commanded to maintain the Men of the same Town. *Claus. 13 Ed. 3. m. 14.* Men of Arms for the Defence of the Sea-Coasts complained their Wages were not paid them: Ordered, The Town from whence they came should pay them. The Statute of 11 *H. 7. cap. 1.* provides, that Soldiers that go out of their own Counties to attend the King in his War, shall have their Wages from the Time they go from their Houses, to be paid by the King's own Officers.

I hold

I hold that this Assessment is not lawful and allowable: then if the Assessment thus made falls to the ground, the Power to the Sheriff to assess doth; and he may do it as he lists, put more upon one than another, therefore an Assessment in that kind is not legal.

Then the Clause, *Si rebelles fuerint, &c.* to imprison them, then to give Power of Imprisonment to the Sheriff: Clauses have been in former Writs, in Cases of Arrays, to distrain, if they refuse to pay; never in Case of levying Money, to imprison for it; it is clearly against *Magna Charta* to be imprisoned, unless he be indicted, or by due Process of Law.

The next Thing is the last Clause of the Writ, 'If more be gathered than shall be needful, to be returned amongst those that have paid it.' That sheweth the Ship must be done; we are now upon the Record, and by this Record it doth not appear that a Ship is made. It appears Mr. Hampden was assessed 20*s.* towards the making of a Ship. It is said, If the Money be paid, others can provide Ships. This is not according to Law, to command a Ship of War of 450 Tuns, and to turn it into Money; for if a Ship were made by a County, the County, should have it again, but in this Case it is otherwise; this *Scir' Fac'* is brought to have the Money.

For the *Certiorari*, it is directed to a Sheriff out of Office (*que del residue de ceo*) and ought not so to be, for all Writs are directed to the present Sheriff; so for the old Sheriffs to shew Cause what they have done, and the new Sheriffs to make their Return, he is the immediate Officer of the Court.

Admit the *Scir' Fac'* should go forth, it would do something, *onerare, &c.* to whom, or how, nothing here; but *Scir' Fac'* *quare onerari non debet*; but to whom *onerari*, it doth not appear.

Besides, if the Sheriff levy Money in that kind, and bestow it on a Ship, it is well. If not so bestowed, then those that received the Money are accountable to those of whom they had it. In *Ed. 3.* Time, Soldiers received Money to go to Service in War, yet staid at home, but were compelled to repay it to the County where they received their Wages. Also two High Constables having received Money for Soldiers, were indicted for not employing it accordingly, and adjudged to restore it to the County where they received it, and to find Sureties. So it doth not appear that this Ship was builded, there is no Preparation for a Ship; the Sum assessed is not legal; then the Writ is not legal, because it varieth from all the Precedents formerly; it varieth in the Time of 26 Weeks, before that but for 13 Weeks; in the Manner for Soldiers Wages to Inland Counties, which was never before. I say, it varieth from all the Precedents, in that Kind. And so I hold this particular Writ is not sufficient, nor warranted by the Law, and that Judgment in this Case ought to be given for Mr. Hampden.

The Argument of Sir George Crooke Knight, one of the Justices of his Majesty's Court of King's-Bench at Westminster, in the great Case of Ship-Money, as it was presented to the King's Majesty.

The Case is this upon the Record.

THE King by Writ under the great Seal, dated 4 Aug. Anno 11. of his Reign, di-

rected to the Sheriff of the County of Bucks, and to all the Men in that County, commandeth them in these Words.

1. *Quia datum est nobis intelligi, quod Prædones quidam Pirato ac Maris Grassatores tam nominis Christiani hostes Mahumitani quam alii congregati Naves & bona & Mercimonia non solum Subditorum nostrorum, verum etiam subditorum amicorum nostrorum in mari quod per gentem Anglicanam ab olim defendi consuevit nefarie diripientes & spoliantes & ad libitum suum deportavere hominesque in eisdem in Captivitat' miserrimam mancipantes.*

Motives of this Writ, which are five.

2. *Cumque ipsos conspiciamus Navigium in dies præparantes ad Mercatores nostros ulterius molestand' & ad Regnum gravand' nisi citius remedium apponatur eorumque conatui viriliter obvietur.*

3. *Consideratis etiam periculis quæ undique his guerrinis temporibus imminet, ita quod nobis & subditis nostris defensionem Regni omni Festinatione qua poterimus accelerare convenit.*

4. *Nos volentes defensione Regni, tuitione maris, securitate Subditorum nostrorum, Salva Conductione Navium & Merchandizarum ad Regn' nostrum Angliæ venient' Et de eodem Regno ad partes externas transeunt' (Auxiliante Deo) maxime providere; cum nos & Progenitores nostri Reges Angliæ Domini Maris prædicti semper hætenus extiterunt, & plurimum nos tæderet si honor iste Regius nostris temporibus depereat aut in aliquo minuatur.*

5. *Cumque onus istud defensionis quod omnes tangit per omnes debet supportari prout per legem & consuetudinem Regni Angliæ fieri consuevit.*

Vobis Præfat' Vicecom' Balliv' Burgensibus Majoribusque probis hominib' & omnib' aliis, quibuscunque supra mentionat' in Burgis, Villis, villatis, hamletis & locis supradictis eorumque Membris. 1. In fide & legiantia vestra quibus nobis tenemini. 2. Et sicut nos & honorem nostrum diligitis. 3. Nec non sub forisfactur' omnium quæ nobis forisfacere poteritis firmiter injungend' Mandamus.

Charges of this Writ, which are 3:

1. *Quod unam navem de Guerra, Portagii 450 doliorum. 2. Cum hominib' tam Magistris peritis quam Marinariis valentioribus & expertis, centum & octoginta ad minus. 3. Ac tormentis tam majoribus quam minoribus pulvere tormentario ac basis & telis aliisque armaturis pro bello sufficientibus. 4. Et cum duplici Eskippamento, nec non victualibus usque ad primum diem Martii jam proxim' sequen' ad tot homines competent' 5. Et abinde in viginti & sex Septimanas ad Custagia vestra, tam in victualibus quam hominum Salariis & aliis ad Guerram necessariis per tempus illud super defensionem maris in obsequio nostro, in Comitiva Custodis maris, cui custodiam maris ante prædict' primum diem Martii commitemus & prout ipse ex parte nostra dictaverit moratur' parari, & ad Portum de Portsmouth circa decimum primum diem Martii duci facias. Ita quod sint ib' in eod' die ad ultimum ad proficiscend' ex inde cum navibus nostris & navibus aliorum subditorum nostrorum. 1. Pro tuitione maris. 2. Et defensione vestrum & vestror'. 3. Repulsioneque & debellatione quorumcunque mercatores nostros & alios subditos & fideles prædicti in Dominia nostra ex causa mercaturæ se divertentes vel ab inde ad proprium declinantes super mare gravare seu mole stare satagentium.*

Commands of the Writ, which are 5.

End for which the Ship is to be.

Clauses of the Assess. 1. *Assignavimus autem te præfat' vicecom' Bucks ad assidend' omn' bon' in villis de Agmondesham Wendover & Marlow Magna & in omnibus aliis villis villat' Burgis Hamlettis & aliis locis in Com' Bucks præd' & terræ tenentes in iisd' navem vel partem navis præd' non habentes vel in ead' non deservientes ad contribuend' expensis circa provisionem præmissorum necessar'.* 2. *Et saper' præd' vill' Burg' Hamlett' & locor' membris eorumq' sic ut præfertur ad assidend' & ponend' viz. quemlib' eorum juxta statum suum & facultates suas.* 3. *Et portiones super ipsos assessat' per distributiones aliosve modos debitos levand'.* 4. *Et collectores in hac parte nominand' & constituend'.* 5. *Ac omnes eos quos rebelles & contrarios inveneris in præmissis in carcere mancipand' in eod' moratur' quousque pro eor' deliberatione ulterius duxerimus ordinand'.*

Preclose of the Writ for the Ease of the Subject. *Et ulterius mandamus quod circa præmissa diligenter intendatis & faciatis & exequemini cum effectu sub periculo incumbente. Volumus autem quod non colore præd' mandati nostri. 1. Plus de iisd' hominibus levari fac' : quam ad præmiss' sufficien' ad expensas necessar'. 2. Aut quod quisquam qui pecuniam de contribuentibus ad præd' custag' faciend' levaverit ead' vel partem inde penes se detineat. 3. Vel ad alios usus quovis quæsito colore appropriare præsumat. 4. Volentes quod si plusquam sufficiat collectum fuerit hoc inter solventes pro ratu portionis ipsis contingen' exsolvatur.*

By virtue of this Writ, Mr. Hampden is assess'd to 20 s. for his Lands in Stoake Mandevile in that County, which, not being paid, is certify'd amongst others into the Chancery, upon a Writ of *Certiorari*, dated 9 Mar. 12 Car. by a Schedule thereunto annex'd. And by a Writ of *Mittimus*, teste 5 Mar. 13 Car. this Writ of 4 Aug. 11 Car. and the Writ of *Certiorari*, and the Schedule annex'd, is sent into the *Exchequer*, with a Command there to do, for the levying of Sums so assessed and unpaid, *prout de jure & secundum legem regni nostri Angliæ fuerit faciend'*; whereupon a *Sci' Fa'* issued out of the *Exchequer*, reciting the said Writ, to warn Mr. Hampden amongst others, to shew Cause why he should not be charged with this Money. Upon this he being summon'd, appear'd, and demandeth the hearing of those Writs and Schedule; which being read unto him, thereupon he demurreth in Law. And whether Judgment upon this whole Record be to be given against *John Hampden*, that he is to be charged or no, that is the Question; for he is the only Party in this Case. And there is no Cause why any Man should say that the Question is, Whether Judgment should be given for the King, or the Defendant; for as this Case is, the King is no Party to the Record, but only it is a judicial Process out of the *Exchequer*, grounded upon the former Record, for the Defendant to shew Cause why he should not be charged: which hath been very elaborately argued by the Defendant's Council, who demurred, that he should not be charged; and by the King's Council, very learnedly and elaborately argued, that he should be charged.

This Case is a Case of great Weight, and the greatest Case of Weight that ever we read, argued by Judges in this Place; and therefore, adjourned into this Place for Advice of all the Judges: For of their side it is alledged, That it concerneth the King in his Prerogative and Power Royal; and on the other side, That it concerneth

all the King's Subjects in their Liberties, their Persons, and their Estates; for which it hath made some of us to wish and move among ourselves, that it might have been by his Majesty's Favour, heard and determined in another Place by his Majesty, and his great Council of his Realm, where all Convenience and Inconvenience might have been considered of, provided for, and prevented for present and future Times, and not to be argued only by us, who are accounted his Majesty's Council at Law; wherein if any thing be done amiss, the Fault must light upon us, as misadvising the King therein. But seeing it hath pleased his Majesty, that the same should be argued and determined in this Place, whose Pleasure we must obey, I must give my best Advice upon my Oath to the best of my Skill; wherein I hope not to trench upon his Majesty's Prerogatives, which we are all bound by our Oaths, to the best of our Skills, to maintain, and not to suffer them to be diminished; nor upon his Royal Power; but truly to deliver what I conceive the Law to be, concerning the Case in question.

Wherein I must confess I have been much distracted, having heard so learned Arguments on both sides at the Bar, and so many Records and Precedents cited on either side; but they did not so much move me, for the Council have on either side proposed such Reasons, as they thought convenient for the maintaining of their Opinions, and perhaps with a prejudicate Opinion; as I myself by my own Experience, when I was at the Bar, have argued confidently, and as I then thought the Laws to be of that side for whom I argued. But after being on the Bench, and indifferently weighing all Reasons and Authorities, have been of a contrary Opinion; and so the Law hath been adjudged contrary to that Opinion which I first confidently conceived.

But that which hath moved me most, and maketh me distrust my own Judgment in this Case is, that my Brothers that have argued before me, who have argued upon their Oaths, and I presume have seen the Records and Precedents cited on either side, have all argued one way; with whose Opinions I should willingly have concurred, if I could have satisfied my own Judgment with their Reasons; but not being satisfied, I have learned that I must not come with a Multitude against mine own Conscience, for I must stand or fall with my own Master. And therefore I shall shew Reasons, and leave myself to the Judgment of my Lords and others my Brethren. And whatsoever shall be adjudged I must submit unto, and so do with all others, and do now declare my Opinion to be, that as this Case is, Judgment ought to be given for the Defendant. My Reasons and Grounds that I shall insist upon are these:

1. That the Command by this Writ of 4 Aug. 11 Car. for to make Ships at the Charge of the Inhabitants of the County, being the Ground of this Suit, and Cause of this Charge, is illegal and contrary to the Common Laws, not being by Authority of Parliament.

2. That if at the Common Laws it had been lawful, yet now this Writ is illegal, being expressly contrary to divers Statutes prohibiting a general Charge to be laid upon the Commons in general, without Consent in Parliament.

3. That it is not to be maintained by any Prerogative or Power Royal, nor Allegation of Necessity or Danger.

4. Ad-

4. Admitting it were legal to lay such a Charge upon Maritime Ports, yet to charge any Inland County, as the County of *Bucks* is, with making Ships and furnishing them with Masters, Mariners and Soldiers at their Charge, which are far remote from the Seas, is illegal, and not warranted by any former Precedent.

5. I shall examine the Precedents and Records cited to warrant this Writ, which have been all the principal Grounds of the Arguments to maintain the same. And I conceive there is the chief ground-work being in my Notes, but I forgot it.

But before I proceed to the Argument, I desire to remove two difficulties: *First*, That by the Demurrer the Danger of the Kingdom is confessed, and so it is to be allowed for a Case of Necessity.

To this I answer, That the Demurrer confesseth not Matters in Fact, but where the Matter is legally set down; but if it be not a legal Proceeding, then the Demurrer is no confessing of the Matter of Fact. This appeareth in the Book-Cafe, *5 Hen. 7. fol. 1.* and *Coke lib. 5. fol. 96.* in *Burton's Case*, That a Demurrer is no confessing of Matters of Fact, but where the Matter precedent is sufficiently pleaded or laid down; and so it is held in all our Books.

The *Second* Difficulty is, That this Case is so resolved by all our Opinions under our Hands, that this Writ was legal; which was much pressed by Mr. Solicitor.

To this I answer, That it is true that I have set down my Opinion under my Hand unto Two Cases, to the first voluntarily in *Dec. 1635*, which was thus:

‘ I am of Opinion that where the Good and Safety of the Kingdom in general is concerned, and the whole Kingdom is in Danger, of which his Majesty is the only Judge, there the Charge of Defence ought to be borne by all in general.’

This I hold to be agreeable to Law and Reason; this Opinion I do still and shall always maintain; for where the Kingdom is in Danger, the King may command every Person of his Kingdom with all his Force to come and defend it at all Times and in all Places of his Kingdom where he pleaseth: and the King is the sole Judge of the Danger, and of War and Peace; and if any do not perform his Commands therein, he is fineable and punishable in a deep manner.

The second was in *Febr. 1636*. which is thus, ‘ That when the Good and Safety of the Kingdom in general is concerned, and the whole Kingdom in Danger, his Majesty may by Writ under the Great Seal of *England* command all his Subjects of this Kingdom at their Charges to provide and furnish such Number of Ships with Men, Victuals and Ammunition, and for such time as his Majesty shall think fit, for the Defence and Safeguard of the Kingdom from such Danger. And that his Majesty may compel the doing thereof, in case of refusal and refractoriness. And that in this Case his Majesty is sole Judge of the Danger, and when and how the same is to be prevented and avoided.’

To this Opinion, I confess, I then with the rest of the Judges subscribed my Hand; but I then dissented to that Opinion, and then signified my Opinion to be, that such a Charge could not be laid by any such Writ, but by Parliament: and so absolutely in that Point one other did agree

with me, and dissented from that Opinion; and four others, in some other Particulars, from that which was subscribed. But the greater part seeming absolutely to be resolved upon that Opinion, some of them affirming that they had seen divers Records and Precedents of such Writs, satisfying them to be of that Judgment; I was pressed to subscribe with them, for that the major part must involve the rest, as it was said to be usual in Cases of Difference, and for that the lesser Number must submit to the major, altho they varied in Opinion; as it is in our Court, if three Judges agree in Opinion against one or two where there are five Judges, Judgment is to be entered *per Curiam*, if the major part agree, and the other are to submit to it: and in Cases of Conference, and Certificate of their Opinions, if the greater part did agree and subscribe, the rest were to submit their Opinions. And this by more antient Judges than myself was affirmed to be the continual Practice: And that it was not fit, especially in a Case of this Nature so much concerning the Service of the King, for some to subscribe, and some to forbear their Subscriptions: And that altho we did subscribe, it did not bind us, but that in point of Judgment, if the Case came in question judicially before us, we should give our Judgments as we should see Cause after the Arguments on both Sides, and we were not bound by this sudden Resolution.

Hereupon I consented to subscribe; but I then said, that in the mean time the King might be misinformed, by our Certificate under our Hands, conceiving us all to agree together, and to give him this Advice under our Hands, and not know there was any dis-sented or was doubtful: but it was then said, the King should be truly informed thereof; and thereupon we that dis-sented, did subscribe our Hands with such Protestations as aforesaid, only for Conformity, altho contrary to the Opinion I then conceived.

But this being before Arguments heard on either Side, or any Precedents seen, I hold that none is bound by that Opinion. And if I had been of that Opinion absolutely, now having heard all the Arguments on both Sides, and the Reasons of the King's Council to maintain this Writ, and why the Defendant is to be charged; and the Arguments of the Defendant's Council against the Writ, and their Reasons why the Defendant should not be charged to pay the Money assessed him; and having duly considered of Records and Precedents cited and shewed unto me, especially those of the King's Side, I am now of an absolute Opinion that this Writ is illegal, and declare my Opinion to be contrary to that which is subscribed by us all. And if I had been of the same Opinion that was subscribed, yet upon better Advise ment being absolutely settled in my Judgment and Conscience in a contrary Opinion, I think it no shame to declare that I do retract that Opinion, for *humanum est errare*, rather than to argue against my own Conscience. And therefore none having, as I conceive, removed those Difficulties, I shall proceed to my Argument, and shew the Reasons of my Opinion, and leave the same to my Lords and Brothers. Not one Precedent nor Record in any precedent Time, that hath been produced or shewed unto me, that doth maintain any Writ, to lay such a Charge upon any County Inland or Maritime.

I have examined this particular Writ, and the several Parts thereof; and do conceive it is illegal, and not sufficient to ground this Charge upon the Defendant.

1. The Motives of this Writ are not sufficient to cause such a Writ to be sent forth.

2. The Command of the Writ to prepare a Ship at the Charge of the Inhabitants, which mentions Victuals and Men, is against the Common Laws and Statutes of this Kingdom.

3. That to lay a Charge of finding Victuals, and Wages of Soldiers and Mariners, is illegal, and contrary to the Common Laws and divers Statutes.

4. The Power of Assessment given to the Sheriff alone, and to distrain for this, is illegal, and not warranted by any Precedent.

5. The Power of Imprisoning is illegal, and contrary to divers Statutes, and not warranted by the Precedents.

6. That the Preclose of the Writ, and the Practice of it, is contrary to itself, and *oppositum in objecto*.

7. If this Writ were legal, yet the manner of the Assessment by the Sheriff as it is certified, is not warranted by this Writ; consequently this Sum cannot be demanded of the Defendant by virtue of this Writ.

8. That the *Certiorari* and *Sci Fa* issued not legally, and consequently no Judgment can be given against the Defendant thereupon.

For the first Point, that this Writ, 4 Aug. 11 Car. is against the Common Law, my Reasons are these:

1. Because this is the first Writ since the Conquest that went out to any Inland County to prepare a Ship with Men and Ammunition, for ought appeareth by any Record that hath been shewn. And where there was never any Precedent, by the Rules of Mr. Littleton, fol. 23. the Law is conceived not to allow any such Writ. And Sir Edward Coke in his Comment upon Littleton, fol. 81. saith, That where there is no Example, it is a great Intendment the Laws will not bear it.

So I conceive here, there never having been a Precedent before of any such Writ to the Sheriffs and Inhabitants of a County, to prepare a Ship with Men and Ammunition upon any Occasion whatsoever, that it is against the Common Law to award such a Writ.

2. For that the Common Law of England setteth a Freedom in the Subjects in respect of their Persons, and giveth them a true Property in their Goods and Estates; so that without their Consent, or implicitly by an Ordinance which they consented unto by a common Assent in Parliament, it cannot be taken from them, nor their Estates charged: and for this purpose the Law distinguisheth between Bond-men, whose Estates are at their Lords Will and Disposition, and Free-men, whose Property none may invade, charge, or unjustly take away but by their own free Consent, and therefore not warranted by Law; which is proved by these Authorities.

Coke in his Reports, lib. 8. fol. 92. in Francis Case, sets down this Rule, *Quod nostrum est, sine facto seu defectu nostro amitti, seu in alienum transferri non potest.*

Mr. Lambert, fol. 24. setting down the Laws of England which were confirmed by William the Conqueror, hath these Words: *Inter alia volumus*

Et concedimus, quod omnes Monarchæ Regni sui prædicti habeant Et teneant terras suas Et possessiones suas bene Et in pace, liberas ab omni exactione injusta Et ab omni tallagio (not mentioning there injustice) ita quod nihil ab eis exigatur præter servitium suum juste debitum. Hereby it appears there is an absolute Freedom from all Tallage.

17 of K. John, in Mat. Paris, fol. 246. the King doth grant and confirm unto his Barons and Commons, inter alia these Liberties following: *Nullum scutagium vel auxilium ponamus in Regno nostro nisi per commune Concilium Regni nostri, nisi ad redimendum corpus nostrum, filium nostrum primogenitum Militem faciendum vel ad Primogenitam filiam maritandum.* By this it appears what was then conceived to be amongst other their Liberties, and then confirmed; which was, that no Aid should be laid upon them but by Parliament, for the Parliament was then called *Commune Concilium*.

That the Law is so, appeareth by the Treatise written by Fortescue, who had been Chief Justice of England in King Henry IV's Time, and after Chancellor of England, when he wrote the Book, intitled, *De laudibus legum Angliæ*, fol. 25. cap. 9. he saith thus; That the King of England cannot alter nor change the Laws of England at his Pleasure, for *Principatu regali sed Et politico ipse populo suo dominatur.* If his Power were Royal only, then he might change the Laws, *Tallagia quoque Et cætera onera eis imponere ipsis inconsultis*; but adds, that the King of England *sine subditorum assensu leges mutare non potest, nec subiectum populum renitentem onerari impositionibus peregrinis.* And cap. 13. fol. 31. he compares the King and Subjects of England to the Head and Body Natural: *Ut non potest corpus physicum nervos suos commutare neque membris suis proprias vires Et propria sanguinis alimenta denegare sua, nec Rex qui caput corporis politici mutare potest leges corporis illius, nec ejusdem populi substantias proprias subtrahere, reclamantibus eis aut invitis.* Thus he in this Place; but in fol. 84. cap. 36. he seemeth to say, *In hoc individuo, Rex Angliæ neque per se nec ministros suos, Tallagia, Subsidia, aut quævis onera alia imponit, leges suas, aut leges eorum mutat, aut nova condidit sine concessione vel assensu totius Regni sui in Parlamento suo expresso.* Which Words seem so general, that in no Case he can do it.

So it appeareth by the Book-Case, 13 Hen. 4. fol. 14. That the Grant of the King, which tendeth to the Charge and Prejudice of his People in general, is not good, unless it be by Parliament. But it is agreed there, That Grants of Tolls, of Fairs, of Pontage, Pickage, Murage, Ferrying, or such like, which are for the Profit, Good, and Ease of the People, and Profit of them that will take Benefit thereof, and not compulsory to any to pay, but to them that will take the Benefit; and being very small and reasonable Sums, the Law doth give Allowance to them: but if they were great Sums, that tend to the Charge of the People, the Law will judge them void.

This appeareth in Sir Ed. Coke's Reports, lib. 5. fol. 63. in the Case of the Chamberlain of London, That an Ordinance made by the Common-Council of London, where they have a Custom by their Common-Council to make reasonable Ordinances to bind all within the City, concerning Clothes to be brought to Blackwellball, there to be view'd, measur'd and search'd, before they were sold, and a Penny upon a broad Cloth appointed for the Officer that did that Service; that such a Charge was reasonable; for that it was for the publick Benefit

Benefit of the City, and the Commonwealth; and a pecuniary Penalty laid for not performance of that Ordinance was allow'd.

Ibid. fol. 64. in *Clark's Case* it is resolv'd, That an Ordinance made by the Assent of the Plaintiff himself, and other Burgeffes of the Town of *St. Albans*, for a small Tax upon the Inhabitants of the Town, towards the Erection of the Courts, and other Necessaries, for the Term to be kept there, was allow'd to be good, and did bind the Plaintiff, being by the Plaintiff's own Consent, and for the publick Good of the Town.

Also *Coke*, lib. 11. fol. 86. in *Darcie's Case* citeth this out of *Fitz-Her. Na. B.* fol. 122. That every Grant of the King hath this Consideration in it, tacit or exprefs, *Quod Patria per Donationes illius, magis solito non oneretur.* And as by Grant the King cannot charge his People, so neither can he by Writ lay any Charge upon his People, but by their Consent, or where they have apparent Benefit thereby; And that is the Reason of the Writ in the *Reg.* 127. and *Fitz-Her. Na. B.* 113. Where by Breach of the Sea-Walls any Inundation is of the Country, the King, who is *Pater Patriæ*, and taketh care for the Good and Safety of his People, sendeth out his Commission to inquire by whose Default any such Breach happen'd, and to cause all that had Lands or Commons to be contributory to the making up of the Sea-Walls; and this is done by a Jury: but this Charge cannot be laid upon a County or Town in general, but upon particular Men that have Loss or Benefit, or may have Loss or Benefit thereby: And this is done by Inquiry of a Jury, before the Sheriffs, or Commissioners appointed. So it is at this Day, upon Commissions of Sewers, as appeareth by *Coke*, lib. 10. fol. 142. in the Case of the Isle of *Ely*. The Taxation by the Commissioners of Sewers, must be upon every particular Man that hath or may have Loss or Benefit by such Inundations, and making up of the Walls; and cannot be laid upon any remote Parts, which are out of the Level of such Loss or Benefit; and it must be certain and particular upon Persons: certain, by reason of Loss or Profit, and cannot be laid in general upon a Town; but in those Cases there is a particular Loss or Benefit, and in particular Places, and but in petty Charge. And then where the Law alloweth that which in Reason is to be done, that may be done without a special Statute: for, *De minimis non curat lex.* But in this Case there is a general Charge thro' the whole Kingdom, which the Law doth not permit, without common Consent in Parliament.

But it hath been alledg'd, That this Charge hath been imposed for the publick Safety, and Defence of the Kingdom: and may not this be done when every one hath Advantage by it?

To this I say, When imminent Danger and Cause of Defence is, there must be Defence made by every Man (when the King shall command) with his Person: In such a Case every Man, as it is said in the Precedents, is bound *per se & sua* to defend the Kingdom. And I think no Man will be unwise, but that he will *exponere se & sua* for the Defence of the Kingdom, when there is Danger; for otherwise, he is in danger to look to *se & sua*: but to lay a Charge in general upon the Kingdom, either for making or preparing of Ships, or Money in lieu thereof, is not to be done but by Parliament, where the Charge is to be borne in general by all the Subjects.

To prove further, That no Man may have his Goods taken from him but by his Consent, appeareth by a Record, *Mich. 14 Ed. 2. Rot. 60.* in the King's-Bench, in a Writ of Error brought upon a Judgment given at *Durham*; where in an Action of Trespais, by *William Heyborne*, against *William Keylowe*, for entering his House, and breaking his Chest, and taking away 70*l.* in Money, the Defendant pleaded not Guilty; the Jury found a special Verdict, That the Scots having entred the Bishoprick of *Durham* with an Army, and making great Burning and Spoils, the Commonalty of *Durham* met together at *Durham*, whereof the Plaintiff was one, and agreed to send some to compound with the Scots for Money to depart, and were all sworn to perform what Composition should be made, and to perform what Ordinance they should make in that behalf: and thereupon they compounded with the Scots for 1600 Marks; but because that was to be paid immediately, they all consented that *William Keylowe* the Defendant, and others, should go into every Man's House, to search what ready Moneys were there, and to take it for the making up of that Sum: and that it should be repaid by the Commonalty of *Durham*; and thereupon the Defendant did enter into the Plaintiff's House, and did break open the Chest, and took the 70*l.* which was paid accordingly towards the Fine. The Jury was demanded, Whether the Plaintiff was present, and did consent to the taking of the Money? they said No: whereupon the Plaintiff had Judgment to recover the said 70*l.* and Damages, for that otherwise he had no Remedy for his Money; and the Defendant was committed in Execution for that Sum. And thereupon the Defendant, *Keylowe*, brought a Writ of Error in the King's-Bench, and assigned his Error in Point of Judgment; and there the Judgment was reversed, and the Reasons set down in the Record were, *First*, Because the Plaintiff, *Heyborne*, had his sufficient Remedy against the Commonalty of *Durham* for his Money: *Secondly*, Because he himself had agreed to this Ordinance, and was sworn to perform it; and that the Defendant did nothing but what the Plaintiff had assented to by his Oath, and therefore is accounted to do nothing but by his Consent, and as Servant unto him, therefore he was therein no Trespasser: and therefore the Judgment given in *Durham* was reversed, because he had assented to that Ordinance, tho afterwards he was unwilling; yet having once consented, his Goods were lawfully taken. By which it appeareth, that if he had not particularly consented, such an Ordinance would not have been good to bind him; altho this was in a Case of great Danger, and for Defence.

2 *Ric. 2. pars 1.* The Parliament-Roll proveth this directly; altho it be no Act of Parliament, yet the Record is much to be regarded, for it sheweth what the Law was then conceived to be: for *Scroope*, the Lord Chancellor, then shewed to all the Lords and Commons assembled in Parliament, That all the Lords and Sages had met together since the last Parliament, and having conferred of the great Danger the Kingdom was in, and how Money might be raised in case of imminent Danger, which could not stay the Delay of a Parliament, and the King's Coffers had not sufficient therein; the Record is, they all agreed, Moneys sufficient could not be had without laying a Charge upon the Commonalty, which say they, cannot be done without a Parliament; and the Lords them-

selves, for the time, did supply the said Necessity with Money they lent: which Record proveth directly, That this Charge without an Act of Parliament is illegal.

So upon these Reasons I conclude, That this Writ, compulsorily to charge the Subjects against their Wills, is not warranted by any Book, and therefore illegal.

If this Writ should be allow'd, great Inconveniences would ensue, which the Law will always avoid, and not permit any Inconveniences.

1. If any such Charge may be laid upon the Counties by Writ, without Assent in Parliament, then no Man knoweth what his Charge may be; for they may be charged as often as the King pleaseth, and with making of as many Ships, and of what Burdens, and with what Charge of Ammunition, Men and Victuals, as shall be set down. Wherein I doubt not, but if the Law were so, the King being a very pious and a just King, would use his Power very moderately; but Judges in their Judgments are not to look to present Times only, but also to all future Times, what may follow upon their Judgments.

That this Inconveniency may be, appeareth by the *Danegelt*, first appointed in Times of Necessity, to redeem them from the Cruelty of the *Danes*, which often changed, and still increased: for *A. D.* 991, when it began, it was but 10000 *l.* In 994, it was increased to 16000 *l.* And in 1002, it was increased to 24000 *l.* And in 1007, it was increased to 36000 *l.* And in 1012, to 48000 *l.* So if this Writ be well awarded, it may be at pleasure what Bounds it shall have. Also there was never but one single Subsidy and two Fifteenths used to be granted in Parliament, until 31 *Eliz.* and then a double Subsidy, and four Fifteenths were granted: Sir *Walter Mildmay*, then Chancellor of the *Exchequer*, moving for it, and saying, *his Heart did quake to move it, not knowing the Inconvenience that should grow upon it*; he shewed great Reasons for his moving it, it being about the Time of the *Spanish* Invasion, and so it was granted. Afterwards, 35 *Eliz.* treble Subsidies and Fifteenths were granted. And 43 *Eliz.* four Subsidies and eight Fifteenths were granted; and yet these were not accounted grievous, neither would it have been, if it had been ten Subsidies, because in Parliament, and convenient Times and Means appointed for the levying of them. Tonnage and Poundage were granted to this End in 13 *Rich. 2.* and have continued ever since by several Grants until this King's Time, wherein it was unhappily question'd in Parliament: but the End thereof was, that the Kings might have Money in their Purfes, against Times of Need, for extraordinary Occasions, especially for the Defence of the Realm, and guarding of the Seas, as it is especially declared by the Statute 1 *Jac.* and former Statutes, and for other necessary Uses, as the King pleased.

Object. But it is said, That Tonnage and Poundage is not now granted to the King, and therefore the King is enforced to these extraordinary Courses.

Tho it be not granted, yet I think it is taken; and I doubt not but to the same Intent, and for the same Purposes employ'd for which it was first granted; which was, for the Defence of the Kingdom, and Guard of the Sea. Therefore in case of Danger and Necessity, every Subject for the Defence of the Kingdom, is bound *Legiæ debito*, as some Records say, and *Legiæ suæ vin-*

culo astricti, as others speak; *se & sua totis viribus, & potestate exponere, &c.* And in such a Case the King may demand the Persons of his Subjects, and arrest their Ships to wait on his to defend the Seas; yet with this also, When they go out of their Counties, to be at the King's Charges: But to command the Subject by Writ, to build new Ships, or to prepare Ships at their Charges, or to lay a common Charge on the Subjects in general, for matter of Defence, or avoidance of Danger; is not warrantable by the Common Law.

2. Another Inconvenience is, That it is left in the Power of the Sheriff to charge any Man's Estate at his Pleasure, taxing some and sparing others, as his Affections lead him; and sometimes by colour thereof levying more than he need, and enriching himself; which Power the Law never alloweth him, altho it were in lesser Matters; as to make an Assessment for Breach of Sea Walls; but to do it by a Jury, and not by himself alone. So for these Reasons I conclude, This Writ is against the Common Law, and so illegal.

I conceive, if the Common Law were doubtful in this, whether such a Charge might be imposed by Writ; yet now it is made clear by divers express Statutes, That the King is not to lay any Charge upon his Subjects, but by their Consent in Parliament; and that is, by many Acts of Parliament in force, and not repealed: and there is no doubt but that the King by Parliament may bind them and their Successors, every King by Oath being bound to perform the Statutes of his Realm.

The Statute of 25 *Ed. 1. cap. 5.* which is in these Words, 'Forasmuch as divers People of our Realms are in fear, that the Aids and Taxes which they have given us before-time towards our Wars, and other Busineses, of their own Grant and Good-will, however they were made, might turn to a Bondage of them and their Heirs; because they might be at other time found on the Roll; and likewise for the Prizes taken thro'out our Realm by our Ministers; We have granted for us and our Heirs, That we shall not draw any such Aids, Taxes or Prizes into a Custom, for any thing that hath been done heretofore, by any Roll, or any other Precedent that may be found.'

Ibid. cap. 6. 'Moreover, we have granted for us and our Heirs, as well to Archbishops, Bishops, Priors, and other Folk of the holy Church; as also to Earls, Barons, and all the Commodity of the Land; that for no Business from henceforth we shall take any Aids, Taxes, nor Prizes, but by the common Assent of the Realm, and for the common Profit thereof, (saving the antient Aids and Prizes due and accustomed) which are the express Words of that Statute. Now, what those antient Aids were, is well known, that they were *ad redimendum corpus, ad filium primogenitum militum faciendū & ad filiam primogenitam maritandā*: Which Aid concerns not the Subject in general, but particular Men were liable thereunto by their Tenures. So this Saving need not to have been; for the Body of the Act extended not to them, but to the general Aid of the Kingdom.

However, if this *Salvo*, as it hath been objected, would preserve this Aid now in question, yet the Statute made afterwards, *de Tallagio non concedendo*, being without any *Salvo*, takes it away:

Which

Which Statute, *Rastal* in his Abridgment, fol. 441. in his Title of *Taxes*, abridgeth in this manner: *Anno 25 Ed. 1.* it is ordained, 'that the Taxes taken, shall not be taken in Custom, nor but by the Assent of this Realm, except the antient Aids and Taxes: and there the Tax of 40 s. upon the Sack of Wool is released.

Ibid. 'That no Taillage, by us or our Heirs in our Realm, be put or levied, without the Assent of the Archbishops, Bishops, Earls, Barons, Knights, Burgessees, and other free Commons of our Realm; that nothing be taken from henceforth, in the name, or by reason of *Male tout* of a Sack of Wool. Statute de Tallagio non concedendo.'

Object. Mr. Solicitor laboured much to prove, that there was no such Statute de Tallagio non concedendo: 1. For that it was not to be found on the Rolls of Parliament. 2. For that it was not set down when it was made. 3. That it was but an Abstract out of *Confirmatio Chartarum Libertatum*. Mr. Attorney said, he would not deny it to be a Statute, neither would he affirm it; but that yet it did not extend to take away the Aid demanded, by Prerogative or Power Royal for the Defence of the Kingdom.

Respons. To this I answer, This was never doubted to be a Statute until this Argument; and that it is a Statute, appeareth, 1. For that it is printed in the *Book of Statutes*, for a Statute. 2. It is recited in the *Petition of Right*, to be a Statute. To that it is not found on the Rolls, I answer, That many Statutes that are known Statutes, are not found on the Rolls, as *Mag' Char'* is not.

And as touching the Time, I conceive it to be made 24 Ed. 1. cap. 1. for so it is set down in the great *Book of Statutes*, printed 1618, to be the first Statute therein made, viz. in these Words: *No Taillage nor Aid shall be taken or levied by us or our Heirs, in our Realm, without the good Will and Assent of the Archbishops, Bishops, Earls, Barons, Knights, Burgessees, and other Freemen of the Land.*

And that it is a Statute, all my Brothers have agreed.

The only doubt then is, whether this Statute extendeth to Aid for the Defence of the Kingdom; which I think it doth: for it is the precise Words of it, That no Taillage or Aid shall be imposed but by Grant in Parliament, which extends to all manner of Aids: and by this Law the Subjects of *England* have defended themselves ever since, as with a Buckler, as saith *Bodinus*, fol. 97. whereby it appeareth, that notice was taken of this Law in foreign Parts, and so held still to be a Statute in force.

The next Statute is 14 Ed. 3. cap. 1. which recites the Grant of the great Subsidy of the ninth Fleece, the ninth Lamb, &c. formerly granted; whereupon these Words follow: 'We willing to provide for the Indempnity of the said Prelates, Earls, Barons, and others the Commonalty of the Realm, and also of the Citizens, Burgessees, and Merchants aforesaid, will and grant for us and our Heirs, to the same Prelates, Earls, Barons, and Commons, Citizens, Burgessees, and Merchants, that the same Grant shall not be had forth in Example, nor fall to their Prejudice in time to come, nor that they be from henceforth charged or granted to make any Aid, or sustain any Charge, if it be not by the

VOL. V.

'common Assent of the said Prelates, Earls, Barons, and other great Men and Commons of the said Realm of *England*, and that in the Parliament: and that all the Profit arising of the said Aid, and of Wards, Marriages, Customs, and Escheats, and other Profits, arising of our said Realm of *England*, shall be set and dispend- ed upon the Maintenance of the Safe-guard of this Realm of *England*, and of our War in *Scotland*, *France*, and *Gascoigne*, and in no Place else- where during our War.'

By this Statute it appeareth that it is expressly provided, that the Subjects should not be from thenceforth charged nor grieved to make any Aid, nor sustain any Charge but by common Assent, and that in Parliament; which is as express as may be, and exclusive to any Charge otherwise; which I conceive was made against the appointment of making, or preparing and sending out of Ships at the Charge of the Towns wherein they were, or sending Men out of their own Countys at the Charge of the County.

Object. Now whereas it is alledged by my Brother *Weston*, and my Brother *Berkley*, That this was but a temporary Statute, and ended when the War ended, which appeareth by the last Clause for Employment of those Profits towards those Wars; I conceive it appeareth to be an absolute and perpetual Statute, for it is granted for him and his Heirs in perpetuity. And also it appeareth by *Plowden* in his *Comment.* fol. 457. in *Sir Thomas Worth's Case*, where a Grant is by the Name of the King, which is in his Politick Capacity; this extendeth against him, his Heirs, and Successors, altho they be not named. Also the Intendment of this Law appeareth to be for the Security of the Subjects, from thenceforth for all future Ages. And then the Office of Judges, as appears by *Sir Edward Coke* his *Reports* lib. 5. fol. 7. and *Plowden's Comment*, in *Aston and Stud's Case*, is to construe Statutes according to the true Intent of the Makers thereof, which was in this Statute, that it should be a perpetual Security for the Subjects. And to little purpose it had been, to make a Statute to continue but during the Time of the War, or during the King's Life.

Object. Also where it is alledged that the Statute of 14 Ed. 3. is not mentioned in the *Petition of Right*, which is some Argument that it was not conceived to be a continuing Statute.

Respons. To that I answer, That in the *Petition of Right* it is said, That by the Statute there recited, and other the good Statutes of this Realm, the Subjects shall not be compelled to pay any Taxes, Taillage, Aid, nor other like Charge not set by Parliament; in which this Statute is as well intended as other Statutes, and as far as if it had been expressly recited. Also it appeareth by all the Books of Statutes, that this Statute is granted as a Statute continuing, whereas others expired, are set down as expired.

21 Ed. 3. pars 2. m. 11. A Subsidy being granted by Parliament, viz. 40 s. on every Sack of Wool transported before *Michaelmas* following, and 6 d. on every 20 s. of Merchandize, for the Safe-guarding of the Merchants and Defence of the Coast, &c. After *Michaelmas*, viz. 31 Octob. 21 Ed. 3. by Writ the Collectors were commanded to continue the Collection of those Subsidies until *Easter*. But, 26 Nov. 21 Ed. 3. the King by Writ com-

H h 2

manded

manded the stay of the 6 d. in the 20s. and to continue the Collection of the Subsidies upon the Sacks of Wool until *Easter*.

22 *Ed. 3. Rot. Parl. m. 16.* The Parliament being holden in *Lent*, the Commons complain of the Continuance of this Collection of the Subsidies upon the Sacks of Wool longer than the Parliament had granted it, and provided that it should not be continued longer than *Easter*, at the procurement of any Person. By this it appeareth, that the Parliament being careful that the Time for levying of a Subsidy granted, should not be enlarged by any Power, much less would they admit of a Writ to lay a Charge without Grant by Parliament.

25 *Ed. 3. m. 8.* It was enacted that no Man should be compell'd to find Men at Arms, other than such as hold by such Service, except it be by common Assent in Parliament. By this it appeareth, that if Men be not compellable to find a Man at Arms, unless it be by common Assent in Parliament; much less is any bound to be contributory to the preparing of a Ship with 180 Men at Arms, and Victuals, and Wages of Soldiery for 26 Weeks, unless it be by common Assent in Parliament.

Rot. Parl. 21 Hen. 4. Num. 22. An Act of Parliament, as I count it, in the very Point, is in these Words; 'For that of late, divers Commissions were made to divers Cities and Burroughs within the Realm, to make Barges and Barringers, without Assent of Parliament, and otherwise than hath been done before these; however the Commons do pray the King that these Commissions may be repealed, and that they may not be of any Force or Effect.' To which it is answered, 'That the King willeth that the said Commissions be repealed;' which is an absolute and perfect Statute.

But then there are added these Words: 'But for the great Necessity he hath of such Vessels for the Defence of the Realm in case that the War shall happen, he will treat with his Lords of this Matter, and afterwards will shew it to the Commons to have their Counsel and Advice in this Point.' So by the Record it appeareth that the Commons did conceive, that no Cities, Burroughs, nor Towns, without Consent in Parliament, were to be charged with the making of such Vessels; to which the King agreeth. And from that Day to this, until the making of these Writs, in no Age, altho the Kingdom hath been many times in danger of Invasion, and hath been invaded, there do not appear any Records that ever I have seen of Writs directed to any Towns or Cities at their Charges, to make or prepare any Ships or Vessels whatsoever.

Object. And whereas it hath been objected, and especially insisted upon by my Brother *Berkley*, that this latter Part, that the King will treat with his Lords concerning them, and after confer with the Commons, is a gentle Denial of that Act; as the Experience is at this Day. *Le Roy se aviser* is a Denial of an Act.

Respons. Hereupon I answer, It is an absolute Act, for it is an absolute Assent to the Petition. And that which came after was but a plausible Excuse, for that such Commissions had gone out; and this farther Consultation never appeared to be made, nor ever any such Writ or Commission for such Vessels to be made went out since until this Writ.

13 *Hen. 4. m. 10.* A Grant is of a Subsidy of Wools, Woolfels, Hides, and other things there mentioned, and of Tonnage and Poundage for one Year, for the Defence of the Marches of *Calais*, &c. and for the Defence of the Realm, and the Safeguard of the Sea. And therein is this express *Proviso*, 'Provided that this Grant of a Subsidy of Wools, &c. and Tonnage and Poundage, in time to come, shall not be taken in Example to charge the Lords and Commons of this Realm with any manner of Subsidy for the Safeguard of *Calais*, &c. nor for the Defence of the Realm, nor the Safeguard of the Seas; unless it be by the Will of the Lords and Commons of the Realm, and that by a new Grant to be made, and that in full Parliament to come.' By this appeareth that it was then provided, that no Charge should be laid on the Lords or Commons, no not for the Defence of the Realm, but by Grant in full Parliament.

13 *Hen. 4. m. 43.* A Petition was in Parliament reciting, That there was an Office granted of Alnager within *London* and the Suburbs of the same, with Fees to that appertaining, where any such Office never was, nor any such Fees appertaining thereunto; and that by colour thereof, they levy one Half-penny of the Buyer and a Half-penny of the Seller, and upon Sale of every hundred Ells of *Carvass* a Penny of the Seller and a Penny of the Buyer, wrongfully against the Statutes in the Times of your Highness's Progenitors made to the contrary, by which it is ordained that no Taillage nor Aid shall be granted nor levied without Assent and Consent of the Lords and Commons of your Realm, as by the said Statutes is fully declared; wherefore they prayed that such Letters Patents made thereof shall be void and holden for none. And this was granted; whereby it appeareth that it is declared then in Parliament, that those Statutes were and did continue; that no Taillage or Aid shall be levied without Grant in Parliament.

1 *Ric. 2. c. 1.* It is enacted in these Words: 'Our Sovereign Lord the King remembring how the Commons of this Realm by new and unlawful Inventions, and inordinate Covetize, have against the Laws of this Realm been put to great Servitude and importune Charges and Exactions, and especially by a new Imposit called a Benevolence, whereby divers Subjects of this Land against their Wills and Liberties have paid great Sums of Money, &c. It is enacted and ordained, that the Subjects and Commons of this Realm from henceforth shall in no wise be charged by such Charges or Impositions called a Benevolence or such like Charge: And that such Exactions called a Benevolence, before that time taken, shall be taken for no Example to make any such, or any like Charge, from any of his Subjects of this Realm hereafter, but shall be damned and nulled for ever.' By this it appeareth that it is expressly provided that the Subjects shall not be charged by way of Benevolence, which is in nature of a Free Gift, nor such like Charge; that is, no Charge of Money shall be laid upon the Subjects upon any pretence whatsoever, be it for Defence in time of Danger, or Guarding of the Sea.

The last and concluding Statute is the *Petition of Right*, made in the third Year of his Majesty's Reign, reciting, That it was enacted by a Statute made in the Time of *Edward I.* commonly called

Statutum de Tallagio non concedendo, that no Tallage or Aid shall be laid or levied by the King or his Heirs in this Realm, without the Good-will and Assent of the Archbishops, Bishops, Earls, Barons, Knights, and others the Free-men of the Commonalty of this Realm. And by a Statute of 25 Ed. 3. That none shall be compelled to make any Loans to the King, because such Loans were against Reason, and Franchise of the Land. And by another Statute, That none shall be charged by any Impositions called a Benevolence. By which Statutes, and other the good Statutes of this Realm, your Subjects have inherited the Freedom that they shall not be compelled to contribute to any Taxes, Tallage, Aid, or other like Charge not set by Parliament.

And then they pray, that none hereafter be compelled to make or yield any Gift, Loan, Benevolence, Tax, or such like Charge, without common Consent by Act of Parliament. And after five other things there mentioned, the Conclusion is: 'All which they pray as their Rights and Liberties.' Unto which the King answers, 'Let Right be done as is desired.' Which is a full and perfect Statute, shewing in this Point the Liberty of the Kingdom prayed, and allowed; which was not done without the Advice of the Judges, whereof I was one, whose Opinions were then demanded, and resolved that the same did not give any new Liberty, but declared what the Liberty of the Subject was in this amongst others, that they should not be compelled to be contributory to any Tax, Tallage or Aid, nor any like Charge not set by Parliament. All which Statutes, those of 25 Edw. 1. 34 Edw. 1. and 14 Edw. 3. being in the negative and in force, I conclude that these Writs to lay such a Charge is against the Law, and so the Assessment by colour thereof unlawful.

Object. Now whereas the precedent Arguments have been that the Kingdom being in Danger, therefore these Writs went forth for the making of Ships, because there could not be so suddenly any Parliament called, and the Parliament is a slow Body, and the Kingdom may be lost whilst there is a Consultation, and the Danger is conceived to be very great, because that the Writ 4 Aug. so mentions, that the Pirates provided a great Navy to infect the Kingdom, and it is fit with speed to provide a Remedy: And that the Writ of *Mittimus* mentioneth, That *Salus Reipublicæ periclitabatur*: And we must believe these Suggestions to be true, for the King's Certificate by this Writ is *Recordum Superlativum*, as Mr. Solicitor and my Brother Berkley termed it, and must leave it upon the King's Conscience if it be not true, to lay such a Charge upon an untrue Suggestion. And the Defendant also by his Demurrer hath confessed all the Suggestions in the Writ to be true; therefore it must be concluded the Kingdom was in great Danger, and present Remedy must be had by making of these Ships, and must be commanded by these Writs, and not to stay for a Parliament: and my Brother Crawley said, It may be if a Parliament were called, they will not yield to the going forth of such Writs, altho the Kingdom was never so much in Danger. And this Charge in respect of the making of the Defence is not within the Intention of these Statutes; and if it had been expressly mention'd within a Statute, that such a Charge should not be imposed, it had been a void Statute, and contrary to the Laws, that the Kingdom should not be defended.

Responf. 1. To all these I answer, That the Matter now in question is upon the Writ 4 Aug. Whether that be legal or not; and the Suggestions therein be sufficient or not for the Writ of *Mittimus*, mentioning that *Salus Reipublicæ periclitabatur* at the Day of the issuing of the Writ 4 Aug. which is a Year and an half after the first Writ, doth not help it; and this is not notified to the Sheriff and Inhabitants of the County to make them the more careful, and in a greater Contempt if a Ship were not provided, but it is only a Notification to the Barons of the *Exchequer*, that the same was the Reason that the same issued forth.

Responf. 2. The Suggestions are not absolute, that any such Danger was, or such Navy was prepared by Pirates; but only mentioneth, *Quia datum nobis intelligi* that the Pirates had done such Mischief.

Responf. 3. If such Suggestions had been absolutely set down, yet we are not always bound absolutely to believe them; because many times untrue Suggestions are put into Writs and Patents; and yet it doth not lie upon the King's Conscience, neither doth the Law impute any Fact to the King, that any such be for the Law doth always conceive honourably of the King, That he cannot, nor will not, signify any Untruth under the Great Seal; but he is abused therein, and the Law imputeth it to them that so misinformed the King, and thrust in such Suggestions into the Writ or Patent. And therefore all Patents grounded upon untrue Suggestions, are accounted void.

Responf. 4. That the Demurrer confesseth nothing but that which is legally and well set down; but if it be illegal, the Demurrer confesseth it not, but is well offer'd for that Cause.

Responf. 5. If the Kingdom were in Danger, yet a Charge must not be laid in general upon the Subjects, without their Consent in Parliament: for either the Danger is near, and then the present Provision must be made by Mens Persons, and the present Ships of the Kingdom, which the King may command from all Parts of the Kingdom, as need shall require; but cannot command Money out of Mens Purfes, by distraining of their Goods, or imprisoning of their Persons. But if the Danger be further off, by reason of any foreign Combinations, (as it is conceived it may be here) that Provision must be made of Ships by all the Kingdom for Defence; then, as *Philip Commynes*, fol. 179. saith, That Cloud is seen afar off, before that the Tempest falls, especially by a foreign War; and such Invasions cannot happen so soon, but that the King may call his Sages together, and by Consent make Provision for such Defence.

So I say here, If there be Time to make Ships, or prepare Ships at the Charge of the Counties; then is there Time enough for his Majesty, if he pleases to call his Parliament, to charge his Commons, by Consent in Parliament, and to have a Subsidiary Aid, as always hath been done in such Cases. And they are not so long coming or meeting, but they will make Provision for Defence, it being for all their Safeties: For it appeareth by *Coke*, lib. 9. fol. 1. in his Epistle, that King *Alfred* made a Law, That a Parliament should be held twice every Year, and oftner, if need requir'd, in Times of Peace: So that it was then conceived, that it was necessary to have Parliaments to redress Inconveniences.

Also by a Statute made 4 *Ed. 3. cap. 14.* it is enacted, A Parliament shall be held once every Year, and oftner, if need be. And also by a Statute made 36 *Ed. 3. cap. 10.* it is enacted, for the Redress of Mischiefs and Grievances that daily happen, a Parliament shall be holden every Year, as another Time was ordained by a Statute, which, I think, referreth to 4 *Ed. 3.* Also it appeareth by the Speed that was in the Parliament held in the third Year of his Majesty's Reign, when five Subsidies were granted, two of them to be paid within few days after the Sessions of Parliament ended; and therefore might, as this Case is, been order'd and provided for by Parliament within 7 Months, as the Time was between the Teste of the Writ, and the Time prefix'd for Ships to be prepar'd and sent.

Object. And whereas it is objected, That perhaps the Parliament would not have consented, and so the Kingdom might have been lost.

Respons. It is answer'd, That it is not to be presum'd, that the Parliament would deny to do that which is fit for the Safety and Defence of the Kingdom, their own Estates and Lives being in Danger, if the Kingdom were not sufficiently defended: For it is a Rule, *Nihil iniquum est presumend' in lege.* So of the High Court of Parliament, That they would not deny that which is fitting. But I confess, I think that if it had been moved in Parliament, they would never have consented to these Writs, such never having been awarded before since the Conquest. And if they had consented, they would have taken a Course how the same should have been made with the most Conveniency, and not to leave it to the Sheriff to tax them how he would.

Object. To that which hath been said, That this Charge is not within the Statute, and that a Statute to inhibit such a Charge for Defence were void.

Respons. I answer, that it is true, That if a Statute were, that the King should not defend the Kingdom, it were void, being against Law and Reason. But a Statute that Money shall not be charg'd or levy'd, nor that Men shall be charg'd to make or prepare Ships at their own Charges, without common Consent of Parliament, I conceive were a good Law, and agreeable to Law and Reason. And the King may by Parliament, restrain himself from laying such a Charge, but by Consent in Parliament. And then the King being a just and pious King, as ever govern'd the Kingdom, which we that serve in his Courts of Justice have daily Experience of, would not assent unto, or suffer any such Charge, if he were truly inform'd the imposing of this Charge were against any one Law of his Kingdom, as this is against so many; but would say, as it is said of the Statute made 35 *Ed. 1.* That the Pope should not be permitted to present to Benefices; That he was bound by his Oath to see that, and other Laws in force, and not repealed, to be performed: That he would not suffer such Charges to be laid, contrary to the Laws and Statutes of his Realm: And would do as the late famous Queen *Elizabeth* did, when having required a Charge upon divers of her Subjects, by particular Letters from the Lords of her Council, of several Sums of Money for present Help towards her Wars in *Ireland*, hearing that one of her Judges, being convented before her Lords for the Payment of it, thereby discouraging others to pay it, answered, It was against the Laws, that

the same should be imposed, there being an express Statute against it, which he being a Judge was bound by his Oath to signify; he being, as much as in him was, to be a Conservator of the Queen's Oath in that behalf. The Queen, I say, was very angry that such an Imposition had been laid against Law, and commanded it should be stop'd from further gathering; and to some that had paid their Moneys, the same was restor'd. And therefore the principal and only Fault in the charging of his Subjects by these Writs, if they be unlawful, as I conceive they are, is in those that devised them, and informed him that they were lawful, and such as his Progenitors had from time to time used to send forth; and in his Judges who have affirmed it to be lawful: Therefore upon this Point I conclude, That this Charge, by this Writ, is illegal; and is no sufficient Cause to charge the Defendant.

Object. Whereas it hath been much urged and argued by Mr. Solicitor, and Mr. Attorney, That this Writ is warranted by the King's Prerogative and Power-Royal, to send forth such Writs for Defence and Safety of the Kingdom in Time of Danger.

To this I answer, That I do not conceive there is any such Prerogative; for if it were a Prerogative, I should not offer to speak against it: for it is part of our Oaths, that are Judges, to maintain the King's Prerogative to the best of our Skill, and not to suffer the same to be diminish'd. But if it be as I have argued, That it is against the Common Law, and against so many Statutes, that the Subjects should be enforced to sustain, or to contribute to any Charge, without the special Consent, or common Assent in Parliament, then there is no such Prerogative; for whatsoever is done to the Hurt or Wrong of the Subjects, and against the Laws of the Land, the Law imputeth that Honour and Justice to the King (whose Throne is establish'd by Justice) that it is accounted not done by the King, but by some untrue and unjust Informations. This appeareth by the Authorities of our Books; for *Bracton, lib. 3. fol. 107.* who is an antient Writer in our Law, said, *Nihil aliud potest Rex in terris, cum sit Dei minister & vicarius, quam de jure potest;* and there a little after, *Itaq; potestas Juris sua est, & non injuriæ, cum sit auctor Juris, non debet inde Injuriæ nasci occasio, unde Jura nascuntur.* Sir *Edw. Coke*, in the 11th Book of his Reports, in the Case of *Magdalen College*, where the Question was, Whether Queen *Elizabeth* having taken a long Lease of a College, being conceived to be against the Statute 13 *Eliz.* it was sought to be maintain'd by her Prerogative, but resolv'd it could not, it being against a Statute, by which she was bound, tho not nam'd, and there *fol. 72.* it is said, *Hoc solum Rex non potest facere, quod non potest injuste agere.* *Plowden's Comment. fol. 246, 247.* in the Lord *Berkley's* Case it is said, That the Prerogative of the King cannot do Wrong, and his Prerogative cannot be any Warrant to do any Wrong to any. *Plowden's Comment. fol. 487.* in *Michell's Case*, it is said by Justice *Harper*, Altho the Common Law doth allow many Prerogatives to the King, yet it doth not allow any, that he shall hurt or wrong any by his Prerogative. 21 *Ed. 3. fol. 47.* the Earl of *Kent's Case*, it is said, That if the King, under his Great Seal, do make any Grant to the Hurt of any other, he shall repeal and avoid it, *Jure Regis;* for the King is accounted to be abus'd by untrue Sug-

Suggestions, when he is drawn to do any Wrong to the Hurt of any other; much more I say, when he is drawn to do any thing to the Hurt of his Subjects in general. Sir Ed. Coke, lib. 11. fol. 86. in *Darcie's Case*, it is said, That every Grant of the King hath this Condition annexed unto it, *Tacite aut expresse, ita quod Patria per Donationem illam magis solito non oneretur, seu gravetur.* The Book call'd *Doct̃or and Student*, fol. 8. setting down, That the Law doth vest the absolute Property of every Man's Goods in him, and that they cannot be taken from him but by his Consent, faith, That is the Reason that if they be taken from him, the Party shall answer the full Value thereof in Damages. And sure I conceive, that the Party that doth this Wrong to another, shall, besides the Damages to the Party, be imprison'd, and pay a Fine to the King; which in the *King's-Bench*, is the tenth Part of as much as he payeth to the Party. So then, if the King will punish the Wrong of taking of Goods, without Consent, between Party and Party; much more will he not by any Prerogative take away any Man's Goods, without his Consent, particular or general.

So I conclude, that I conceive, there is not any such Prerogative to award such Writs to command Men to sustain such Charge, as to be contributory to it; and to be distrain'd and imprison'd for not Payment thereof.

Also I conceive, That this is not an Act of Royal Power; for if it be illegal to impose such a Charge, then it is not accounted as a Matter of Royal Power, but as a Matter done upon an untrue Suggestion, and a Matter of Wrong done: and Wrong is not imputed to the King, for he can do no Wrong; but it is imputed to them that advised him to this Course.

Royal Power, I account, is to be used in Cases of Necessity, and imminent Danger, when ordinary Courses will not avail; for it is a Rule, *Non occurrendum est ad extraordinaria, quando fieri potest per ordinaria*: as in Cases of Rebellion, sudden Invasion, and some other Cases, where Martial Law may be used, and may not stay for legal Proceedings. But in a Time of Peace, and no extreme Necessity, legal Courses must be used, and not Royal Power.

Therefore, whereas in the Statute of 31 Hen. 8. cap. 8. which was made upon the Suppression of Abbeys, when Rebellions were begun to be stir'd, it is recited, That sudden Occasions happening, which do require speedy Remedies, and for lack of a Statute, the King was enforced to use Royal Power; it was enacted for the Reasons therein mention'd, That the King, by the Advice of his Council therein nam'd, two Bishops, two Chief Justices, and divers others, or the major Part of them, by his Proclamation may make Ordinance for Punishment of Offences, and lay Penalties, which should have the Force of a Law, (with a Promise that thereby no Man's Life, Lands or Goods, should be touch'd or impeach'd) so that therein Royal Power was fortify'd by a Statute: yet that Statute took care that no Man's Life, Lands or Goods, should be taken or prejudic'd; and that Statute was thought inconvenient, and therefore the same by a Statute of 1 Ed. 6. was repealed.

So *Braſton*, lib. 2. cap. 24. fol. 55. And the same is cited in *Coke*, lib. 7. fol. 11. in *Calvin's*

Case, *Regis Corona est facere Justitiam & Judicium, & tenere Pacem, sine quibus Corona consilire non potest, nec tenere.*

Coke, lib. 7. fol. 5. in *Calvin's Case*, cited out of *Fortescue*, *Rex ad tutelam corporum & bonorum erectus est*; which being so, he cannot take away Mens Goods, or charge them without their Consent, by any Prerogative or Royal Power.

Also there can be no such Necessity, or Danger conceiv'd, that may cause these Writs to be awarded to all Counties of *England*, to prepare Ships at such a Charge, and with such Men and Ammunition, without Consent in Parliament; for the Laws have provided Means for Defence in Times of Danger, without taking this Course: for that the King hath Power to command all, or any Persons of his Kingdom, to attend with Arms at the Sea-Coasts, to defend the Coasts, or any other Parts of the Kingdom; and also by his Officers, to make stay or arrest, all or any the Ships of Merchants, and others having Ships; or as many as he pleaseth to go with his Navy, to any Parts of his Kingdom, for Defence thereof; and to attend those to whom he appointed the Guard of the Seas, or the Sea-Coasts, at such Times and Places as they should appoint. And this hath been always taken, and conceived to be sufficient for Defence, against any Prince whatsoever; and yet the same was in Times, when the Navy of *England* was not so strong, as now by the Blessing of God and the good Providence of his Majesty it is.

That this Course was then so taken, appeareth by divers Records, viz. 23 Ed. 1. m. 4. the Record reciteth, That the *French King* had prepared a great Navy upon the Sea, and purposed to invade the Kingdom, *& linguam Anglicanam de terra delere*; and thereupon the King commanded all the Ships, and Men with Arms, to be in readiness to defend the Kingdom.

Rot. Scot. 10 Ed. 3. m. 16. reciteth, That certain Gallies in Parts beyond the Seas, were prepared with Provisions of Men, and Arms, and other Necessaries of War, and ready to invade the Land: Command was, that divers Ships should be in readiness to defend the same; and the Ships of the Ports of *Ireland* to be sent into *England* to help to defend the Kingdom.

Scot. 10 Ed. 3. m. 22. A Writ was to the Bailiff of *South Wales*, (reciting, That the *Scots* and divers others, confederating together, prepare themselves to Arms and Ships in a great Number, and intend to invade the Kingdom) to command them to have one Ship ready upon the Sea to defend their Coasts. The like Writ was then to *North Wales*.

Alm. 12 Ed. 3. m. 10. A Writ to the Mayor of *London*: *Quia hostes nostri in Gallieis cum multitudine non modica congregati in diversis partibus regni hostiliter ingressi sunt, & civitatem predictam celeriter si possunt invadere proponunt.* The King commandeth them to shut up the City towards the Water, and to put all their Men in Arms ready to defend, &c.

Alm. 13 Ed. 3. m. 13. A Writ to the Bailiff of *Great Yarmouth*: *Quia pro certo didicimus quod hostes nostri Franci & adhaerentes eisdem Gallieas & naves guerrinas in copiosa multitudine in partibus exteris congregarunt, & iis homines ad arma parari faciunt, & proponunt se movere versus regnum nostrum & navis regni nostri & Portus prope mare situat*

situa^t pro viribus destruere, & id^o regnum invadere, &c. commands the same Town to prepare four Ships with 140 Men, &c.

At the same time Writs went forth to twenty other Towns upon the Sea-Coasts. *Franc. 26 Ed. 3. m. 5.* Writ to the Earl of Huntingdon and others: *Quia adversarii nostri Franciæ nos & regnum nostrum invadere machinantes, magnum navigium præparari fecer^o & armari, ne dum ad regnum nostrum Angliæ subito attrahend^o sed ad nos & dominium nostrum & totam nationem Anglicanam pro viribus subvertend^o &c.* commanding them to guard all the Sea-Coasts of Kent, and to array all Men to be ready with Arms to defend the Sea-Coasts.

5 *Hen. 4. m. 28.* A Commission is to Thomas Morley and others: *Quod cum inimici nostri Franciæ Britan^o Scot^o & al^o sibi adhærentes inter se obligati magna potentia armati super mare in æstat. prox^o futur^o ordinaverunt regnum nostr^o Angliæ invadere, &c.* commanding them to array Men with Arms to defend, &c.

4 *Hen. 8. Par. 2.* The King by Proclamation to the County of Kent, sheweth, That it is come to his knowledge of certain, that his antient Enemy, the French King, hath prepared and put in readiness a great and strong Navy, furnish'd with Men of War, to invade the Kingdom of England; the King appoints the Lord of Abergavenny and others, to put Men in Array, and to be ready to defend that County.

Anno 1588, when the great Invasion was by the Navy, termed the invincible Navy, which was foreseen long before, this Course of preparing Ships by every County of the Kingdom was not appointed; yet in all these Times, when there appeared so great Danger or Invasion, there never went any such Writ into any of the Counties of England, to provide Ships: But the Navy of England, and Army of England was always accounted sufficient for the Defence of the Kingdom.

So I conclude this Point, that I conceive this Course cannot be taken by any Prerogative or Royal Power, nor any Allegation of Necessity or Danger.

For the fourth Point, I conceive, that if it were legal to lay such Charge upon maritime Parts; yet to charge any inland County with making of Ships, and furnishing them with more Mariners and Soldiers at their Charges, which are far remote from the Sea, is not legal, nor warranted by any former Precedent; for it commandeth an unreasonable and impossible thing by them to be done: and then a Writ, commanding such a thing as is unreasonable and impossible for the Parties of themselves to perform, without Help of other Counties, is always illegal; for it is a Rule, That *Lex non cogit ad impossibilia*: If one by Covenant bind himself to do a Thing impossible, the Covenant is void.

This appeareth by the Book-Case 40 *Ed. 3. fol. 6.* where the Case is expressly, that if a Man do covenant to do a Thing impossible, the Covenant is void, and the Deed is void in that respect: also the Book, *m. 2 Ed. 4. fol. 2.* If a Feoffment be made upon Condition to be void, if the Feoffee did not a Thing which is impossible, the Feoffment is good, and the Condition void; for it was the Fault of the Feoffer to annex such a Condition. And this appeareth by the Case of an Arbitriment. If the Arbitrator award, that one shall enter into Bond, with such an one as his Surety, to pay a Sum of Money, or to do any

other Act, it is void, as to the finding of a Surety at the least; for it is not in his Power to compel him to be his Surety: therefore the Law accounteth it unreasonable, and so void. And this appeareth by the Book-Case 17 *Ed. 4. fol. 5.* where it is so resolved.

So this Writ commanding the Sheriff and Inhabitants of an Inland County to find a Ship with Masters and Mariners; whereas there are not any Ship-Wrights that have Skill to make Ships, nor any Masters or Mariners ever there to guide a Ship, for they are still conversant about Matters of the Plough, and feeding Cattel, and Husbandry, and are train'd up by Musters to Skill of Arms to defend the Country, but not with Sea-Affairs; for most of the County never saw a Ship, nor know what belongs to Masters or Mariners; and the County is not bound to seek out of the County for such Men; and perhaps if they should, they cannot tell where to have them: Therefore, when such Writs to Inland Towns have been awarded to find Ships with Masters and Mariners, it being conceived by Information that they were Maritime Towns, and had Ships, and Mariners dwelling with them; the Truth thereof being made appear to the contrary, they have been discharged, as appears by a Record, 13 *Ed. 3. part 2. m. 14.* where a Writ went to the Admiral of the Fleet: Upon Complaint to the King by the Men of Bodmin in the County of Cornwall, that they were unjustly charged to find a Ship with Masters and Mariners, whereas that Town was no Port-Town, nor adjoining to the Sea, but far within the Land, nor ever had Ships lying there, nor Mariners, nor Seamen, nor ever used to find any such for Sea-service, and that their Major and Officers were imprison'd for not finding a Ship; thereupon the King appointed to have it inquired whether their Allegations were true, and if it were true, signified that he would not have them be unjustly charged, but that they should be discharged thereof. Which sheweth, that it was then accounted unjust to lay such a Charge upon a Town that was an Inland Town, and had no Mariner inhabiting in it; much more when such a Charge is laid upon an Inland County, which is much farther remote from the Sea, and cannot perform by themselves that which the Writ commanded.

Object. But this Record being objected by the Defendant's Counsel, Mr. Solicitor gave Answer, that the same was, because the Admiral of his own Authority had charged them, which was not according to his Commission; for he was only to charge the Port-Towns and Sea-Towns: but that the same may not be done by the King's Writ, the Record doth not prove.

Respons. But to this I answer, that I conceive it is all one when such a Charge is laid upon a Town by Writ which is an Inland Town, for so it appeareth by another Record of the same Year, viz. 13 *Ed. 3. part 1. m. 14.* where a Writ was directed to the Admiral of the Fleet, *Ab ore Thamefis versus partes occidentales*; reciting, that where the King by his Writ to the Town of Chichester, commanded the Mayor and Commonalty there, that they should make *unam Navem & duos Escularios de Guerra parari*, with Mariners and Men at Arms, to be at Portsmouth such a Day, to go with the King's Ships; and that they had complained that they had not, nor ever had any Ships arriving in that Town, nor had any Seamen or Mariners dwelling

dwelling there ; and that it appeared to the King, by Inquisition of a Jury returned into his *Chancery*, this their Allegation to be true : therefore, because the King would not have them *indebitè gravari*, (for so be the Words of the Record) the King commandeth the Admiral that they should not be troubled nor distrained for not performance of such Service. Whereby it appeareth, that if they being within a few Miles of the Sea, should not be charged to find such a Ship, much less more Inland Counties that are farther remote from the Seas, are justly to be charged with finding Ships and Mariners. Therefore I conclude this Point, that I conceive, this Writ in that respect is not legal, nor warranted by any former Precedent.

The fifth and great Point hath been, and indeed the chief Argument hath been, a multitude of Records and Precedents, which have been cited, that should warrant these Writs ; and that the King hath done nothing but what his former Progenitors have done, and have lawfully done ; and that he doth now but *Mores Majorum*, and that which always in antient Times hath been done and allowed, and therefore ought to be done.

I confess this Allegation much troubled me, when I heard, these Records cited, and so learnedly and earnestly pressed by Mr. Solicitor, and after by Mr. Attorney, to be so clear, that they might not be gainsaid : but that they proved a clear Prerogative, or at least a Royal Power, that the King might do so, especially when my Brother *Weston*, and my Brother *Berkley* (who have seen the Records) pressed some of them, and relied upon them for the Reasons of their Judgments : I say, I was much doubtful thereupon, until I had perused all these Records sent me by the King's Counsel, and satisfied my Judgment therein.

But now I answer, That if there were any such Precedent (as I shall shew there was not one shewed to me) to prove this Writ to be usual, yet it were not material ; for now we are not to argue what hath been done *de facto*, for many Things have been done, which were never allowed ; but our Question is, what hath been done, and may be *de jure*. And then, as it is said in *Coke, lib. 4. fol. 13.* in *Witton's Case*, it is said, *Multitudo errantium non parit errori patrocinium* : and *lib. 4. fol. 94.* in *Slade's Case* ; Multitude of Precedents, unless they be confirmed by judicial Proceedings in Courts of Record, are not to be regarded ; and none of these were ever confirmed by judicial Record, but complained of.

But to give a more clear Answer unto them, I say, that in my Opinion, upon view and serious reading of all the Records that have been sent me on the King's Part ; for I have read them all over *verbatim*, and I presume they sent all they conceived to be material, and I having taken Notes of every one of them, and diligently considered of them, I conceive that there is not any Precedent or Record of any such Writ sent to any Sheriff of any Inland County, to command the making of Ships at the Charge of the County ; but this is the first Precedent that ever was since the Conquest that is produced in this kind.

But it is true, that before 25 *Ed. 1.* there have been some Writs to maritime Towns and Ports, and other Towns, as *London, &c.* where they have had Ships and Mariners, to provide and prepare Ships, and to send them to such Places as the King pleased to appoint, upon any just Cause

of Fear of any Danger, for the Defence of the Sea and Kingdom ; and great Reason, that they having Ships and Masters of Ships and Mariners, should be at the King's Command, to bring all or as many as he pleaseth for the Defence of the Sea and Kingdom, being those that had the most Benefit of the Seas, and likely to have the greatest Loss if the Sea and Coast were not daily guarded ; and those were appointed most commonly to be at the King's Charge, but sometimes upon Necessity they were appointed to be at the Charges of the Towns and Ports adjoining : which I think was the true Cause of the Complaint in Parliament in 25 *Ed. 1.* and of the making that Statute for the staying of that Course ; for there is no Record of any such Writs afterwards in *Edward the First's* time, after that Statute to maritime Towns, to prepare or send Ships at the Charge of the Towns.

But in the time of *Ed. 3.* then the War being between him and the *French King* in *Annis 10, 11, 12, & 13* of that King, were the most Writs awarded to maritime Towns, to send Ships at their Charges sufficiently furnished ; and those I think were the principal Cause of the making of the Statute of 14 *Ed. 3. cap. 1.* And after that Statute no such Writs, nor any Commissions for that purpose were awarded to any maritime Towns, or Inland Towns, for the making of Ships, but one ; which Record was much pressed by Mr. Attorney, and afterwards by my Brother *Weston*, and my Brother *Berkley*, to prove, that this Course was, and might be practised after the Statute of 14 *Ed. 3.* for sending forth such Writs, and allowed : But that Record is fully satisfied, for it was grounded upon an Ordinance of Parliament in 1 *Rich. 2. m. 52.* that all antient Cities, Burroughs, and Towns, that would then, should have their Charters confirmed without any Charge of Fine, save only to make a Ship of War for Defence of the Realm : so this was not compulsory to any, but voluntary to those that would have their Liberties confirm'd. And afterwards, in 1 *Hen. 4.* Commissions were awarded for making such Vessels of War ; but those issuing forth without any Ordinance of Parliament, were complained of in Parliament 2 *Hen. 4.* and no such Writs issued forth in any Age, to any maritime Towns, to make Ships, or prepare Ships at their own Charge for the King's Service, until these late Writs.

This general Answer I give to all the Records ; and now I shall take a short View of all the Records that have been cited and sent to me, and leave them to the Judgment of my Lords and others, if any of them prove these Writs usual and legal.

The Records of King JOHN's Time.

6 *Job. m. 1.* 3 *Job. m. 3.* 14 *Job. m. 2.* 17 *Job. m. 7.* Three of these are to arrest and make stay of Ships, that they should not go out of the Kingdom, but to be ready for the King's Service ; and the other was to bring Ships of particular Towns to the Mouth of the *Thames*, for the King's Service.

19 *Job. m. 4.* A Commission to guard the Seas, to *Job. de Marshal*, and to the Sheriff of the County of *Lincoln*, and to all others to attend his Commands.

15 *Job*. Writ to the Barons of the Cinque-Ports, and divers other Towns, to have their Ships ready for the King's Service.

In the Time of Henry III.

14 *Hen. 3. m. 14.* 14 *Hen. 3. m. 5.* A Writ to the Bailiff of *Portsmouth*, to prepare one Galley. A Commission to the Sheriff of *Rocheſter*, and another to the Sheriff of *Kent*, to cauſe all Men to be in Arms in that County, and to aſſeſs them what Arms they ſhould find.

48 *Hen. 3. m. 4.* A Writ to the Sheriff of *Norfolk*, commanding him to cauſe them appointed to attend all the Coaſts in that County, who having ſerved 40 Days intended to depart, that they ſhould ſtay eight Days longer by reaſon of the Danger, and longer, if Need required. The like were ſent to the Sheriffs of *Suffolk* and *Effex*.

48 *Hen. 3. m. 2.* A Writ to the Mayor of *Bedford*, commanding him to provide for the Expences of them that were ſent from thence for the guarding of the Seas; yet it is but for eight Days more after the Date of the Writ.

48 *Hen. 3. m. 3.* A Writ to the Men of *Effex*, *Norfolk*, and *Suffolk*, appointed to attend for the guarding of the Sea-Coaſts, reciting, that the King had appointed *T. de M. Cuſtod' maris & part' maritim'* within their Counties, commanding them to aſſiſt him, and to perform therein what he required.

48 *Hen. 3. m. 7.* A Writ to the Sheriff of *Cambridge* and *Huntingdon*, to command all Men of thoſe Counties, able to bear Arms, to come to the King to *London*.

In the Time of Edward I.

25 *Ed. 1. m. 5.* A Writ to thoſe of *Effex*, *Norfolk*, and *Suffolk*, reciting, That ſuch Perſons were appointed *ad cuſtod' maritim'* in thoſe Parts, commanding them to attend them. Another to the Sheriffs of *Norfolk* and *Suffolk*, reciting, That certain Conſtables were appointed to aſſeſs Men at Arms, ſufficient for the guarding of the Sea-Coaſts, commanding them to diſtrain and compel them aſſeſſed to go.

24 *Ed. 1. m. 17.* Writs to the Sheriffs of *Lincoln*, *York*, and *Northumberland*, reciting, That he had commanded *A. de B. ad congregand' & capiend' centum naues*, between *Leigh* and *Berwick*, & *ad homines potentes in eiſd' ponend'*, commanding them to aſſiſt him therein.

24 *Ed. 1. Rot. 62.* A Writ out of the *Exchequer* to *Adam de Guerdo & aliis Gardianis* of the Sea-Coaſts in the County of *Southampton*, to diſtrain the Abbot of *Reading*, to find Horſes, which he was aſſeſſed at for that Service.

24 *Ed. 1. m. 16.* Writs to all Archbiſhops, Biſhops, Earls, &c. in the Counties of *Somerſet*, *Devon*, and *Cornwall*, to attend with their Horſemen and Footmen, for Defence of the Sea-Coaſts in thoſe Parts, when they ſhall be required by the Guardian of thoſe Coaſts.

24 *Ed. 1. m. 71.* A Writ out of the *Exchequer*, directed to all Archbiſhops, Biſhops, Earls, &c. in the County of *Norfolk*, reciting, That *Peter de Rulin* was appointed *ad cuſtodieud' partium maritimar' illarum*, commanding them to aſſiſt him.

24 *Ed. 1. Rot. 78.* A Writ out of the *Exchequer* to the Sheriff of *Berks*, reciting, That the King

was informed by *Adam de Griden* Guardian of the Sea-Coaſts in the County of *Southampton*, that thoſe Men in the County of *Berks*, who were aſſigned to come to the defending of the Sea-Coaſts in thoſe Parts, came not as they were warned, commanding to diſtrain them, and compel them to come and to do the Service.

The like Writs were then awarded to the Sheriffs of *Wiltſ* and *Southampton*, &c.

24 *Ed. 1. Rot. 81.* A Writ to the Bailiffs of *Great Yarmouth*, reciting, That the King was informed, that certain in *Flanders* and *France*, in a great Multitude, apparell'd like Fiſhermen, intended to invade their Town, warning them to gather their Ships together, and all their Arms, to defend themſelves againſt ſuch an Attempt.

24 *Ed. 1. inter Com'.* A Writ to all Sheriffs and Bailiffs, &c. reciting, That he had appointed ſome therein named, *ad congregand' numerum navium & galliarum majorum*, &c. commanding the Sheriffs in their ſeveral Counties to be aſſiſting to them therein.

24 *Ed. 1. m. 9.* A Writ of *Superſedeas* to the Guardian of the Seas in the County of *Southampton*, to diſcharge *Hugh de Pleſſis* to find Arms for his Lands in that County, for guarding of the Seas, becauſe he was in ſervice with the King.

Nota, All theſe Records are for Arrays, and congregating Ships, but none to make or prepare Ships at the Charges of the Counties.

24 *Ed. 1. m. 26.* A Writ to the Sheriff of *Effex* to diſcharge for the Winter time thoſe that ſtay at the Sea-Coaſt, with their Arms to defend the Coaſt; but commanding them to be in a readineſs when they ſhould be again commanded. The like Writs were then awarded to divers Sheriffs of maritime Counties to the ſame purpoſe.

25 *Ed. 1. m. 12.* A Writ to the Sheriff of *Lancaſter*, reciting, That whereas the King had formerly commanded him to go to all the Ports and Towns where Ships were, commanding the Bailiffs of the Ports to have all the Ships of Burden of 40 Tons at *Wincheſea*, by ſuch a Day; now commandeth the Sheriff to ſee them made ready, and ſent thither accordingly.

Ibid. m. 13. The like Writs directed to the Sheriffs of *Lincoln*, *York*, *Northumberland*, and *Cumberland*.

Ibid. m. 14. The like Writs directed to nineteen other Ports and Towns in other Counties.

21 *Ed. 1. m. 20.* A Commission to ſend away Men at Arms in the County of *Westmoreland*.

21 *Ed. 1. Rot. 77.* In the *Exchequer*, ſhewed by the Defendant's Couſel, Writs went to ſeveral Maritime Towns upon the Sea-Coaſts, and other Towns where Ships were uſually made, to make Ships and Gallies; and that the King will allow and pay for them, when he knoweth the Charge thereof.

In the Time of King Edward II.

Pat. 9 Ed. 2. Part 2. A Writ to all Men in the Towns upon the Sea-Coaſts, and Ports of the Sea, between *Southampton* and *Falmouth*, reciting, That the King had appointed *John de Norton* to make Provision for a Navy in thoſe Towns and Ports, at their Charges, he commandeth them to perform what he in that behalf ſhall require.

Clauf. 20 Ed. 2. m. 8. A Writ to the Bailiff of *Yarmouth*, reciting, That whereas the King had commanded all the Ships of the Burden of fifty Tons, from the *Thames-Mouth* towards the *West* Parts,

Parts, to be at *Portsmouth* such a Day, &c. and they had sent two Ships: That the Masters and Mariners complained, that they could not serve without Wages, and therefore appointeth them to send them Wages.

20 Ed. 2. m. 10. A Writ to the Bailiffs of *Yarmouth*, commanding them to send all their Ships of the Burden of thirty Tuns and above, to *Orewell* in *Suffolk*, with double Tackling, Victuals, and other things necessary for one Month.

The like Writs at the same time to other Towns, to the Number of four and thirty.

20 Ed. 2. m. 10. A Writ to the Mayor of *London*, to provide three Ships with Men and Ammunition, to go with nine Ships of *Kent* to guard the Sea-Coasts.

15 Ed. 2. m. 15. A Writ to the Sheriff of *Norfolk*, commanding him to warn all Barons, Bannerets, Knights, and others of that County, to attend the King at *Coventry*, at such a Day to go with the King.

15 Ed. 2. m. 15. Writs to the Sheriffs of *Norfolk* and *Suffolk*, commanding them to arrest all Barons, Bannerets, Knights and Esquires, who were commanded to attend the King at *Coventry*, such a Day therein named, and came not, to be before the King and his Council to answer it.

The Record saith, like Writs were then awarded to divers Sheriffs of other Counties.

16 Ed. 2. m. 13. A Commission to array all Persons between the Ages of Sixteen and Sixty, with Arms convenient, to come to the King, when they shall be required.

19 Ed. 2. m. 6. A Writ to the Archbishop of *Canterbury*, commanding him to array all his Servants and Families, to be ready to defend the Kingdom, if any Invasion should be.

The like Writs at that time to all the Bishops.

In the Time of King Edward III.

2 Ed. 3. m. 92. A Writ to the Mayor and Bailiff of *Southampton*, commanding them to cause all their Ships of the Burden of forty Tons, and above, to be furnish'd with Men of Arms, and Victuals; ready to defend the Land, if any Invasion shall happen.

Scot. 7. Ed. 3. m. 19. A Commission to *Hugh Courtney*, to guard the Seas in the Counties of *Devon* and *Cornwall*, and commanding all others to assist him.

10 Ed. 3. m. 25. The like Commission to *Hugh Courtney*, for guarding the Sea, in the same Counties.

Ibid. A Writ to *Bartholomew de Insula*, for Custody of the Sea-Coast in the County of *Southampton*; and therein is a Command to *John Tichborne*, and others for the County of *Southampton*, and to *Will. de Parshire*, and others for the County of *Berks*; and to *Job. Mareditt*, and others for the County of *Wilts*, to array Men with Arms, and to have them in readiness to defend the Coasts of *Southampton*.

Scot. 10 Ed. 3. m. 2. A Writ to *Will. Clinton*, Guardian of the Cinque-Ports and others, to survey all the Ships of the Cinque-Ports, and other Ports from the Mouth of the *Thames* to *Portsmouth*, and to cause them to be furnished with Arms and Victuals for 13 Weeks, from the time they shall go from *Portsmouth*.

Scot. 10 Ed. 3. m. 2. A Writ to the Mayor of *Winchelsea*, to cause the Ships appointed for that

Town to be furnished with Men and Arms, and Victuals, and other Necessaries for thirteen Weeks.

Scot. 10 Ed. 3. m. 16. A Writ to the Admiral of the Fleet from the Mouth of the *Thames* to the West Parts, to keep upon the Seas the Ships of the Cinque-Ports, and other Ships arrested to defend the Kingdom against attempt of any Invasion.

The like Writ was then to the Admiral of the Fleet, from the Mouth of the *Thames* to the North Parts, with the like Command to hold the Ships together upon the Sea.

Scot. 10 Edw. 3. m. 16. A Writ commanding the Ships of the Ports of *Ireland* to be sent hither, to guard the Seas here.

10 Edw. 3. m. 12. A Writ to the Bailiff of *Yarmouth*, to cause the Men of that Town to contribute to the Charges of the Ships and Men, and Victuals, sent from thence for the Defence of the Kingdom.

Scot. 10 Edw. 3. m. 22. A Writ to all the Bailiffs of Liberties; and Men of *South-Wales*, to have one Ship riding upon the Seas for Defence of those Parts.

The like to the Men of *North-Wales*.

Scot. 10 Edw. 3. m. 21. A Writ to the Arrayers of Men for the County of *Berks*; to compel them of that County, assigned and assessed for the keeping of the Sea-Coast in the County of *Southampton*, to go to *Portsmouth* by a Day therein appointed.

Alm' 12 Edw. 3. m. 12. A Commission reciting, that the King had appointed all the Ships from the Mouth of the *Thames* Northwards, to be arrested, and to cause them to be furnish'd with Ammunition, Men and Victuals, and to be brought to *Yarmouth*; and that the Men of *Lynn* refused to contribute to the Expence of the Charge of the Men sent in the Ship from that Town, and the furnishing of that Ship; and therefore commands the Commissioners therein named, to assess them that refuse to contribute and distrain them.

Alm' 12 Edw. 3. m. 13. The like to compel the Men of *Bardefsey* to contribute for the Expences of the Men of that Town.

Claus. 12 Edw. 3. m. 17. The like to compel the Men of the Counties of *Surrey* and *Suffex*, to contribute to the Expences of the Men of those Counties, that did attend for the guarding of the Sea-Coasts in those Parts.

Vasc. 12 Edw. 3. m. 8. A Writ to all Archbishops, Bishops, &c. and to the Sheriff of *Kent*, and the Barons of the Cinque-Ports, and all others in that County, commanding them to be assisting to *J. de Cobham*, to whom the Custody of the Sea in those Parts is committed; and to defend those Coasts against any foreign Invasion that shall happen.

Alm' 12 Edw. 3. m. 10. A Writ to the Mayor of *London*, reciting the Danger of Invasion, and commanding to shut up the Gates at the Waterside, if the Enemies approach.

Alm' 13 Edw. 3. m. 12. A Writ to the Bailiff of *Yarmouth*, reciting, that he had by his Writ commanded four Ships of War of that Town to be made ready with Men, Ammunition, and Victuals for three Months, at the Charges of the Town; to be brought to *Orewell*, and that they failed to come at the Day, to the great Peril of the Land; therefore commandeth the Bailiff to compel them at another Day therein prefixed, to be at the same Place.

There it is set down, that the like Writs were awarded to the Bailiffs of seventeen other Towns, for sending their Ships, being charged some of them for one Ship, and some for two Ships.

Claus. 13 Edw. 3. m. 38. A *Supersedeas* for the Abbot of *Ramsay*, for being charged with Arms for guarding the Coasts in *Norfolk*, for his Lands in *Norfolk*, because he was by Command attending with all his Forces in the County of *Huntingdon*, for the Safety of these Parts.

Claus. 13 Edw. 3. m. 14. A Writ of *Supersedeas* to the Arrayers of Arms in the County of *Oxon*, to discharge *John Mauditt* to serve there, because he served in *Wilts*.

Claus. 13 Edw. 3. m. 14. A Writ to the Arrayers of Arms in the County of *Wilts*, which is only concerning the Payment of Soldiers Wages, who then attended to guard the Sea-Coasts.

These being all the Records shewed me, it appeareth that there were no Writs issuing out in those Times to any Sheriffs of Inland Counties, or Maritime Counties, to make or prepare Ships upon any Occasion whatsoever, but only to Maritime Towns, to send their Ships, or prepare their Ships, at their own Charges.

The Records shewed me since 14 *Ed. 3.* do not shew any Writs to be awarded to any Maritime Town, to prepare Ships at the Charge of the Towns, except the Records of 1 *Rich. 2.* and 1 *Hen. 4.* which I have before answered; and they since that Time shewed unto me, except such as I have mentioned in my Argument, are these:

Scot. 10 Edw. 3. m. 14. A Commission to *Nicholas de Cartlope*, to array Men to resist the *Scots*.

Ibid. A Writ to the Mayor of *York*, to array all their Men to be ready when they shall be required.

20 *Edw. 3. m. 15.* A Commission concerning the Arrays of Men in the Counties of *Derby* and *Nottingham*, and to punish them that come not when they are warned.

Rot' Franc' 21 Ed. 3. m. 31. A Writ to the Arrayers of Men in the County of *Southampton*, to discharge the Abbot of *Battel*, for finding Arms for Defence of the Sea-Coasts there.

Franc' 25 Ed. 3. m. 20. A Commission to *John Bodingham*, for the Custody of the Port and Maritime Parts in *Cornwal*, and to array all Men to be in readines. There is set down, that the like Commission is to others in several other Counties.

Franc' 26 Edw. 3. m. 5. A Commission to the Earl of *Huntington* and others, to have the Custody of the Ports in *Kent*, and to array Men, and to set up Beacons; which is the first I observe of this Kind.

Franc' 46 Edw. 3. m. 34. The like Commission then to several other Persons, to array Men in several Counties, as *Warwick*, *Oxon*, *Berks*, and *Bucks*.

A Writ to the Archbishop of *Canterbury*, reciting the Danger of Invasion by the *French*, to hurt the Church and Kingdom, commanding him to array all his Clergy in his Diocess, and to be ready to go with the King's Forces, &c.

The like Writs to all other Bishops in the Kingdom.

Franc' 50 Edw. 3. m. 47. A Writ to the Arrayers of Men in the County of *Norfolk*, and to the Sheriff of *Norfolk*, commanding them to command all great Men and others that have Mansions upon

or near the Sea-Coasts, to resort to them with all their Families, for the Defence of the Coasts.

The like to the Arrayers and Sheriffs of ten other Maritime Counties.

Scot. 29 Ed. 3. m. 13. A Commission to the Bishop of *Durham* and others, to array Men in *Durham*, *Cumberland*, and *Northumberland*, to resist the *Scots*.

Franc' 40 Edw. 3. m. 31. A Writ to *William Zouch* and others, to remove with all their Families to their Houses upon the Sea-Coasts.

Nota, That all these Records are for arraying Men, and none for preparing Ships.

In the Time of King Richard II.

1 *Rich. 2. m. 7.* A Writ to the Bailiffs of *Scarborough*, because their Town was upon the Coasts of the Sea, and in danger of Invasion, carefully to look to the Custody thereof.

Eod' Rot' m. 12. A Writ to the Mayor and Bailiffs of *Oxford*, to repair the Walls of the Town, and to compel those that had Lands there, to contribute to the Expences thereof.

This Record hath been much urged by Mr. Solicitor and Mr. Attorney, that if the King have such a Power to command the Walls of a Town to be repaired, much more to command Ships to be made, which are the Walls of the Sea, and consequently the Walls of the Kingdom.

But this is clearly answered; for that it is but a private Town, and that which hath been formerly so walled, and for Defence and Safety of the Town; and none were to be charged but those that had Benefit thereby; and so it proveth nothing to the Case in Question.

Eod' Rot' m. 42. One Writ to the Sheriff of *Kent*, and another to the Sheriff of *Essex*, commanding them to perform an Ordinance made by the King and his Council, for setting up of Beacons, and keeping Watch about them.

Scot. 7. Ric. 2. m. 8. A Writ to the Archbishop of *Canterbury*, to command all his Clergy between sixteen and sixty, to be array'd and put in Arms, both Horse and Foot, according to their Qualities, to defend the Kingdom.

Franc. 11 Ric. 2. m. 13. A Writ to Serjeants at Arms, to arrest all Ships of War in the Ports of *Plymouth*, or *Dartmouth*, and other Ports, in the County of *Cornwal*; and to bring them to *Hunksbooke*, to go with the King's Majesty's Ships.

In the same Roll, divers other Writs to divers other Sheriffs at Arms, to arrest the Ships in divers other Ports.

Scot. 21 Ric. 2. m. 3. A Commission to the Duke of *Albermarle*, to array Men in the *West-Marches*, towards *Scotland*, to resist the *Scots*.

In the Time of King Henry IV.

Rot. Viagii, 1 Hen. 4. m. 11. A Writ to the Sheriffs of *Derby* and *Nottingham*, reciting, That the King certainly understood that the *Scots* intended with a great Power to invade the Kingdom; commanding them to proclaim in all Parts in their Counties, That all Men between sixteen and sixty, should put themselves into Arms, competent according to their Degrees and Qualities, to be ready upon two days warning at any time, to defend the Kingdom.

The

The like Writs were then directed to the Sheriffs of *Lincoln, York and Lancaster.*

Claus. 1 Hen. 4. m. 12. A Writ to the Archbishop of Canterbury: *Satis informati estis qualiter inimici mei Franciæ & alii sibi adhærentes, cum magna classe Navium, cum magna multitudine armatorum super mare congregatorum diversas villas per Costerum Regni mei invadere, & nos & Regnum meum destruere, & Ecclesiam Anglicanam subvertere intendunt & proponunt; thereupon commands, That the Clergy in that Diocese be array'd and arm'd, and to be ready to go against the Enemy.*

The like Writs to all other Bishops in England.
Nota, *Altho this great Danger be mention'd, yet no Command to prepare Ships.*

Pat. 5. Hen. 4. Part 2. m. 28. A Commission to Thomas de Morley, and others, and to the Sheriffs of *Norfolk and Suffolk*, and to the Bailiffs of great *Yarmouth*, reciting, *Quod cum inimici Franciæ, Scotiæ, & alii sibi adhærentes se obligat magna Potentia armati super Mare in æstat proximam futuram ordinaverunt & intendunt Regem invadere, &c.* Command to survey the Town of *Yarmouth*, and fortify it.

Nota, *Here also, tho such great Danger and Distance of Time, yet no Writs issued to any Counties to prepare Ships.*

In the Time of King Henry V.

Pat. 3. Hen. 5. Part 2. m. 37. A Commission to array all Men at Arms in the West Riding in *Yorkshire*, to be ready to defend those Parts.

The like Commissions to others, in nineteen other several Counties.

In the Time of King Henry VI.

Pat. 13 Hen. 6. m. 10. Pat. 39 Hen. 6. m. 11. Pat. 39 Hen. 6. m. 12. Pat. 39 Hen. 6. m. 1. Commissions for arraying of Men for the Defence of the Kingdom, if Invasion shall be; and for repressing of Rebels.

In the Time of King Edward IV.

Pat. 10 Edw. 4. m. 12. Commissions to George D. of Clarence, & al^s to array Men for Defence.

Pat. 10 Ed. 4. m. 13. A Commission to John Lord Howard, to be Captain of all the Forces.

Pat. 49 Hen. 6. m. 22. A Commission to Marquess Mountague, to array and put in Arms all Men beyond *Trent*.

In the Time of King Henry VII.

Pat. 1 Hen. 7. Part 1. A Commission to Richard Fitz-Hugh, and others, and to the Sheriff of *Yorkshire*, to array and cause to be armed, all able Persons, Abbots and others, to be ready to defend the Kingdom.

1 Hen. 7. Part 1. A Writ to the Sheriffs of *Norfolk and Suffolk*, to proclaim in all Parts in those Counties, for that there was likely to be open War between Charles King of France and the King of the Romans, and great Navies are prepared on either side; commands, That Watch and Ward be kept, and Beacons kept to give warning; and that every Man be ready, if need be, to come and defend the Kingdom.

In the Time of King Henry VIII.

4 Hen. 8. Part 2. A Writ to the Sheriff of *Kent*, commanding him to proclaim in that County, That the King being certainly informed, that the French King had prepared a great and strong Navy, furnished with Men of War, to invade the Kingdom; therefore commandeth all Men between the Age of sixteen and sixty, to put themselves in Arms, to be ready to defend the Kingdom at an hour's warning.

In the Time of Queen Elizabeth.

11 Eliz. Commissioners went to take a View of all the Horses in *England* fit for Service, and to survey all the Arms, to have them all put in readiness, as Necessity should require.

Now it appeareth upon View and Examination of all these Records, most of them being cited by Mr. Solicitor and Mr. Attorney, in their several Arguments, there are none of them to prove the sending of any such Writs to Inland or Maritime Counties to prepare Ships; altho there have been many times great Danger; nor yet any Writs to Maritime Towns, after the Statute of *14 Ed. 3.* to charge them to find any Ships at their Charges.

So then I conclude this Point, That I conceive this Writ is not warranted by any former Precedent.

Now I come to examine the Point of this Writ, Whether the same be legal and warranted by any former Precedent: And I conceive it is not.

1. The Motives mentioned in the Writ are, *Quia datum est nobis intelligi*, which is no certain Information: *Quod quidam prædones & maris grassatores*, did take the King's Subjects, Merchants, and others, and carry'd them into miserable Captivity. *Cumque ipsos conspiciamus navigant indies præparantes ad mercatores nostros molestand' & Regem nostrum gravandum.*

All these, and those following, I conceive are not sufficient Motives, and were never in any Precedent before to have a Royal Navy prepared. For the former Precedents are, that great Princes in open Time of Hostility had provided great Navies with Ammunition and Soldiery, with intent to invade the Kingdom, as appeareth by the former Precedents: and against such Provisions it was necessary to provide the Royal Navy, the King's Ships, and all the Ships of the Kingdom, to be gathered together to withstand them. But to make such Preparations against Pirates, it was never put in any Writ before; for when Pirates infested the Seas, they came as it were by stealth, to rob and to do mischief; and they never dared appear but when they may do mischief, and escape away by their swiftness. But against them, the usual Course hath been, that the Admiral or his Deputy with some few Ships have secured the Coast, and not to employ the whole Navy. And this appeareth by a Record, *25 Ed. 1. m. 9.* William Leighbourn the Admiral was appointed upon such an Occasion with ten Ships to lie upon the Seas, for the Safeguard of the Merchants: and the usual Practice hath been, when they hover upon the Sea, by sending a few Ships of War to scatter them, and make them fly away. And there is no fear of the Loss of the Dominion of the Sea, by any Act Pirates can do; neither is it convenient that every County of the Kingdom should provide Ships against them.

2. The Command of this Writ is to provide a Ship of 450 Tons at the Charges of the County, furnished with Masters and Mariners; which is impossible for them to do for the Reasons before alledged, and therefore is illegal, and not warrantable by any former Precedent.

3. The Command of this Writ to find Wages for Soldiery for 26 Weeks after they came to *Portsmouth*, when they are out of their County, and in the King's Service, is illegal; being against the Course of Precedents in divers Times, and against divers expresse Statutes, and this appeareth by divers Records.

15 *Johan.* In the Writs of Summons of the Tenants by Knights Service, it is expressly mention'd, that after forty Days Service (for so many days they were to do Service by their Tenure) they should be satisfied *ad denarios Regis*.

Pascb. 26 *Ed.* 1. Amongst the Writs of the Exchequer, it is there set down, that the Footmen of *Cheeshire* being 1000, who were appointed to go for the Defence of the Borders of *Scotland*, would not stir out of their County without Wages; and there 'tis set down, that one therein named was sent down with Money to pay the said Footmen.

Mich. 26 *Ed.* 1. *inter Bria' irrot'* in the Exchequer, by reason of the Invasion of the *Scots*, many thousands of Soldiers were taken from divers Parts of the Kingdom *ad vadia Regis*. And there 'tis mentioned, that Clerks were sent down with Money to pay the Soldiers of several Counties their Wages.

30 *Ed.* 1. In the Exchequer, in Account, the Wages for Land Soldiers for several Counties, and the Wages for Mariners are set down, what the Wages that were paid came to by the Day, and by the Week, both by Sea and by Land.

Trin' 31 *Ed.* 1. *inter Brevia* in the Exchequer, the Wardens of the Marches of *Scotland* signify'd to the Barons, that the Men of *Cumberland* and *Westmoreland*, appointed for the Defence of the Marches, would not stir out of their Counties without Wages; whereupon Order was given for Wages for them.

19 *Edw.* 2. Commissions went out to pay Soldiers, who served out of the several Counties, for Defence against *Scotland*.

Hil' 2 *Edw.* 3. *Rot.* 16. In the Exchequer; it was ordered in Parliament, That whereas some Soldiers had received of some of the King's Officers, Money for their Wages, they were fain to give Bonds for Re-payment, and that those Bonds should be all re-delivered.

1 *Edw.* 3 *Cap.* 5. That no Man shall be compelled to go out of his County, but where Necessity requireth by sudden coming of strange Enemies into the County; and then shall be done, as hath been done in times past: which, I conceive, is to be at the King's Wages, when any are out of their Counties.

But to clear all Doubts, the expresse Statute of 18 *Edw.* 3. *cap.* 7. is, That no Men of Arms, Hobbellers and Archers, chosen to go in the King's Service out of *England*, shall be in the King's Wages from the time they go out of the Counties where they were chosen, until they come again.

19 *Hen.* 7. *cap.* 1. Those that had any Grants of Lands from the King; and 11 *Hen.* 7. *cap.* 1. Those that had any Offices of the Grant of the King, are to serve the King in his Wars: But in both it is appointed, they shall have Wages from

the time they shall come from their Houses, until they return.

2 & 3 *Edw.* 6. *cap.* 2. It is narrated, That no Captain receiving Soldiers, serving by Sea or Land, shall receive any Wages for more Soldiers, or more Time than they shall serve; and shall enter the days of their entering into Wages, upon Pain, &c.

All which Records and Statutes do prove, that the Soldiers should be at the King's Wages; therefore the Command for Soldiers Wages for twenty six Weeks, when they go from *Portsmouth*, is illegal, and expressly against these Statutes: and so the Assessment being entire, as well for the Wages, as the other Charges, I hold it to be clearly illegal, and not to be demanded.

4. That the Command of this Writ to the Sheriff, to assess Men at his own Discretion, is not legal, nor warranted by the Precedents: for Precedents are commonly, that Assessments for Contribution, for making or setting out of Ships, have been by Commissioners, which by Presumption had Knowledge of such Matters, as commonly Sheriffs have not. Also, this leaveth to the Sheriff too great a Power to value Mens Estates, as to inhance whom he will, and to favour whom he will.

5. That the Power to the Sheriff and Mayors of Towns, &c. to imprison, especially as it is used, is illegal, and expressly against divers Statutes: for it is provided by *Mag' Char' cap.* 29. *Quod nullus capiatur vel imprisonetur, nec super eum mittimus, nisi per iudicium parium suorum, vel per legem terræ.*

Also, 5 *Edw.* 3. *cap.* 9. That no Man shall be attach'd, or his Goods seiz'd; contrary to the Form of *Mag' Char'.*

Also, by the Statute made 37 *Edw.* 3. *cap.* 18. it is recited, That by that great Charter, none should be taken or imprisoned, but by due Process of Law; yet by colour of this Writ, the Sheriff may imprison any Person, yea, any Peer of the Realm: for altho Peers are not to be arrested upon ordinary Process between Party and Party, as it is resolved in the Countess of *Rutland's* Case, in *Coke lib.* 6. *fol.* 32. yet upon Contempt, and upon Process of Contempt, which is always for the King, any Peer may be imprisoned, as it is resolved by all the Lords, and all the Judges, in the *Star-Chamber*, in the Earl of *Lincoln's* Case: and so the Sheriff, by colour of this Writ, may arrest any Peer, as for a Contempt in not paying. But by the Book-Case, 2 *Edw.* 3. *fol.* 2. it is resolved, That a Writ to imprison one upon Suggestion, before he be indicted, or without due Process of Law, was illegal. So for this Clause, I hold this Writ to be illegal.

6. The last Clause of this Writ is, That by colour of this Writ, no more should be gathered than will be sufficient for the necessary Expence of the Premises, and that none who shall levy any Money towards these Contributions, shall detain the same with them, or employ the same to other Uses; and if more than did suffice were collected, it should be repaid amongst those that paid, after a rateable Proportion. But as the Course is taken, it is not to be perform'd: for no Ship, nor Tackling, nor Ammunition, nor Men, nor Wages, nor Victuals being provided, it is not to be known, whether more be gathered, or less than would suffice: And there being Money gathered, it is of necessity either detained with the Collector, or the Sheriff, or employed to other Uses than are appointed

pointed by the Writ; so the Writ is not performed: And the Money assessed and collected, is not duly paid nor collected; and the Money assessed and unpaid cannot be duly demanded.

7. Admitting the Writs were legal, and the Commands therein legal, yet the Assessment, as is certified, is not sufficient to charge the Defendant; for it is not certified, that any Ships with Ammunition, and Men were prepared: and this is a Year after the Time it should have been prepared, and sent to *Portsmouth*. And if it were not prepared, there is no cause to charge the Defendant; and that not appearing to be done, it shall be conceived not to be done.

For if one be charged, in consideration of a thing to be done, before a certain time to pay a Sum of Money, if the thing be not performed according to the time, none can be charged for not payment of the Money after the time is past: for it is in nature of a Condition precedent, to have a Duty or Sum of Money to be paid after the Condition performed; and there, he that will have the Duty, must shew that the Condition is performed.

This appeareth in the Case of 15 *Hen. 7.* and *Coke, lib. 7. fol. 9. Ughtred's Case*. And therefore, if the Ships be not prepared according to the Writ, nor Money employed for preparing a Ship for and in the Name of the County; then every one that paid any Money, either voluntarily as in obedience to the Writ, or compulsorily upon Distress, may demand their Money again of the Sheriff, or of them that received it: For as they paid their Money, so it must be disposed of, and cannot be disposed of otherwise by any Command whatsoever, altho it be under the Great-Seal: For the Command being under the Great-Seal, to prepare and furnish a Ship to such a Purpose as in the Writ is mentioned, and they paying it to that Purpose, it cannot be otherwise disposed, altho it be more for their Advantage; for private Men having Interest therein, that cannot be taken from them, nor dispensed withal. Therefore, in *Coke, lib. 7. fol. 37.* in the Case of *Penal Laws*, it is resolved, That if the Penalty appointed to be forfeited upon a penal Statute, be given to the Poor of the Parish where the Offence is committed, the King cannot dispense with the Penalty for that Offence, because the Poor have an Interest therein: but if the Penalty be given Part to the King, and Part to the Poor, the King may dispense with his own Part, but not with the Part of the Poor.

Object. And where it hath been said, That it is by way of Accommodation, because the Country cannot well know how to provide to content, and perhaps with more Charge.

Respons. To this 'tis answered, They must do it at their Peril, if the Writ be legal; and then if it be done, they shall have the Benefit thereof. For as my Brothers *Weston* and *Berkley* have both agreed, if the Ship were made when the Service was done, the County for which it was made shall have the Benefit of the Ship, Ammunition, and Victuals, and of the Service of the Men, being made more expert against another Time; and the Ship may with some easy Charge serve again, and nothing lost, but the Expence of the Victuals; and the Kingdom shall be so much the more strengthened by having so many Ships made or prepared; and they may have Account of their Money how it was bestowed; and if any Surplusage be gathered, to have it restored. And

that the Law is so, that if the Money be received of the County, and not employed accordingly, the Party so receiving it, and detaining it, or misemploying it, is to pay a Fine to the King for the same, and is accountable for the Money, appears by two Records.

The one in *Hil. 16 Edw. 3. Rot. 23. B. R.* where two Soldiers were indicted, for that they taking 3 *l.* a-piece towards their Arms, and the bringing of them to the Place where they were appointed to serve the King in *England* in his Wars, they went not, but tarry'd still in their Houses, and retained the Armour and the Money which they had received for that Purpose. They thereupon being convented, pleaded not guilty; and the one was found to go in the Service according to the Appointment, so he was discharged: and the other was found, that he received the Money, and went not to do the Service, nor restored the Arms nor Money; thereupon he was committed to the Prison, and paid to the King a Fine, and found Sureties to pay the Money to the Hundred from whom he had received it.

The other was *Hil. 20 Ed. 3. Rot. 37. B. R.* There two high Constables were indicted, for that they, 5 *Ed. 3.* had received six Marks of the Towns in their Hundreds, to set forth Soldiers, and had not set them forth, but detained the Money; which they denying, it was found that they had received the Money for that Purpose, and had disbursed 10 *s.* and 6 *d.* thereof towards the setting forth of Soldiers, but had retained 38 *s.* and 6 *d.* and not disbursed it: thereupon they were fined and imprisoned, and afterwards enlarged upon Sureties to pay the Money they had retained undischursed, at the next time the King commanded Soldiers from those Parts. By both which Records, being for Offences done so long before, it appeareth, that those that have received Money of the Country to prepare Ships, and not employ'd it accordingly, are answerable to the King and his Successors, to pay a Fine for Mis-employment of it, and are chargeable to those of the County of whom they received it for Payment thereof.

8. For the last Point, I conceive, that this *Certiorari* directed to the two that were late Sheriffs at the Time of the Assessment, and not to the Sheriff that was at the Time of the *Certiorari* awarded, who is the only immediate Officer to return the Writs, is not legal; for it is the first that hath been seen of that kind: for all Writs are directed to some immediate Sheriff, requiring him to demand of the former Sheriffs, what they did upon the former Writ; and they are to return to him what hath been done, and he to return the same to the Court whereunto he is an immediate Officer; and the former are not any Officers. So the *Sci' Fa'* thereupon grounded, I conceive, is not good: Also the *Sci' Fa'* to warn Mr. *Hampden ad ostendendum si quid pro se habeat, & quare de prædictis viginti solidis onerari non debet*, not shewing to whom, is uncertain, and is insufficient. Thereupon I conclude upon the whole Matter, that no Judgment can be given to charge the Defendant.

The Argument of Sir William Jones Kt. one of the Justices of his Majesty's Court of King's Bench at Westminster, in the Exchequer-Chamber, in the great Case of Ship-Money.

IN *Easter* Term there issued forth a *Sci' Fa'* and this doth rehearse divers Sums of Money assessed upon divers Persons in the County of *Bucks*, for providing a Ship of 450 Tons, with Men, Ammunition, &c. to attend the King's Navy for defence of the Kingdom.

And afterwards upon a *Certiorari* out of Chancery, directed to the Sheriff, to certify those Assessments, and the Names of those that made default of payment, Mr. *Hampden* was returned to be assessed at 20 s. and hath made default.

Upon this Return the King by *Mittimus* out of the Chancery sent the Writ, the *Certiorari*, and the Return, to the Barons of the *Exchequer*, to do as the Court shall think fit.

Thereupon a *Sci' Fa'* went forth to the Sheriff to summon Mr. *Hampden* to shew Cause why he should not pay the 20 s. assessed upon him: He was returned warned, and appears and demands Oyer of the several Writs and their Returns, and of the *Sci' Fa'*: and upon all this he demurreth in Law, and Mr. Attorney hath joined in Demurrer with him. And my Lord Chief Baron and the rest of the Barons have adjourned this hither, to desire the Advice of all their Brothers of the Law; and indeed it requires Advice, for it is as great a Case as ever came to be advised on before Judges.

I say it is a great Case; it concerns the King in his Royal Prerogative, and the Subject in his Interest, in his Land and Goods, and Liberty of his Person. They that have spoken already, and they that shall speak after me, shall hardly escape the Censure of the People, of some that have some Understanding, of some peradventure that have less, and of some that have none at all, but speak according to their Opinions, Affections or Wills. *Fœlices essent Artifices, si per solos Artifices judicarentur*: we should be happy to be judged by them that are learned; but when it is by them that understand not, then it is turned into Calumny and Reproach.

Some have taxed them that have gone or will go with the King, as tho they were fearful, and went about to captivate the Liberty of the People and take away their Goods. Some are taxed on the other side, if on the contrary, that they are given to Popularity: so as I may say as the Psalmist, *Domine, ne posuisti in lubrico loco*; for it is impossible to escape their Tongues, and between those two Decks of Censure I am like to fall. And however I may fall with my Sentence, with God's Grace I shall make no Shipwreck of my Conscience.

I am trusted by the King to display his Justice equally to all, and sworn to dispense his just Prerogative, as well as the Subject's Liberty; and if we do otherwise than as Judges, we do as false Men. If any Man offend contrary to his Oath, he doth forfeit his Lands, Goods and Tenements. I shall not therefore for any respect do against my own Conscience; but descend to give Judgment, not regarding the watry Mouths of others.

The King's Counsel, and the Counsel at the Bar, have spoken so largely to this business, and it is spoken to by my Brothers so fully, that I can hardly say any thing but what hath been said before; so I will select some few things, to satisfy my own Conscience, tho I cannot satisfy any Man's else; which I will do as plainly as I can, and as I ought to do. And if there had not been a variety of Contestation, I should have spoken very little; but now Necessity requireth that I must enlarge myself a little more.

1. I will state the Question, and in it put many things objected out of doors. The Question is, whether the King of *England*, when he perceiveth Danger to be imminent to the Kingdom, and a necessity of Defence, may not by his Writ send to all Counties as well Inland as Maritime, to require them, at the charge of the County, for a convenient time to provide Shipping, with Men and Ammunition, &c. but no Money to come to his Purse, but the Ships to go to defend the Kingdom.

The Question stands not, whether the King may draw it to be a perpetual Charge upon the Subject, which under favour he cannot; for this goeth upon a Fear of Danger, which continueth but for a time, and therefore this cannot be perpetual; for when the Occasion ceaseth, the Taxes must likewise cease. There is a Case to this purpose, 39 *Hen. 6. fol. 39. Protection. Brooke*. A Protection granted to one for three Years, and the Question was, whether a good Protection: The Rule is, the King may grant a Protection for one Year, and at the Year's end, renew it for another Year if the occasion require it, and so for a third Year; yet he cannot at the beginning give a Protection for three Years together. So in this case, tho the King may, upon an emergent Occasion, command Ships, yet by reason of that Occasion he cannot make it perpetual, for the Occasion may cease.

2. In this Case, I will not exempt the King's Majesty himself, to bear a part of the Burden; the Head and Body must go together, he must join with his Subjects in the defence of the Kingdom.

3. The Question is not, whether for a foreign War he may command this Charge; it must be only in defence of the Kingdom in case of imminent danger.

4. It is not whether the King may lay this to draw a Sum of Money into his own Purse, for the King sends to have no Money; but to provide a Ship; and if the Sheriff accordingly provides a Ship, there is an end of the business; all this is out of the Case.

As *Catlyn* Chief Justice compared a Fine to *Janus Bifrons* having two Faces, the one looking backwards, the other forwards; so may I of my Argument: I shall first look backwards, and tell you *Quid fecimus*, what we have done; and then forwards and tell you *Quid faciemus*, what we shall do.

The *Quid fecimus* rests in the Advice we have given to his Majesty in the Case, and the Opinion of the Judges subscribed with their Hands delivered over to his Majesty (*which was read at large by him*.) The advice we gave consists of four Assertions.

1. That when the Kingdom is in danger, all the Kingdom is to join in the Charge of Defence.

2. What shall be adjudged a Danger, and what not, his Majesty is the sole Judge there-

of, and of the Means how to prevent and avoid it.

3. That in Case of Danger he hath Power to send to Inland Counties, as well as to Maritime, to assist to defend against Invasion.

4. That the King hath a Power of Compulsion, to punish those who refuse to contribute to this Charge.

This Opinion being jointly and severally delivered by us, declared by my Lord Keeper in the *Star-Chamber*, in the Presence of us the Judges, before the Lords of the Council, with an intimation as if it were the full Consent of all the Lords of the Council before-hand, and there commanded to be inrolled in all the Courts at *Westminster*; yet we so delivered our Opinions, that if better reason was shown to alter them, we might recede from them; for we had better *recurrere*, than *male currere*.

Now to the 2d Point, *quid faciemus*, whether to stand to this Opinion or not, and then whether this Book or Record will warrant it, and how far it differeth from what we have done, I shall speak my Conscience.

I am an old Man and ready for my Grave, my Tongue and my Heart shall go together. I am of the same Opinion I was then; and conceive what we then delivered was according to Law; with all modesty submitting to those that have been or shall be of a contrary Opinion, for the grounds of Law and Nature support it.

1. *Salus Populi est Suprema lex. Qui sentit commodum, sentire debet & onus. Quod omnes tangit, ab omnibus debet supportari.* What do these Rules intimate else, but that when a Danger is imminent, the Charge must lie upon the whole Kingdom, and the Burden must be borne by all? And that is not denied by them that were of Counsel on the other side. It must not be every kind of Fear and Rumour that must draw this kind of Burden upon the Subjects; but such a Danger as the King in his understanding perceiveth doth require a speedy Defence.

2. That the King is sole Judge of this Danger, and how to prevent and avoid it, is not to be literally understood, for we are his Judges deputed, but our Judgment flows from him. Judgment is settled in the King, he is the Fountain of Justice, from whence all other proceeds. *Brañon* saith, *Rex vicarius Dei est in terra sua*. We are Judges cumulative not primitive; so he is the supreme Judge. In the Parliament the King is the sole Judge, the rest are but Advisers. 22 *Ed. 3. fol. 3.* Here it is that the old fashion of penning of Statutes was *Rex Statuit*. 7 *Hen. 7.* Afterwards it came to be with the Advice of the Lords and Commons. *Trin. 6 Hen. 6. Rot. 41. Banc. Reg.* There was a Prior brought a Writ of Annuity against one in *Ireland*, there was Judgment in the *Common-Pleas*; then at length a Writ of Error in Parliament; the Judgment affirmed; afterwards a Writ of Error in the *King's-Bench* here, and both Judgments reversed. And in the entry of the Judgment the Record saith, *Nos cum assensu & ad requisitionem Communitatis* do reverse the Judgment. Where note, the King is the Man that is the sole Judge thereof. (By the way observe, out of this Record, the Power of the *King's-Bench* in *England*; for upon this Record it appears a Writ of Error was brought in the *King's-Bench* in *England* to reverse a Writ of Error in Parliament in *Ireland*.) This sheweth the King in Parliament is the sole Judge, the rest but Ad-

vifers. So, as I said before, he is the only supreme Judge of the Danger himself, and of the way of Prevention, whether by his Council or by his Parliament.

The 3d Assertion is, That the King without Parliament, in case of imminent Danger, hath Power to send to Inland and Maritime Counties to provide Ships. And I think he may so do by the Fundamental Laws, Common Laws, and Statute Laws, and by the Precedents.

First of all, for the Common Laws, (here I leave the Divines to talk of the King's Power, who under favour take more liberty than is fitting to say in a Pulpit; for he that will have the Statute *de Tallagio non concedendo*, if it be a Statute, to bind the King, such a Man is not *Cæsar's* Friend, but speaks without his Book) *Brañon* saith, That by the general Law of Monarchy, the Subjects Goods are at the King's Pleasure: But a King ruling by politicke Advice, is to rule according to his fundamental Laws, which yet in *England* take not away, but preserve those *Jura Supremæ Majestatis*, as to pardon all Offences, to stamp Money, and infinite others more declar'd in Parliament, 1 *Jac.* which Court is that *tres bault Court*, of which none ought to think dishonourably. I leave Divines to talk their Pleasure: We are to judge according to the fundamental Laws and Customs of the Realm. There is a Book which Mr. Attorney remembered well, that the King of *England* hath more Power than any other King. If the King must by the Law defend the Kingdom, he must lay a Charge to provide for the same. The Common Law owns the King as Sovereign and Head of the Kingdom, that should defend and protect it. 1 *Sam. 8. 19, 20.* They would have a King to be adjudged by, as other Nations had, and to go in and out before them; that was the Fashion of Kings before, to judge their People by Laws, and to defend them with Arms. It is an incident Quality inherent in the King. It standeth with Nature and Reason, that the King should have the Charge of the Defence. If this inherent Quality should be taken away, how can he defend his People? If he be no more than a common Person, he cannot be a King, unless he take the Defence and Protection of his People upon him. Mr. Attorney shewed learnedly, the King is a Monarch and Sovereign, the People his Subjects: He is the Head of the Body, and therefore may command it. *Fitz-Herb. Na. Br. and Stamford* Prerogative, that the King protects the Bodies and Lands of his Subjects: He is *Vicarius Dei*, appointed to protect the Kingdom; so there is a Tie of Allegiance that binds every Man. *Stamford, cap. 2. of Prerogative*, the King by Law is the Protector of the Body, Lands, and Goods of his Subjects; so he hath a Liberty and Prerogative for this End, (not for his own Profit) in the Bodies, Lands, and Goods of his Subjects, in Time of Danger. 11 *Hen. 7.* Every Man in his own Person is bound to serve the King for the Defence of the Realm; and gives a Reason, and that is the Reason of Protections, because they are bound to it; therefore they should have no Harm done unto them. The King himself cannot free any Man from his Allegiance, without Act of Parliament; neither can the Subject free himself, as in *Dr. Storie's Case*. So you see the King's Majesty hath Interest *pro bono publico*, in the Person.

He hath also an Interest in our Estates, if it be *pro bono publico*; as in the Case of *L.* it was adjudged he has Power to come over Mens Lands. Now what Prerogative hath the King concerning that? and yet, according to *Popham* the two Chief Justices and Chief Baron agreed, that where a Man hath an Inheritance in Lands and Woods, the King cannot cut his Woods for his private Use, unless it be *pro bono publico*; nor dig Gravel in another Man's Lands: but yet in Case where it is *pro bono publico*, he may do it, and make Bulwarks on their Grounds for Defence of the Kingdom.

So for Pontage and Murage, the King cannot compel the Subject to make the Walls of his own House, or a Bridge for his own private Use; but where it is commanded to be done, where the Subject hath a Benefit, there it is good: so here is the Difference of the Case, where the King commands for his private Use, or *pro bono publico*.

My Brother *Crooke* saith, the King may press Ships for his Service, in the Defence of the Kingdom, but not command Inland Counties to furnish Ships: yet there is a Precedent in *Oxford* to the contrary.

By the fundamental Laws of the Kingdom, he is the Defender of his Subjects, of their Bodies, Lands, and Goods; and where it is *pro bono publico*, they are to pay towards it. If there had not been Objections that dazzled me, I should have done before this.

The Case of the Abbot of *Robertsbridge* is an Allowance of this Charge, a double Charge of Lands there in two several Places. I remember in a Parliament, where I learned a great deal of good, 1 *Jac.* the King without Consent in Parliament, laid an Imposition on Merchandize, but it was in case of Necessity, *pro bono publico*.

Now to answer Objections, and those were many, my Brother *Crooke* did double and redouble them. Brother, we sit one next another, antient Judges, tho different in Opinion. I speak out of my Conscience, as you have spoke out of yours; so, tho there be Variety of Opinions, yet Conscience is the same.

First, saith he, the fundamental Laws of the Kingdom have settled a Property in the Goods in the Subject, that without their Consents, this cannot be taken from them.

This doth not trench upon the Property of the Subject, if you take the Case right: If this be a lawful Prerogative in the King to lay this Charge, then how can it be said, that the Subjects Property is invaded? For if the Property *ab initio* be in the King, then the Law annexed this to the Lands and Goods of the Subject in the Beginning, and made them liable to it by a secret tacit Condition. If a Man do enter for a Condition broken, this is no divesting of the Property out of the Subject. If Goods be given to one till such a thing happen, or upon such a Condition, there is a Property in the Donee, yet it is clogged with a Limitation and Condition; and when the one or the other happens, the Property may be reduc'd or transferr'd; as in all Assessments and Rates, Goods are liable to the Payment thereof: so for the Payment of those things necessary for the Defence of the Kingdom without their Consent; for if legal, what needs this Condition? I would wish no Man to clamour, that this is to divest the Subject of the Property in his Goods; for it is nothing but what is for the Defence of the Kingdom.

The next Authorities objected by my Brother *Crooke*, are the Laws of *William the Conqueror*, and Charter of King *John*, then the Statutes, then *Fortescue*; and therefrom he saith very much, that the King of *England* cannot lay Taxes upon his Subjects, without their Consent in Parliament.

And where he speaks of Taxes and Charges that cannot be imposed without Consent, some other Places of the Author do shew, that it is where the King imposeth it for his own private Use, and not in Case of publick Defence.

The next is 13 *Hen.* 4. the Charges of 1 *d.* upon a Cloth for measuring, adjudged void. I conceive it was not adjudged void upon that Point. True, in Parliament it was complained of as a Grievance to the Subject; but every Petition in Parliament doth not argue a Right: it may be it was *ad damnum*, yet *absque injuria*; that Case differs much from this, for there was a Charge to a private Benefit, and no Regard to the publick, which perhaps the Law will not allow, but where there is a *quid pro quo*; nor of the Case of Dice, Cards, Monopolies, those Cases nothing like this: so a Commission of Sewers may lay a Charge for the Repair of a Bank; when the Lands are overflown, and the Owners be not able, the Neighbourhood must be taxed; so in Case of a Bridge.

Then the Statute of 2 *Rich.* 2. was objected; nothing must come to the King's Purse nor to the King's Coffer, but it must be for the defence of the Kingdom.

This was no lawful Charge, because the intention was to fill the King's Coffers, which were empty, and that could not be done but by Parliament; so it is not in our Case, no Money is to come to the King's private Use.

That of *Hen.* 4. for repealing of Commissions that were awarded to provide Barringers, the Record saith only that the King's Answer to the Complaint was, *Le Roy se avisera avec ses Signores*.

Then he cometh to the Statute of Tonnage and Poundage only for ordinary defence of the Kingdom.

Why there should be any difference between an Inland County and a Maritime I know not, since to the Common Defence all are equally engaged as one intire Body; and the Inland Counties have the benefit by sending their Wools by Sea, and yet they must not help to the defence of the Sea. As in the natural Body one Member helps another, so when the Maritime Counties are not sufficient to make defence (as in case of extraordinary Defence they cannot be) the Inland County must contribute. Besides, the King may unite an Inland County to a Maritime, and make them but one County; is not he Lord of the Land as well as of the Sea? What was the Law before the division of Counties? Surely it was equal in charging the whole Kingdom; for I see no Reason but an Inland County should be chargeable by Law, as well as a Maritime. In antient times, things done upon the Sea, were tried upon the Land in the King's Bench, as by many Records appeareth. One is of a *Norman* Robber upon the Sea.

Object. But if this be so, the Law suffereth a greater Inconveniency, *viz.* that the King may by his Writ charge what and when he pleaseth.

Respons. This the Law trusteth the King's Goodness with, that he will not require it of his Subjects but when there is occasion; and he may do it,

so long as he continues it no longer than there is occasion.

Object. But were not Dr. Cowel and Dr. Manwaring sentenced in Parliament for such Tenets?

Respons. They were sentenced, and deservedly, but different from our Case: I was a Member in the Parliament, and was in the lower House when Cowel was sentenced. I will tell you what Dr. Cowel did: he wrote a Book, and under the Words *Prerogative, Subsidies, and Kings*, he inferred as if the King might make Laws without Consent in Parliament; and wrote against the Common Law, which the King is sworn to maintain: thereupon he was sentenced, and his Sentence was just, and I gave my Voice for it. The other was Dr. Manwaring, he preached two Sermons that the King was not bound to observe his Laws, that the Right and Liberty of the Subjects are at the King's will and pleasure without Parliament, and that this doth bind the Conscience of the Subjects, and that they are bound to pay Loan-Money upon pain of eternal Damnation; and that they that did refuse to pay the Loan-Money, did offend against the Laws of God, and were guilty of Disloyalty and Disobedience; and that the Authority of Parliaments was not necessary to the granting of any Subsidy. For this he was sentenced, and made his Submission. That was for raising of Money for his own use, but this is to require his Subjects to provide Ships for the defence of the Kingdom.

Object. The next Objection was *Coinage*, that by that Tenure great Profits arise to the King for Defence.

Respons. Shall the Defence of the Kingdom be laid only upon those who have their Maintenance out of the publick Revenue? What will the King have left to maintain himself, his Queen, his Children, Intelligences abroad? Will you strip him of all? It is true, I hold that the King with the Subjects must join together in the Defence of the Kingdom. If the King be rich, you should have pleaded that the King had sufficient in his Purse.

Object. Then it is objected, that there is no apparent Danger, and that this Charge is not allowable neither by the Common Law, Statute Law, or Custom.

I say, it is due by the Common Law; but will you have Danger so apparent, as *Hannibal ad portas*? Will you suffer an Enemy to come in before you prepare to resist? if once he gets in, you will hardly get him out. Is not that as much to be commended, that doth prevent a Danger before it cometh, as when it comes? Is not the care to prevent Fire from a House before the Fire takes hold of it, as great as when it is on Fire to quench it? Therefore the King, like a good Physician, seeing a Disease growing, before it gets too much strength prevents it.

Object. In six Weeks time, a Parliament may be called.

Respons. Tho it may be, yet after they meet a long time they spend in Consultation before they can do any thing; which would be too mischievous in a sudden Invasion: and therefore King Ed. 3. in his 10th, 11th, and 12th Years, whilst the Parliament was sitting, sent forth his Writs for Aid.

Object. It was alledged by Mr. Holborne, that the Law of Nature teacheth every Man to defend himself.

Respons. What, I pray you, will you then have done, on a sudden Invasion, when Forces must be raised in *Cornwal*, some in other Parts of the Kingdom as remote, and all must meet together? If the King must expect such an actual Invasion, before such time as he sends forth his Writs to have them all in readiness, how poorly would the Kingdom be defended at that time? Our Forces would be scattered, and cannot be brought together, which thus divided cannot withstand a foreign Power.

Object. The last Objection was, that the King at his pleasure may draw when he pleaseth this Charge upon the Subjects, if he say he is of Opinion that there is Danger.

Why may not the Law allow this, and trust the King's Judgment here as well as in the Case of a *Ne exeat Regno*, in which if the King commands his Subjects to stay at home, for such and such a Cause, the Cause is not traversable? *Fitz-Her. Na. B. 165. 85. 7 Hen. 7.* saith, if the King doth rectify an Act of Parliament, you cannot speak against the King's Certificate under the Great Seal; *Null tiel Record is no Plea.*

Again, God Almighty bless the King; it is against presumption of Law, that the King, whose Heart is in the Hand of the Lord, should tell a lye. God gives Wisdom to govern aright. Lying Lips do not become a Prince, Truth to God Almighty he owes. The Law says, the King may *nescire verum*, but not *dicere falsum*. The King may not know a Truth, but cannot speak falsely. Next *Juramento strictus*, he is bound to administer Justice, and not to grieve his Subjects. Is he so unwise to charge them and himself without cause, with providing of Ships? What benefit comes to him by it? Surely to tell a Lye will be no Advantage to him; he were a King of Wickedness to lay a Charge on the Subject to no Purpose; thus he shall charge himself and his Subjects about nothing. Does any Man think he will put a Burden upon his Subjects without Cause? We have a good King, and our Imaginations ought to be good of him.

The fourth Assertion is, that the King hath Power to compel them to the contributing to this Charge. This Power of the King is a special Prerogative, and if good at Common Law it taketh away the Statute, when it is *pro bono publico*, to defend the Kingdom.

The general Words of a Statute shall never be construed to extend to it; the Charter of King John shall never take away the King's Prerogative, neither the Statute *de Tallagio non concedendo*, which I agree to be a Statute, and so my Lord Coke allows it to be. Now this Power of the King, of which I argue, is a special Prerogative in point of Government; it is a *proprium* to a Scepter *quarto modo*, therefore the general Words of a Statute shall never be construed to extend unto it: as if the King hath a special Interest in Land by the Prerogative, it doth not pass away without precise words, as the Books are infinite in it. If the King grants away Land by his Letters Patents, parcel of a Forest, without special words, this shall remain subject to the Forest-Laws still: so many Cases may be put, when general Words

of a Statute extend not to a particular Prerogative. If general Words of the Statute should take away these Aids, why do they not take away the Aids of *pur faire Fitz chevalier*, & *pur file marier*, since that general Words may include them as well as this? But you all grant that these Aids are not taken away, and by the same reason I conceive this remains.

My Brother *Crawley* held, that special Words in an Act of Parliament could not take away his Prerogative, because it would have been an Act against reason. I will tell you what I have heard adjudged in this Case. In the Parliament held 1 *Jac.* there were two things expressly moved: One, That there might be no Wardship or Tenure of the King: the other, that the King might not allow Surveyors. To these Questions, after long Disputes, it was answered by the whole Parliament, that such an Act of Parliament to top the Prerogative of Tenures would be void, because it is inherent in the Crown, for every Man holds immediately or mediately of the King. And 2 *Hen. 7.* an Act of Parliament to restrain the King's *non obstante* to dispense with penal Laws, as not to pardon Murder, is void; his Person and Royal Prerogative cannot be restrained by Parliament. Thus I have done with the former and larger part of my Argument.

Now I come to see if the Record will maintain that which we have here, and I think it will bear it both for Matter and Form. First let us see whether there be Substance enough, to shew that there is Danger sufficient for this Prerogative to require Aid and Assistance; and I think there is sufficient, the *French King*, the *Spaniard*, the *Low Countries* all up in Arms; who knows what danger this Kingdom may be in? and if the King say it is in danger, it is not traversable; if the King had said no more but this, *pro defensione Regni*, without any more saying, it had been sufficient. It also recites that there were *Prædones*, *Pirates*, that took away both Men and Ships; and that foreign Provision was making to take away the Dominion of the Sea; and that all this was *ad gravandum regnum nostrum*: and therefore commands a Ship to be provided *ad defensionem regni*. Here the Danger is general, and therefore the Defence must be general.

An indifferent and equal Assessment is first to be made, and then the Overplus of the Provision to be restored according to the Writ; for until the Money be had, how can the Provision be made? Tho it has been said, let the Ships be first built, and then make the Assessment; that cannot be, for with what shall the Provision be made? The Money must do it.

For matter of Precedents, as *Danegelt*, &c. I do not much stand upon, because I had not time to peruse them, but conclude on my former Reasons. (My Lord Chief Justice asked him what his Advice was; he answered)

My Advice is upon the whole Matter, that the Barons finding the other Process of Court and *Sci' Fa'* to be according to the *Exchequer*, (for that I leave to them) Judgment shall be given that Mr. *Hampden* shall be charged with the 20 s. with this Limitation and Condition, that none of it comes to the King's Purse, for if it do, my Opinion is against it.

The Argument of Sir Richard Hutton Kt. one of the Justices of his Majesty's Court of Common-Pleas at Westminster, in the Exchequer-Chamber, in the great Case of Ship-Money.

THE King by his Writ 4 *Aug.* informs that there were gathered *Pirata ac Maris Grassatores*, and that they were gathered together in hostile manner to hinder our Merchants from bringing their Goods into our Ports; and reciteth, that there are Wars abroad, and that considering these Perils and Dangers, and that the Defence of the Kingdom consists in the Defence of the Sea, which at all times belonged to this Kingdom, and that the Charge of Defence is to be borne by all; and the King is loth that in his time such an Honour as the Dominion of the Sea should fall away or be diminished, and not be defended, hath therefore sent a Writ to the Sheriff of *Bucks* (as to other Counties) to provide a Ship of such a Burden against the 1st of *March*, and to come to *Portsmouth*, and there to remain for 26 Weeks, and to do as shall be directed them for the Defence of this Kingdom: And the Writ directed, that all that are Inhabitants shall be assessed for the providing of this Ship with Men and Ammunition.

By force of this Writ, Mr. *Hampden* being assessed at 20 s. there went forth a *Certiorari* a Year and a half after, directed to the Sheriff of the County of *Bucks*, to certify what Sums they had assessed by virtue of the said Writ 4 *Aug.* and there are two several Certificates returned into *Chancery*; one, That Mr. *Hampden* was assessed at 20 s. the other, That he hath not paid it. 5 *Maii* 13 *Car.* the King, by *Mittimus* out of *Chancery* recites, that when he awarded the Writ 4 *Aug.* *Salus regni periclitabatur*, and that it was for the defence of the Kingdom and security of his Subjects; and doth send this Writ 4 *Aug.* the *Certiorari*, and *Mittimus*, to the Barons of the *Exchequer*, and commands the Barons to do that which appertains to Justice to be done. Whereupon a *Sci' Fa'* is awarded; whereunto Mr. *Hampden* hath appeared, and demanded *Oyer* of the *Sci' Fa'* *Mittimus*, *Certiorari*, and the Writ 4 *Aug.* and hath demurred generally; and Mr. *Attorney* hath joined in Demurrer: and how this *Sci' Fa'* lieth, is the Question.

And I am of Opinion that this *Sci' Fa'* doth not lie, and that Judgment in this Case ought to be given against the King. For the better understanding of the Court, I shall observe in the Method of my Proceedings,

1. Whether a Charge of this nature may by the King be imposed, by original Writ only under the Great Seal, without a Parliament. Wherein I hold it cannot be proved by any Authority or Reason, unless in time of actual War and Invasion.

2. I will answer those Objections only made formerly by them that have argued, that these Statutes do not extend to this kind of Prerogative, and that this Prerogative is not taken away by any of these Statutes.

3. I will answer the Precedents, both by Precedents of equal Nature, and by some Reasons, where-

whereupon I will conclude, that this Prerogative and Power, which is Monarchical, is included and taken from the King, and that this must be done by Parliament.

4. I will answer some Objections that now have been raised, and were before made by Mr. Solicitor.

5. I will just open the Writ, that it neither containeth Matter sufficient in the Writ itself, nor is there Matter to warrant any such Levy as is pretended; neither is the same lawful, nor can it be mended by the *Mittimus*, nor can be commanded by those Sheriffs that are no Sheriffs in this Case upon the Matter.

Now, as my Brother Jones hath taken a great deal of pains and time, I will not be drawn from my own Order by what he hath said; but answer him in his Argument.

1. I say, that this Power of assessing of Money, being a great Charge, cannot by the Law at this day, unless in time of actual War, be imposed upon the People but by Act of Parliament.

The Acts of Parliament that have been mentioned, the first was *Mag' Char'* which is an ancient and great Statute; it cometh unto us with an *Infiximus* from *Ed. 1.* confirmed thirty times; the Words are, *Dedimus & concedimus has libertates subscriptas in perpetuum. Nullus liber homo capiatur vel imprisonetur, aut disseffietur de libero Tenemento suo vel libertatibus, &c. aut aliquo modo distringatur, aut in carcerem mittatur, nisi per legale iudicium parium suorum, vel per legem terræ.* King William the Conqueror made these Laws, and swore Men to those Laws. And then King Edward in the last Chapter commands them to be kept, and he will keep them so long as concerned him and all his People for ever. And for this they granted him a fifteenth Part of all their Goods, and it is a Statute here to this Day, *Stamford fol. 172.* to be tried *per Pares*, as the Barons at this Day have for their Trial the Privilege of this Statute.

The next Statute is *25 Ed. 3. chap. 5.* reciting, 'And forasmuch as divers Persons, &c. we have granted for us and our Heirs, that we shall not draw such Aid and Prize into custom for any thing done heretofore, by any other Rule or Precedent that may be found.' So there is now not only for Taxes for War, but for any other Business whatsoever, *forisque de commune consent de tous la Realme*, saving the ancient Aid and Prizes due and accustomed. And this saving is nothing, for this Statute extends to no particular; for if any extend to Aid by Tenure, all England is not bound to this, but some few. The Statutes extend to such Aids as the whole Kingdom is subject unto; none will say that all the Kingdom holds of the King *pur fils marier*, &c.

The Statute of *34 Ed. 1.* concerning certain Liberties granted by the King to his Commons, this is printed *Anno 1534. 25 Hen. 8.* No Tailage to be taken or levied to us, our Heirs or Successors, without the good Will and Assent of the Archbishops, Bishops, Barons, and other Burghesses and Freemen of the Realm. This Statute hath been quarell'd withal, but the Words are very effectual.

The Statute of *14 Ed. 2.* agreed to be perpetual by my Brother Jones, for my part I can see no Reason why it should be so. The Statute reciteth, That whereas the Barons and Commons of the Realm have granted of their good Free-will the King an Aid towards his Wars as well on this side

the Sea as beyond, of the ninth Sheep, the ninth Sheaf, &c. and the ninth part of all their Goods, we will and grant for us and our Heirs, that the same so charged shall not be brought into Example to make any Aids, he doth not say such Aids, but by Consent in Parliament. No Man can say against these Words, they are so full and absolute.

The Statute *25 Ed. 3.* enacts, that none shall be compelled to find Hobbellers; *Si il ne soit per commune consent in Parliament.* The Reason given in the Parliament-Roll, is very observable; *Car ceo est incounter le droyt del Royalme.* These Words are in the Roll, yet left out in the printed Statutes, but the Reason I know not. This Statute of *25 Ed. 3.* is confirmed by the Statute *4 Hen. 4.*

The Statute *1 Rich. 2.* a very good Statute, tho in a young King's time, enacted and done by the Lords and Commons: There have been many Inventions to charge the Subject. Now *Hen. 4.* invented many Benevolences, and that is recited, That whereas divers Inventions, &c. (all the World I think is full of Inventions) it is enacted from henceforth, that the Subject shall no Ways be charged with any such like Charge. They gave it the Name of Benevolence, but indeed they were Impositions, and great Charges were collected with that Name.

I conclude with that Statute of this King, the Petition of Right, which reciteth the Statute *de Tallagio.* Very many particular things are mentioned there, Men are not to be compelled to lend Money without common Assent in Parliament; which is a Confirmation of these Statutes. I have done with the Statutes.

For the Authority of the Year-Books; I will confirm those two Authorities cited by my Brother Crooke, tho my Brother Jones slight the Authority *13 Hen. 4.* the principal Case being then a Grant of an Office of measuring of Cloth and put in practice, and being granted out of Parliament condemned to be void; for the King cannot grant any common Charge on his People but in Parliament. And tho my Brother Jones said, that perhaps such a Charge was *Damnum*, yet not *Injuria*; surely had not there been more in it, it had not been damned as illegal.

The other Authority is that of *Fortescue*; tho my Brother Jones in that Book doth omit that which is material; for that Man he was sworn Chief Justice of England, and afterwards made Chancellor, who saith expressly in his *9th* Chapter, That the King of England cannot alter any Law; That he governeth his People, not only by Royal but by Politick Power, and can lay no Charge upon them but by Parliament. The King can change no Law, nor make Land Gavel-kind which is not, nor make Land divisible which is not; which he might do if it were to be done by Power Royal. And *Fortescue* concludeth with this excellent saying, *fol. 26. 6.* 'Rejoice therefore, Sovereign Prince, and be glad; for the Law of your Realm administred to you and to your People no small Comfort and Security, &c. 'Prerogative strengtheneth the Subjects Liberty, 'and their Liberty strengtheneth the King's Prerogative.' *Cap. 38.* is full and strong against the King, which my Brother Jones was pleased to omit. The King may by his Officers take Necessaries for his House, nevertheless he is bound to pay for them; for by the Law he ought not to take

take away any of the Subjects Goods without making Satisfaction for the same; neither can he lay any Taillage, Subsidy or other Burden, or make new Laws, or alter old, without express Agreement of his People in Parliament.

I have done with the positive Part of my Argument. I will not trouble you long; I will answer some Objections now made, and heretofore made against these Statutes.

First, For the Statute *de tallagio non concedendo*. True, it is very probable that it was no Statute, but an Extract out of the Statutes of 25 Ed. 1: which is upon Record, the other not being to be found upon the Roll. It was averred *una voce*, it was a Statute, tho' not without Probability it was no Statute, as it was learnedly observed by Mr. Solicitor, in respect of the King's Absence beyond the Seas. Only I collect this out of his Argument, that he thought that that Statute did reach very far against the King, which he could answer no way, but to take it away; therefore he thought it a Statute of some Force.

Next, my Brother Berkley would have the Statute of 14 Ed. 3. to be but a temporary Statute; and but during the Continuance of the Wars. The 1st Part of the Statute is absolute, but the latter part is but a temporary Statute, and but during the Continuance of those Wars. But it must (the former part thereof) needs be perpetual, for it is granted for the King and his Heirs.

The next Objection is by my Brother Jones and my Brother Crawley, That this Power Royal is part of the Prerogative appertaining to his Person, and inherent to the Crown, *a. proprium quarto modo*, so inseparable, that an Act of Parliament cannot take it away.

I confess there are some inseparable Prerogatives belonging to the Crown, such as the Parliament cannot sever from it. And I will prove to you out of Books, Cases and Statutes, that the King cannot release his Tenure *in Capite*. It was endeavoured that a Law should be made that the Court of Wards should be shut up, it was resolved it had been a void Law; such is the Care for the Defence of the Kingdom, which belongeth inseparably to the Crown, as head and supreme Protector of the Kingdom: So that if an Act of Parliament should enact that he should not defend the Kingdom, or that the King should have no Aid from his Subjects to defend the Kingdom, these Acts would not bind, because they would be against natural Reason. But in our Case here, there is no such thing; for there is no Act that restrains the King to lay any Charge at all, but only ties him to one Means, by which he would come by it, to wit, by Parliament. If before the Statute a Man alien Land held of the King without Licence, the King shall seize the Land, and have it forfeited to him and his Heirs for ever. Now by that Statute the Prerogative is restored to a reasonable Fine only; this was as inherent in his Person as any thing could be, and yet it is restrained by Parliament.

Before Mag. Char. the King might take any Man's Goods for his Provision, and cut any Man's Woods down, to build or repair his Castles: yet since that Statute it is enacted, *Nullus Vicecomes nec Ballivus noster capiet equos, &c. nisi reddat liberationem. Nec capiemus boscum alien' ad castra vel ad alia agenda nostra, nisi per voluntatem illius cujus boscus ille fuerit.* And to this Day this Sta-

tute is of force, that the King cannot take these things, nor use his Prerogative.

The Prerogative of *Nullum tempus occurrit Regi*, is a great one; yet in some Case of Lapse of Churches, this Prerogative is taken away by the Statute of 25 Ed. 3. cap. 1. where the King granteth for him and his Heirs not to present but in his own time: and this being pleaded 11 Hen. 4. fol. 7. is adjudged against the King, notwithstanding the Rule of *Nullum tempus occurrit Regi*.

The Statute of 7 Hen. 8. cap. 3. concerning Restraint of Informations, and that of 21 Jac. whereby the King excludeth himself to make a Title to any Land, whereof he had not been in possession within 60 Years before this time, he was tied to no time, but unlimited; yet this great Prerogative is thus bound. 30 Ed. 3. cap. 10. Parliaments to be holden every Year one, or oftner if need be, because of divers Mischances that may happen. It is to be acknowledged as a gracious Favour from his Majesty to his Subjects, that he would admit of this Case to be argued in any ordinary Court of Justice, and not refer it to the Parliament, to which Place all such weighty Causes are most fit to be referred. I am satisfied in my Conscience he would do nothing in this Case, if he were justly informed, or may be informed he ought not to do it by Law.

The Laws of England *mutari non poterunt*, without consent of Council gathered together: *Si iniustum emerferit*, saith Fortescue (as the Case of ours is) it is referred to the next Parliament; *Si aliquid in consuetum*, then it is to be put to the Parliament.

2 Ed. 3. fol. 7. There ariseth a new Question concerning the Statute of Winchester, about Recovery by Actions against the County where Robberies were committed; there the Case in respect of the Difficulty was refer'd to the Parliament, and there the Sheriff was warned to have his Money.

You shall see a notable Case in the Register fol. 224. among the Writs, of two that were at York, and served by a Clerk in the Chancery there to appear at Rome; and because of this Contempt they were committed to Prison, and a Writ came to bail them, returnable *coram nobis in Parlamento*: so Matters of Difficulty were adjourned into Parliament.

Westminster 2. cap. 28. *In nova causa fiat novum remedium in Parlamento*. To resolve Cases of difficulty, Statutes have enacted that there should be two Parliaments every Year, viz. 4 Ed. 3. cap. 4. which was a great Confirmation of the Liberties of this Realm. Littleton 110, 180. Parliaments ought to be frequent. I know not how it comes about, that this Kingdom which hath thus long flourished by Parliaments, should now forget her frequent kind of Government by Parliament, whether by reason of some thing past, or some Disaster now fallen out, that this which is the antient way (I do not say that Parliaments is the Government, but Kings have govern'd by them) is so much out of use now-a-days.

I do not prescribe Power to the Parliament to govern the Realm, but the Publick have been govern'd by the Parliament. There was seen too much of the ambitious Humour of some in the last Parliament, that stirred up nothing but Confusion and Discontentment, as we now feel it to our great Prejudice.

Now I come to the Precedents. *First*, that of *Danegelt* hath been objected; of which there were two Kinds, as Sir *Henry Spelman* in his *Glossary* observes; the one *ad pacandum*, the other *ad coercendum Danos*: great Sums of Money they had to go home again, from 12000 *l.* to 48000 *l.* *per Annum*; and it was raised in three Years: it was continued until King *Stephen's* Time; at which time 'tis said it was released. For my part, I see not but that it might now be put in use as formerly, had it not been for those Statutes of *Edw. 1.* and *Edw. 3.* before-mentioned: for it was not laid down when the Danger ceased, but was continued and taken up by Princes when they had a mind to it, as by *William the Conqueror*, and *William Rufus*; but since these Statutes it was never taken (*and here he read the Words of the Statutes.*) So if these Statutes took that away, why do they not bind in our Case? Which is a full Answer, in my Opinion, to that and all other Precedents before these Statutes: there have been shewed 200 on each side; but I say, it had been better they had never made use of them.

So to all the Precedents made before the Statute *de Tallagio non concedendo*, I give this general Answer, to be of no force.

For the Precedents in *Henry III's* time, which were many; yet in those Commissions for preparing of Gallies, after they were made they were at the King's Cost: This may be done at this time.

And with the Statute of 14 *Edw. 3.* I answer those Precedents of the 10, 11, 12 *Edw. 3.* and by the way observe the Times that were then, that Statutes were forced to be made to remedy those Evils; and surely those were the Burdens and unreasonable Taxes which the King, in the 13th Year of his Reign, confessed he had oppressed his Subjects with, and desired they might be forgotten, because he was urged to it by his Necessities, and not for any ill End of his own, (*and so he caused the Record itself to be read openly before all the Judges.*)

2 *Hen. 4.* 2 *Ric. 2.* A general Assembly called and resolved, That Money could not be raised but by Parliament. Since this time, all the Precedents that have been vouched were for arraying Men, and putting them in readiness.

28 *Hen. 8.* There were some forced upon their own Charges to go to suppress some Rebels in *Lincolnshire*, but afterwards were recompensed for their Charges; saith the Record, Our Pleasure is to send a Messenger, and on a Bill of Charges he shall satisfy them. I do agree, and there are many Statutes, that Men should be arrayed, as the Statute of *Winchester*, which are only Preparations to make Men ready.

Now for that which hath been urged by Mr. Attorney excellently well, That the King, by the Law of the Land, hath a Prerogative in the Lands and Goods of his Subjects; so that in some Cases, the Sheriff may for him break open a Man's House, and the like, because otherwise he cannot execute Justice.

True, the King hath such a Prerogative, and fit it should be used; for otherwise Justice could not be administered, as it is in many Cases, the Sheriff, tho a Verdict by Default, hath Power by Prerogative of the King to break into the House, and give Possession; for otherwise Justice could not be administered, if all Laws were contemned: for which Contempt the King may use his Power.

Again, the King of his own Charge maintains his Courts of Justice, and is bound so to do, 39 *Hen. 6.* 34 *Hen. 6.* And in lieu of these Charges the Law gives him those Fines and other Duties; so there is upon the Matter a *quid pro quo*: But where there is an Interest in a Subject, he cannot take it away without his Consent, as he may do it in Murage and Pontage, and the like; for there is a particular Benefit to the Subject. So I think I am almost at an end of answering the first and second Part of the Precedents; the antient Time was one Way, and the modern Time another Way.

In *Edw. 4.* *Ric. 3.* *Hen. 7's* Times, they are all for Wages of the Mariners, certain Allowances they had; what a Week, what a Day is set down.

But you say, here in this Case appears no Money to be paid by the Subject, but only for a Ship to be provided by the Sheriff, and not any Money to come into the King's Purse.

I must conclude this Part with what is agreed by all, That if this Writ had been to levy Money, it had been void.

As I do take it, the Writ is to prepare a Ship of such a Burden; so the Ship is the Matter: Then give me leave to say this, and I say, as it appears plainly by the Record, there was no Ship prepared at all; then if no Ship, no Writ can be had against him for Disobedience. 'Tis known to all the World, 'tis not Ships, but Ship-Money: Ship-Money is in every Man's Mouth. It hath a Name of preparing Ships, but the end of it is to prepare Money, as in *Yorkshire* twelve thousand Pounds.

If the Provision of a Ship had been expressly alledged, it might have been traversed, and therefore Mr. *Hampden's* Counsel could do nothing but demur; and by demurring, they confess'd nothing but what is materially and sufficiently alledged, so that it might have been deny'd by a Traverse.

But you will object, That I did subscribe to a contrary Opinion, and set my Hand unto it.

To this, for my own part, I must say, and I can say it truly, 1. My private Opinion was ever against it. I did subscribe, but it was but for Conformity; for it is known to all, when a great Number meet together, the Judgment is that which the greater Number saith: Besides these Words to which we subscribed are no wise pursued.

2. Our Opinions were very suddenly required; for the King's Letter bears date *Feb. 2.* and our Opinions upon it bear date *Feb. 7.* following; and it was in a Case wherein we never heard any Argument: and we usually do, and God forbid but we may dissent from our private Opinions upon a better Reason heard. But I am of the same Opinion now that I was then.

But it will be said, we might have done it more advisedly. No Man of us but sometimes delivers his Opinion, and yet after we have heard an Argument, have changed our Opinions, and gone contrary to our former Judgment.

3. If after any Arguments heard I had been of the same Opinion that was delivered, yet this Writ doth not pursue the Direction thereof; for tho we agreed, that the King might charge in case of a general Danger, yet this was and is intended not a Danger of Pirates, but an imminent Necessity, and apparent Danger, which could not be avoided. For I do agree in the Time of War, when there is an Enemy in the Field, the King may

may take Goods from the Subject; such a Danger, and such a Necessity, ought to be in this Case, as in case of a Fire like to consume all without speedy Help, such a Danger as tends to the Overthrow of the Kingdom. Give me leave to say, that Kings of England have exercis'd great Power in taking this to themselves. 17 Hen. 8. in the Cardinal's Time, it was counted lawful to send forth Commissions throughout England, to take a sixth Part of the Subjects Goods; whereupon many upon Refusal were sent to Prison; the Lord Cobham among the rest sent to Prison from Huntington to London: at length Norfolk and Suffolk grew to such a Heat for taking away their Goods in that undue manner, that the King was forced to call a great Council, who suppressed those kind of Writs; and the King laid the Fault upon the Cardinal; and the Cardinal said it was the Advice of the King's Council, and they deny'd it; so he bore the Shame.

So in the time of Queen Elizabeth, who was a gracious and a glorious Queen, yet in the end of her Reign, whether thro' Covetousness, or by reason of the Wars that came upon her, I know not by what Counsel, she desired Benevolence; the Statute of 2 Ric. 2. was pressed, yet it went so far, that by Commission and Direction Money was gathered in every Inn of Court; and I myself, for my part, paid 20 s. But when the Queen was informed by her Judges, that this kind of proceeding was against Law, she gave Directions to pay all such Sums, as were collected, back; and so I (as all the rest of our House, and as I think of other Houses too) had my 20 s. re-paid me again: And Privy-Counsellors were sent down to all Parts, to tell them that it was for the Defence of the Realm, and it should be repaid them again.

Now for the Exceptions to the Writ itself, I must answer my Brother Barkley, That no Allegation afterwards (if the Writ be not good) will help it. The Writ is said to contain Matter sufficient, *Quia datum est nobis intelligi quod quidam piratæ naves & bona subditor nostror' &c.* and lead our Men into miserable Captivity, and provide Ships, Mariners, &c. *ad gravandum regnum nostrum.* Now here's nothing for the Defence of the Realm, *no cognoscimus hostium adventus*; as the Writs did antiently run.

Again, Pirates are to be withstood with ordinary Defence, which appertaineth to the King himself; but for extraordinary Defence against Invasion, when the Kingdom is like to be overthrown, there indeed the whole Kingdom is to contribute to the Defence. And our Resolution was, when such a Danger was apparent, the whole Kingdom in Danger, then the Defence to be extraordinary.

But you object, That tho there be no Danger set forth in the Writ, yet in the *Mittimus* it is certify'd, *Quod salus regni periclitabatur.*

The Writ issued 4 Aug. 11 Car. the *Mittimus* came not out till near two Years after: Now the Counsel perceiving the first Writ was not sufficient, they politickly add to the *Mittimus* this Clause of *Salus regni periclitabatur*: so this coming so long after, cannot make that which was not legal *ab initio*, to become good by Matter *ex post factum*; this could not be helped by any subsequent Matter, as in case of a Fine, &c.

This was much stood upon by my Brother Barkley; but I shall answer him with two Cases not to be deny'd: The First, *Vernon's Case* in

the 4th Report. A Man conveys Land to the Use of himself for Life, the Remainder to *J. S.* for Life, the Remainder to his Wife for her Jointure; tho in this Case *J. S.* die before her Husband, so that now it falls out to be as advantageous to the Wife, as if it had been limited to her immediately after the Death of the Husband: yet it is resolved, because it is not so limited in the Beginning, no good Jointure to bar her of her Claim to her Dower.

Also in *Cbenie's Case*, 5 Report. A Will uncertain (and so not good) shall not be holpen by an after-Averment subsequent to alter the Estate: So it is in our Case, if the Writ were not legal, when it first issued, no subsequent Matter shall make it good.

The Writ commands the Sheriff & *quos rebelles invenerit* to imprison, and to distrain all such as refuse to pay. This is directly against the Statute of *Mag' Char'* none ought to be distrained or imprisoned, but by the lawful Judgment of his Peers, and according to the Laws of the Land; 'twas never contained in any Writ before, nor can any such Writ be maintained.

Besides, the Words of the Writ are to rate every Man *secundum statum & facultates*; shall the Sheriff be a Judge and Party? If the Assessment be done according to the Writ, he must be Judge and Party: Never such a Writ before. All Sheriffs must pay nothing themselves, or every Sheriff must assess himself, 8 Hen. 6. *Dyer* 320. So, for the Reasons aforesaid, I hold the Writ to be against Law.

Again, no Ship was prepared: If it had been prepared, it had been their own Goods; if not, it might have been pleaded, that there was never a Ship; and then the Sheriffs might have been punished for not obeying the King's Commands.

It hath been said, he hath confessed all Matters contained in the Writ; whereas in a Demurrer he confesseth no Matter of Fact, but what is sufficiently set down, 30 Eliz. *Coke* 23. resolves the same.

But to the Writ of *Sci' Fa'* I conceive it not legal; no such Writ can go forth to two Sheriffs of one County, they being neither of them Sheriff at this Time; for it went out after they were out of their Sheriffwick: therefore some Return should have been made by Inquisition. I never did see or hear of any Writ that went to two Sheriffs of one County, as it was to *Bucks*; and so two Sheriffs made two several Returns.

Again, This Money cannot be levied by *Sci' Fa'*, because the Writ directs other Means, either to distrain, or to imprison; therefore not by *Sci' Fa'*, for it is contrary to the Words of the Writ. And seeing the Sheriff hath not followed that Direction, he must answer the Contempt.

But here to answer my Brother Trevor; I do agree in some Cases of a Certificate, or Presentment, that a Bridge was out of Repair, or a Highway stopt, there shall go a *Sci' Fa'* upon that; but that tells to whom the Money shall be paid. But here, the Writ doth not demand the Money to be paid to the King for not preparing a Ship; that must be by Office or Inquisition on Record, if a legal Certificate, as it is. 2 Edw. 3. fol. 2. The King commands the Sheriff of *Leicester* to summon *J. S. &c.* to come and meet him with Aid, to go into *Scotland*; he spent the Money to a great Value: There went a Writ out of the Exchequer to attach this Man: yet after long Debates it was held

held fit, the King must be informed by Matter of Record.

I agree, that the King, as he is Lord of the Sea, may lay Impositions; but then he ought to defend the Merchants Goods from Pirates. That famous Case of *Mick' 4 Jac.* in which Case I was of Counsel, of an Imposition of 5 s. a Tun on Currants, one *Bates* stood out, and would not pay it; adjudged, that that Imposition was lawful, for the King may lay an Imposition; for he hath the Rule of the Sea, and hath Power to hinder Merchants to traffick; and if they traffick, he secures their Goods.

To conclude with that which my Brother *Barkley* said, that the Subjects of *England* are free Men not Slaves, free Men not Villains. Here is no apparent Necessity of any Invasion; therefore by Law, they cannot be thus compelled to part with their Interest in their Goods. If there were any apparent Necessity, they were without Limit or Stint.

Thus have I, with as much Perspicuity as those Imperfections which attend my Age, would give me leave, set you forth my Reasons; and without any further Protestation I conclude, both for Matter and Form, that you are not to give Judgment for the King.

The Opinion of Sir John Denham Kt. one of the Barons of his Majesty's Court of Exchequer, in the great Case of Ship-Money, presented in Writing.

May it please your Lordships,

I Had provided myself to have made a short Argument, and to have deliver'd my Opinion, with my Reasons: But by reason of want of Rest the last Night, (my old Disease being upon me) my Sickness and Weakness are greatly increased, insomuch that I cannot attend the Business, as I desired. And if my Opinion be required, it is for the Plaintiff.

*Serjeants-Inn, Fleet-street,
26 May 1638.*

Sir John Denham's second Certificate, directed to the Lord Chief Justice Brampton, 28 Maii 1638.

My Lords,

U Nderstanding that some Misconstruction was taken by some, of the Declaration of my Opinion, which I desired your Lordship upon the last *Saturday* to deliver in my Name; for further Satisfaction therein I have sent again, altho I was most desirous to have passed my Vote in silence in this Work of weight, by reason I heard not the four last Arguments: yet I delivered my Opinion for the Plaintiff, which I took to be Mr. *Hampden*, by reason it appeareth by the Record that he coming in upon Process, *Queritur de colore præmissorum graviter vexatum & hoc minus juste*; which satisfied me that he was Plaintiff; and therefore I now declare my Opinion for Mr. *Hampden* who did demur.

I shall only deliver these two Reasons for the maintaining of my Opinion. The 1st is, that the

King's Majesty is *sola & suprema Justitia regni*, and the Rule of the Law is and hath always been, that his Majesty can do no Wrong; and thereupon ariseth another Rule of our Law, which I give for my second Reason.

The King's Majesty being of a Corporate Capacity, can neither take any Lands or Goods from any of his Subjects, but by and upon a Judgment on Record, (according to our daily Experience in the Exchequer) there must precede some Judgment in that or some other Court of Record, whereby his Majesty may be intitled either to the Lands or Goods of a Subject, as namely where Seizure of Goods is made for his Majesty either upon Outlawries, Attainders, or Matters of the like nature; as in Case of Seizures in the Court of Exchequer, where Seizures are given by Statutes; yet without a Judgment in that Court upon a Trial for the King, the Goods are not to be recovered to the Use of the King as forfeited.

Upon Consideration whereof, and comparing the same with his Majesty's Royal Writ, I find no Judgment thereupon had nor given; which were the chiefest Reasons of my Opinion for Mr *Hampden*.

The Argument of Sir Humphrey Davenport Kt. Lord Chief Baron of the Exchequer, in the great Case of Ship-Money in the Exchequer-Chamber.

My Lords,

T Here have appeared unto us upon this Record many several Arguments, and excellently made; it comes now to my Course, to express my own Opinion.

It appeareth upon this Record, that *Pasch. 13 Car. a Sci' Fa.* issued out of the Exchequer to the Sheriff of *Bucks*, reciting, Whereas several Sums of Money mentioned in a Schedule to that Writ annexed, by virtue of the Writ 4 *Aug.* assessed upon several Persons for providing of a Ship, were not paid, whereby he was commanded, *quod scire faceret*, to those several Persons in the Schedule annex'd nam'd, to appear in the Exchequer, *Octab' Trin' 13 Car.* to shew Cause why they should not pay those Sums of Money assessed upon them.

Thereupon a *Certiorari* 9 *Mar. 13 Car.* was directed to the Sheriff of *Bucks*, to certify the Sums, and the several Persons upon whom they were assessed, and of the Warning given unto them to pay the same: The *Certiorari* being returned, and in Court in *April 13 Car.*

Then on 5 *May* there came a Writ of *Mittimus* out of the Chancery, by which the said former Writs were sent to the Barons of the Exchequer; which *Mittimus* recites the Writ 4 *Aug.* and not the Record itself: And the Barons are commanded, that they should thereupon proceed, as by the *Mittimus* is required.

Upon these Records, thus certify'd, there issued out of the Court of Exchequer a *Sci' Fa'* that is now in Debate, which was awarded against the Parties mentioned in the Schedule; and Mr. *Hampden* being returned, hath appeared, and demandeth Oyer of the Writ 4 *Aug. 11 Car.* of the *Certiorari* 9 *Mar. 13 Car.* and of the *Mittimus* 5 *Maii 13 Car.* Upon Oyer of these, and reading them unto him, as was demanded, Mr. *Hampden*

hath demurred in Law, alledging, That the Writs, and every of them, and the Returns of them, and the Matters therein contained, are not sufficient to charge him with the Sum of 20 s. on him charged: And thereupon demandeth Judgment, if the King will be pleased any further to proceed upon this Writ.

To this Demurrer, thus tendred by Mr. *Hampden*, Mr. Attorney hath joined, alledging, That the Writs mentioned, and all of them, and the Matters therein contained, are good and sufficient in Law to charge the Defendant with the Sum of 20 s. and demandeth Judgment thereupon for the King; and that the Defendant *Hampden* should be charged with the Sum of 20 s. and thereupon make Satisfaction; but to whom, is not expressed upon the Record.

This Demurrer being thus warily joined on both sides, there have been several Arguments thereupon at the Bar and Bench, excellently (no doubt) argued, and very fully. There hath been introduced and pressed to the Court (whereof there have been several Notes delivered) a Number of Records appertaining to the Question; so far forth, that in one of the Arguments at the Bar, there were excellently well remembred, at the least above 300 Records, and great Authorities.

Upon this Record, the Demurrer being thus joined, my Purpose is, after my meanness, (not being able to give an Account of every Particular) to make a summary Collection of what I shall say, and with that Shortness and Brevity that appertains to me (the Weight of the Cause not deserted) upon the Duty of my Place, and upon my Oath, which I have learned and hold to be *ligamentum fidei inter Deum & animam*, to declare unto this Court what I do conceive to be just upon the Question arising upon the Records, wherein my Meaning is to retain myself unto the Parts of the Record.

Judgment is not here to be given, but a judicial Advice; and according to number of Voices here, Judgment must be given in the Exchequer, without Respect to any of our particular Opinions who sit in this Court. I shall do my best Endeavour to open unto you such Questions, as do appear to me upon the Record to be aptly and fitly debated before us.

The State of the Question out of the Record will appear to be this, That 4 Aug. 11 Car. there issued out of Chancery a Writ, not returnable, unto the Sheriff of *Bucks*: This Writ was *inter Brevia irretornabilia*, according to the Stile in that Court, and in the Court of Exchequer. By this Writ 4 Aug. which I do conceive to be the original main Ground of this Record, it appears what was the Occasion and Ground that Writ was awarded. It was touching and in respect of certain grievous Incurfions by the Pirates upon the Seas, who commit Depredations, and take the Goods and Merchandize, both of the King's Subjects and others that traffick here, and carry them into Captivity; and this is said to be to the great Damage of the Kingdom.

That the Times were dangerous, and hostile Times, *tempora hostilia*; and therefore, it was fit there should be a convenient Remedy provided by the Kingdom for Defence thereof: And thereupon, in that Writ, two several Mandates or Commands are imposed.

The First was a Command and Direction to the Sheriff of the County of *Bucks*, and to the

Mayor of *Buckingham*, and to the Bailiffs and Burgeffes of *Cbipping-Wiccombe*, and Parishes of the County of *Bucks*, & *pro omnib' hominib'* of those Towns, and all others dwelling in that County; these are the Persons who are charged. And by that Writ, 4 Aug. they were charged with this Particular, That they should before the first of *March* then following, at their own Costs, prepare and provide a Ship of War of 450 Tons, furnished and fitted with Men, Ammunition, and Victuals, to be brought to *Portsmouth* at their Charge, at or before the said first Day of *March*; and from thence, to be maintained at their own proper Costs and Charges, for the space of 26 Weeks then next following, to attend such noble Persons, to whom the King would be pleased to commit the Custody of the Sea, and to pursue their Directions.

The Second sort of those two Mandates descends from the Persons to whom the Writ was directed unto some few, and that is upon the Matter to the Sheriff of *Bucks*, and to the Mayor of *Buckingham*, and the Bailiffs and Burgeffes of *Cbipping-Wiccombe*: To these is given and limited a Power by the Writ, distributively, as therein is appointed, respectively to tax and assess the whole County, *secundum statum & facultates*: And those that they should find to be Rebels, they should distrain them, or by any due Means commit them to Prison, there to remain until his Majesty sends forth an Order for their Deliverance. This I do conceive to be the end of those two Mandates mentioned and comprized in the Writ 4 Aug. 11 Car.

After this Writ 4 Aug. 11 Car. almost a Year and an half, then cometh the *Certiorari* out of Chancery, dated 9 Mar. 12 Car. directed to the Sheriff of *Bucks*, who, with the other Referees, should certify unto the King the Names of such Persons as were assessed, and what they were assessed, and who have performed the Assessment, and who not. That Writ was returnable 26 April then next following. And therein Mr. *Hampden* appears as a Defendant to the *Sci' Fa'*; therein was he certify'd to have been taxed to the Sum of 20 s. for his Lands in the Town of *Stoke Mandevile*, and that he did refuse to pay it, and did not pay it unto him, nor any of the Collectors that were appointed.

This being returned into Chancery, and no Order there made, or any Rule, that the Sum imposed on Mr. *Hampden* should be paid, 5 Maii then following, in the same Term cometh a *Mittimus*, reciting the Effect of those Writs, which is directed to the Lord Treasurer and Barons of the Exchequer; herein the Tenor of the Writ (and not the Writ itself) is certify'd into the Exchequer; and withal it certifieth the rest of the Record, together with the Schedules annexed to those Writs; and by that it is commended to the Court that they should proceed to do for the further Receipt and Collection of the Sums behind, as by the Law and Custom of the Kingdom of *England* should be required.

And upon this Certificate here cometh a Writ of *Sci' Fa'* directed to the Sheriff of *Bucks*, to give notice to the Persons that were Defaulters, that they should appear and shew Cause, if they could say any thing, why they should not be charged therewith according to the Laws and Customs of the Realm; and the Writ is so returned: And upon that Return Mr. *Hampden* appears upon the Day in Person, and after Oyer of the Proceeding, hath demurred.

Upon this Record, this being the Case, and the Demurrer thereupon joined, we are to see what is the Law and Custom of *England* upon the Matter extant in the Record; for I intend not to expatiate beyond the Record, but to stick close to it, as it is in the Case now depending in Court, upon this Record: And therein I shall confine myself to some few general Heads, I shall not be long in any thing.

The first thing is, Whether these two Powers and Mandates mentioned in the Writ 4 *Aug.* 11 *Car.* (the original Ground of this Suit) the one for Preparation of a Ship and Furniture, and of the Residue therein mentioned; and the other, for Taxation at the Pleasure of the Sheriffs, and other Persons to whom it is referred, and that expressed upon the Motives of the Writ 4 *Aug.* whether, I say, that these same Mandates were and are good in Law, according to the Law and Custom of the Kingdom of *England*, upon the Matter of this Record; that is the first Question: If that do fail, then the *Sci^o Fa^o* is at an end. If there be no legal Charge imposed upon the Country, then he ought to be discharged.

The second Question is upon the principal Head; admitting these were legal in themselves, according to the Tenor of the Writ, to see then how it is reduced by the Record. Therein I shall offer to Consideration, whether on this Certificate on the Writ 9. *Mar.* out of Chancery, after the Time so past for Execution of the first Writ which is irreturnable, that upon that it be so legal, and according to the Course of Law convey'd over by the Record to be a sufficient Ground and Warrant of the *Sci^o Fa^o* here brought, is the second Question.

The Third Question: This Writ of *Sci^o Fa^o* being issued out, and the Defendant having appeared, and demurred in Law, whether hereupon there be such Matter therein, that they may charge the Defendant with the Sum imposed upon him, so that the King may have a Judgment and Execution upon it: That I conceive to be the last Question.

This Case is a Case of very great Weight, and doth nearly concern every one of us to have an especial Eye unto it. It is an usual Question in our Books, whereof we have much View.

However it be in the Record, to which we are now tied, it concerns the Prerogative of the King, and the Estate of the Subject. In my Conscience I think, for the Act that was done was a gracious, honourable, and royal Act, and proceeding upon just Cause, that there should be a present Remedy for avoiding the Inconvenience that did appear, no doubt for our Good. Herein, tho it be known to every one that knoweth me, but especially to myself, if I partake of the Rule that every Man is bound unto, *Nosce teipsum*, I know withal, that no Man is more bound, nor oweth a more tender Care to preserve the King's Prerogative, and to do that which may advance the same, as we are all bound to do by the great Oath that we have taken upon our Promotion: And in that Particular, I profess none more bound than myself.

Upon this I have been told, and I have truly looked into the Records, so far forth as my Meanness will give leave; and according to what I understand of the Law, and the Custom of the Kingdom of *England*, to be upon this Record, I must needs say, tho I do confess for my own particular unwillingly, that upon this Record Judgment ought to be given for the Defendant, *Quod*

Johannes Hampden sit quietus, &c. however with Submission to the greater Vote of my Brothers.

For first, I do conceive, that this Charge, thus commanded, and thus taxed, is not warranted by the Laws and Customs of the Kingdom of *England*: I shall therefore offer to the Consideration of the Court, the several Discussions upon the Writ.

First, For the Writ 4 *Aug.* 11 *Car.* directed to the Sheriff of *Bucks*, to the Mayor and Burgeses of *Buckingham*, and Bailiffs and Burgeses of *Chipping-Wiccombe*, & *probis hominibus Com^o Bucks*; hereby are they charged upon their Allegiance, that they should, before the first of *March* following, prepare at their own Costs and Charges, *per probos homines*, thro'out all the County, a Ship of War well furnished, and that the same Ship of War they shall maintain at their own Costs and Charges, for the Space of 26 Weeks, to attend the King's Navy, for the Custody of the Sea, as the King shall appoint and direct.

This first Point I take is not warrantable by the Law and Custom of *England*; in respect, being a Matter of so great a Charge, and by them, being an Inland County, impossible to be performed to prepare a Ship before that Time, being no Maritime County, but an Inland County: This I do take in itself, that this is not a Charge to be imposed upon a County, by the Name of *probos homines*, or of the particular Men there named, except it were by their own Consent and Approbation. And with their Consent, I agree, a Charge upon *probos homines*, so they receive nothing to their own Uses, is good enough; whereof I find one excellent Record, 24 *Ed.* 1. A Writ that issued out of the *Exchequer*, and whereof there is the Record remaining to this Day inrolled and certify'd to be a true Copy: There it is directed in Case of Necessity, when the King is absent beyond the Sea, upon Information of the Discovery of a present and instant Invasion of the Enemies in *Flanders* and *France*, under Colour of coming as Fishermen to surprize the Town of *Yarmouth*, and all the Parts of the Coasts thereabouts; the Lord Treasurer that then was (the King being beyond the Sea) the Under-Treasurer who had the Custody of the Sea, and the Barons of the *Exchequer*, caused a Writ to be directed to the Bailiffs *probis hominibus* of that Town; and no doubt of it, in the Judgment of our Predecessor himself, was good Law, and the Writ legally executed upon the instant Necessity appearing. But *Forrescue* speaks not so much of the Necessity, as hath been observed: Therefore it is not good to conclude upon some general Words in him, That in no Case of Necessity the Charge can be laid; for the Scope of the whole Book, consider'd well, will not warrant it: The Intent of it is not against Cases of Extremity. You see not in the Case, but that therein the Regal Course must be observed, according to the Law and Custom of the Kingdom of *England*.

But when I do consider of the first Charge of preparing a Ship at their own Charges, and of the Consideration of the next Charge in the same Writ for Taxation, I do not see, nor I cannot perceive, how the same do agree, but that the one is repugnant unto the other; for that the former Part commands the Charge to be generally by all; and by this last Power it is limited to be done by a particular Person, and that to be done at his Will, and as he shall think fit; whereby

the Sheriff, Mayor, and Bailiff, thus employed, are excluded from the Charge; for they can do no Act upon themselves. It should have been done *per sacramentum proborum hominum*, considering these two different Powers. I hold the Law so to be clear in this Point. It appears not upon this Record that they were assenting unto it, or agreed upon any Ordinance herein.

Now the Power of the Preparation, upon the whole it is on the Sheriff himself, Mayor, Bailiffs, *probos homines* and all; but when you come to the latter *ipso facto*, by the Laws and Customs of the Realm, a great Part of the former Charge is removed directly from those that were chargeable: Power of Taxation is appointed; to whom? to the Sheriff; and how can he tax himself? He and all his Estate within the County of *Bucks* under the first Charge, and all discharged by the Power of Taxation limited in the second Clause: and therein I take it, that this same is not legal according to the Customs and Laws of *England*, the one doth not agree with the other. If you ask me the Reason of it, my Brother *Hutton* hath given it. The Charge is upon the Sheriff, and 'tis not possible for the Sheriff to tax himself, he cannot find himself *inter Rebelles*, he cannot commit himself to Prison, there to remain till such time as the King's Majesty shall deliver him; that he cannot do. So for the other Referees of *Buckingham* and *Chipping-Wiccombe*, exempted likewise; if they can do this, then clearly the former Charge, imposed by the first and said to be done by them all, is out of doors.

Now it cannot be done, according to the Law of *England*, upon the Sheriff or upon his Land. The Point I think is very evident in our Books. 18 Hen. 8. If a Defendant that is Sheriff be to be summon'd, and he return that he cannot do it, Justice *H*—said that Return was not good, for that he might summon himself. 8 Ed. 3. But if it come to a further Question, that if there be any Execution to be done where another may be prejudiced, he cannot do it, as to impanel a Jury upon a Writ where he is a Party, which may prove a Prejudice to another; for if he do it, it is not lawfully done, as it is in *Dyer*, fol. 8, 9. Of the Sheriff in a common Recovery. So upon these Authorities, for the first question, I hold it manifest, that this Act which the Sheriff is charged to do, is afterwards by this second Power discharged: these two Powers do not cohere, and therefore are not warranted by the Laws and Customs of the Realm of *England*.

Concerning the first Question my Opinion is clear, that there is a material and legal Exception appearing on the self-same Writ. My Reason is, the Sheriff is the great Officer of the County; but when he must do it, I take it legally, he ought to do it according to the Duty of his Place by the Law of *England*; that I do not take to be at his Will and Pleasure to lay one thing upon one, and another thing upon another: for my part, I conceive this must be done *per sacramentum*; he is not to be Judge in case of Uncertainties, when a division of Charge and Taxes is to be made; where things are put in Certainty in any of the King's Courts, there he may execute, as take a Man's Goods, imprison, &c. but in case of Uncertainty, the Law hath annexed to his Office a Way and Means how to reduce the thing to a Certainty, and that is, *per sacramentum proborum hominum*: as in the Case of Parceners, if they

have a mind to make Partition of their Inheritance, they may do it by Agreement between them if they will, or by making of Lots by a third Person, and the Elder shall chuse; but if she herself make the Partition, she shall not both divide and chuse; that alters the Case for Execution, when it is *in propria persona*. But admit they cannot agree, the Judgment of the Law is, that the Sheriff shall go in his proper Person into the Ground; shall he at his discretion make the Partition as he pleaseth? No: The Judgment is, the Sheriff shall go in Person unto the Land, and that there *per Sacramentum*, *per Inquisitionem*, to be taken by chosen Jurors, they must consider of it; upon such a thing so done *per Sacramentum*, then indeed it is in the Sheriff's Power, he may now chuse whether he will prefer the Elder or the Younger. But for our Case, that this should be done by a Sheriff, by his Discretion, whilst the Interest of several Persons is concerned, is as it were to make a Rape. I do not find that in any Book of Law, I must confess. In that Act, which is done by the Law, there can be no Error or Partiality; so in *Fitz. Na' br'* in his Writ *de onerando pro rata portione*, see what there is to be done: it goeth to the Sheriff, he is trusted with the doing of this, but he is trusted by legal means; what shall he there do? Where 20 Acres of Land held of the King in chief, they are sold to several Hands, there must be a Writ *de onerando pro rata* for discharging of the Rent; but this must be done *per Sacramentum*, not by the sole Power of the Sheriff. Hereof I find a notable Precedent; it is true, it is not in our Books of Law, but in an Historian; yet he doth set it down in that manner, that a Man may trust him so far; *Matth. Par.* he saith, and sheweth us that 17 Hen. 3. eight Years after the making of *Mag' Char'* authorized by Parliament, that the King himself in his Parliament was pleased (according to the Institutions of Parliament) to require *Consilium & Auxilium*, for the King's Wars; where, by the way, let me observe, that *Auxilia* from the Subject granted to the King in Parliament are not merely voluntary, but Duties, to give Monies for Supply of Necessities of State; and in that I agree with the Opinion of my Predecessor, *Ho. Chief Baron*. 19 Hen. 6. The King is bound to defend the Kingdom. The same Law that binds him to the defence of the whole Realm, gives the King a Right of Inheritance to claim Subsidies for the defence thereof. But to return to *Mat. Paris*: It appeareth there that the King in Parliament did demand Aid of his Subjects, *Consilium & Auxilium*, their Counsel as they were bound, their Help as they were able. It is said, that they made choice of the Earl of *Chester* to give their Answer, who at first held it not fit to do it, alledging their Estates were but weak, that by the Laws of the Kingdom they that had been there in Person, they for their Escuage might not be troubled. The Prelates they were more courteous in their Answer, they desired time to assemble themselves together, many being far distant: thereupon was a time assigned, till *Mens' Pasch'*. In the mean time they all considered, the Lords on the one side, and the Lords Spiritual on the other side; and being demanded a fifteenth of their Goods, they answered, So as they might have their antient Laws established to them, for which they had been so much troubled, they would willingly assent unto it. The King consented unto it, and thereupon

Magna

Magna Charta was there confirmed upon grant of a Fifteenth to his Majesty. But when they came afterwards, they did all agree, that for Necessity, and for the King's Charges in his Wars, which did require a speedy Supply, they were contented to yield to him a fourth Part of their Goods, to be levied in this manner, that is, (for so it is mentioned expressly in *Matth. Paris*, and the form is there set down *de verbo in verbum*.) I have it here to read it: That every Sheriff within his County should return a Juror in every Town: That to four Gentlemen of good Value, and accounted principal Men in every Town, Power is given, that they shall do (as a Jury, to set forth upon their Oaths) Assessments reasonable according to their Estate and Power; and because it appeared then there, (the very Exception now taken) that the Assessors could not tax themselves, tho they had Power to tax the Residue, therefore a Power was given to two others of every Town, and they should be sworn, and upon their Oaths tax the four former Assessors. This tells unto me, what the antient and usual Manner was of Taxes and Assessors by the Custom of *England*: the Manner was not at the voluntary Pleasure of the great Officer of the County; but they that did tax others, should be taxed by others. And this Opinion is directly in *Matth. Paris*, that the Laws of *England* were so. And therefore for my own part, for the Sheriff to tax at his discretion, I know no Law for it.

Stat. 1 Ed. 3. By the true Record, according to the Manuscript of the *Exchequer* Book here, in *French* it is *Chap. 7.* and so it appeareth in the *Tower* there inrolled: It is expressly there upon a Complaint made, that they held themselves aggrieved with an Assessment; their Grief was, that whereas Aid was granted to the Crown, more than formerly was used, &c. and Taxes not rightly laid upon them by the Sheriff and Commissioners: this Grievance thus complained of in Parliament, and the Manner of their Taxing disliked, the King saith that from thenceforth, the Taxations and Assessments should be made as in antient Manner, and not otherwise. Here is an express Negative, no Taxes to be done but by Jury; which excludes in my Opinion this same Tax thus done, that is, by his own Power and Discretion, is not warrantable by the Law of the Land. And herein give me leave, as I think in my Conscience, and as I think the Truth is, if this Inconveniency had not tended to a Grievance in very many Particulars, we should never have heard of this Question; but by this means it cometh in question, both the one and the other: for the Act itself, it is a gracious and a royal Act. It is requisite and necessary, as the State and Condition (if it so appears upon this Record) of the Kingdom may be in, that there be a Supply according to the Necessity; for the King is Lord of the Sea; as it was argued at Bar, in a Cause brought before us the Barons of the *Exchequer*, where we did unanimously agree, and adjudge that the King was, and is in my Conscience, rightly true Lord of the very Propriety and Ownership of the Seas. The Occasion upon which this grew a Question was, as I conceive, upon the writing of two Books: The one called *Mare Liberum*, that no Ownership of the Sea should belong to the King; whereas it is the Sea of our Sovereign, and Defence by Sea, under Almighty God, that is our Protection; and if we should suffer any else to have an Interest in it, it

would hazard the whole Kingdom. But in Answer to this Book, Mr. *Selden* hath wrote very learnedly a notable Book called *Mare Clausum*, approved of by his Majesty, and inrolled in the *Exchequer* by Command from his Majesty, there to remain. But since there is another Book written (which I had at my Argument) by one *Pontanus*, directed to the great Chancellor of the King of *Denmark*; and he undertaketh therein to make an Answer to every particular Chapter in Mr. *Selden's* Book; and truly, as I think in my Opinion tho weak, Mr. *Selden* hath a Judgment in Law against him upon a *nihil dicit*.

Of how great Consequence the Dominion of the Sea is to this Kingdom, who knows not? So that without question, the Tax was very fit to be done, if the Power given to the Sheriff had been as warrantable. But this same second Power, to free himself and lay it upon the Residue, is not good, nor warrantable by the Law. Thus much for the first Question concerning the Powers contained in the Writ 4 Aug. which doth not resort to the Rule and Custom of the Kingdom of *England*.

In the next place, let us see whether the Writ mentions Causes sufficient for the issuing of it. For the IncurSIONS of Pirates I conceive it no just Cause: But the Expressions in the Writ, as *Quia datum est nobis intelligi, ut informatur, vulgaris opinio est & rumor est, &c.* If the King undertake it upon this, he is not to shew how he discovereth it. I am satisfied in my Opinion, upon view of the Precedents, it is sufficient if the King do alledge, *Quia datum est nobis intelligi*, or *Quia intelleximus, &c.* it is enough, for it is so in these Precedents, *Quod vulgaris opinio, &c.* All these, or any of these containing such a Matter that the Kingdom is in danger, I agree the same doth conclude the Party, and that the King is the sole Judge of it. The Case is not traversable, the Writ must be obeyed, agreeing with the Laws and Customs of *England*.

That this may be done by the King's Writ, excellent and strong Arguments have been made. That this Imperial Power belongeth to the Crown, I heartily acknowledge it; his Power declareth it so; Reason it should be so: Not voluntary at his Pleasure, but it is according to his *Politick Capacity*, not excluding his natural Imperiality. *Quia Rex*, he doth it not; but *Quia Rex Angliæ* he doth it: So I find it in *Fortescue*.

The Grounds premised in this Writ, that the Kingdom was in present danger; Truth in my Conscience it was so, and if that had not been done so, *England* had heard of it before this Day. Therefore there must be an Expression of the Kingdom to be then instantly in danger, or such a Preparation in such a convenient time, or else it will be in a great danger; but that must be expressed, for I hold the Law to be so. *Doctor and Student* saith, it is the old Custom of the Land, the King shall defend the Sea: 'tis true, against whom? Against Pirates and petty Robbers, but not against a sudden Invasion at his own Charge. These *Prædones* who were spoken of in the Laws of King *Edward*, when *Danegelt* was given, they were of that Condition that they endangered the whole Kingdom. They did occasion the Tax of *Danegelt*, to raise from twelve to forty eight thousand Pounds; and *William Rufus* raised it to 4 s. a Hide, imposed upon a just Ground to repel the *Danes*, being common Enemies: and this was continued until *Hen. II's* time, but since taken away

away by several Statutes, as 25 *Edw. 1.*, &c. That same *Danegelt* which was heretofore imposed on the Kingdom by the Terror of the *Danes*, continued still, tho the Name be altered; it is mentioned in the Red Book in the *Exchequer* to be used in *Hen. Ps* time; but after the time of *Hen. 2.* I hold that it is taken away by the Statutes before mentioned of *Edw. 1.*, &c. and therefore if for private Danger this Assessment be imposed, it is not according to the Laws and Customs of this Realm.

I am over-troublesom, and I fear shall hardly hold out; give me leave to proceed to the second Consideration. And admitting those Charges in the first Writ to be legal, the next Consideration to be had is, whether the *Certiorari* and the *Mittimus* do legally revive the first Writ, it being a Writ irreturnable, and not executed according to the Tenure of it within the time limited and prefixed to be done.

This *Certiorari* issued long after the first Writ, dated a Year and a half after. And in my Opinion this cannot be; for the Nature of a Writ not returnable, is to command a positive thing to be done within such a time; if it be not done accordingly, there is an end of the Force of that Writ: So that here in our Case, the Power given to the Sheriff being not executed in due time by him, but done out of time, cannot be renewed now; for otherwise you will make a Man an Offender by a Relation, which being a Fiction in Law, cannot so operate, nor be made penal to him for non-performance: and tho afterwards by the *Mittimus*, these Words *Salus regni perichitabatur* come in, yet will they not revive or make good the Commands of the first Writ. If the first Writ had been returnable, and a Return made, and a Default according to the Return, the Writ had been still continued, and must have been referred by another Court, and the Party presented by a Jury upon Default; and upon Presentation and Indictment, the King shall have his Remedy: But not being so, it is but a Suggestion, upon which a *Sci' Fa'* cannot issue, as in *Butler and Baker's Case*, Report 3. and being not returnable, is but dead in Law; and being certify'd upon the second Writ, it is not good, it cannot be to relate to make him a wrong Doer; to that purpose is the Case cited, 26 *Edw. 3.* *Leicestershire Case*, reciting; Whereas one Sir *John de Lamston*, that he had deliver'd certain Moneys to *Robert de Etc.* and that he had waisted such a Manor, and taken away Goods to the Value of 2000*l.* and thereupon it was commanded he should be attached by his Body, he appeared at his Day, and because, &c. he was discharged of it; and according to that I find it, 7 *Edw. 3.* there it was suggested to be made in one King's time; and whereas it was not, and there abated, then the Question, Whether the King may do it or no? He giveth the Answer, That where it concerneth the King in his own Right, there he may do it; but when the Title came to the King from another Party, there it was otherwise.

Upon this I do conceive this *Brev' irreturn'* falleth short of making him punishable, as if it had been a Writ returnable; let the Writ 4 *Aug.* be never so good, the Writ thereupon is not legally issued.

The next thing is upon the *Sci' Fa'*; the Question upon this Record is, Whether this doth appertain to the King; and I conceive, it doth not

appertain to the King: My Reason is this, because in the very Writ 4 *Aug.* it is expressly provided, that it shall be employ'd to no other Use, but the Preparation of the Ship therein-mentioned, and by no means to any other purpose. It doth not now appear, who were Collectors therein appointed to receive the Money, whereby to become chargeable over to the King. It doth not appear upon this Record, that any Ship was provided, or that any Fault was in them that were employ'd, or of Surplusage in the Collectors Hands: tho it was a worthy and gracious Act in his Majesty, yet this is not so legally executed, as the King may have a Writ of *Sci' Fa'*.

If Judgment be for the King, it must be with this Limitation, that it must not go to the proper Coffers of the King, as my Brother *Jones* observed. And in my Conscience, if it were paid to him, he would be a Loser by it. You see what the Writ is, you should be charged upon *onerare & satisfacere* one Ship; *non constat* there was any Ship, or any Collector, or any Act, concerning it: This Money was pre-ordained only to prepare a Ship, and to be employ'd merely upon that, and for no other Purpose; and this appeareth not at all, whether any Ship was made, yea or no; now how shall we give Judgment? The *Sci' Fa'* is, That Mr. *Hampden* should shew cause why he should not satisfy the Sum imposed upon him; but whom he should satisfy, or to whom the Money should be paid, *non constat*, as was well opened upon the Demurrer: for it is not, *Si Dominus Rex valet aut debeat onerare* the Defendant, but that the Defendant *oneretur & inde satisfac'*: Nothing is put into the Record to bring this to the King; therefore *quod oneretur* cannot be executed at all; and according to the Books of 39 *Edw. 3.* and 49 *Edw. 3.* if Judgment be to be given, and it cannot be executed, there it shall not be given at all: So the Judgment required on this Demurrer, is upon the Matter *oneretur*, and shall by no Colour come to the King. God knows it belongs to him, and that deservedly; but in a legal Course *non constat*; therefore to give Judgment, *quod oneretur*, and not know to whom (for to the King it cannot) would be wrong; for this Reason I cannot see how Judgment can be given, *quod oneretur*.

But hereupon another thing troubleth me very much, and which, in my Opinion, makes it clear, that Execution cannot be made upon this *Sci' Fa'*; and that is the *Mittimus* to us in the *Exchequer*, which by *Recordum ipsum* is not certified, but only the Tenor of the Record. I do conceive the Law to be so upon this Difference, as it is taken in a Case excellently well argued, 33 *Hen. 6.* where it is said, if the Record be in any other Court, whence Execution may be awarded, and the Tenor of that Record is by *Mittimus* sent into another Court, where Execution may be likewise awarded; in such a Case a *Sci' Fa'* cannot issue upon such a Record; for this is but an Extract of a Record. So if a Man should sue out Execution upon a Judgment given before the Justices of Assize, what will you do with this? And if he have no Goods within the Precinct, you must remove this. How do you remove it? Not by certifying the Tenor of the Record, but *ipsum Recordum*: But if the Record itself be certify'd into the *Chancery*, and sent by *Mittimus* into the *Common Pleas*, that is good, and we are Judges of the Record: No other Court can give Judgment upon the Record, but we.

Here

Here is sent unto us the Tenor of the Writ, and not the Record itself that I can find; and so two Executions may be upon one Judgment. 37 Hen. 6. A Transcript or Tenor of a Recognizance came out of the *Chancery* into the *Common Pleas*, to have executed, & non allocatur: and so it is *Dyer*, 4, & 5, & 22, of the Queen, there was a Transcript there of a Recognizance, to the intent that they might have a *Sci' Fa'* upon it, and held clearly by the Court, that upon the Tenor of a Record no *Sci' Fa'* could lie: So all this appearing upon the very first Branch of the Record, that this was merely a Tenor of the Record, and not *Recordum ipsum*, I do not know how upon this Record there can be Execution.

Thus have I done with the several Discussions of the Writ and Record, which upon my Reasons before alledged, I conceive it not sufficient in Law to charge Mr. *Hampden*.

I come now to the great Question concerning the Danger of the Kingdom, and our Certificate to his Majesty. Give me leave, according to our former Resolution made in Answer to his Majesty's Question proposed, to speak of what we did certify: and in my Conscience truly, and I hold it real, that when any Part of the Kingdom is in Danger, actually in Danger, or in expectancy of Danger, and the same expressed by his Writ; I agree, the King may charge the Subjects without Parliament, towards the Defence thereof; for *necessitas est lex temporis*, in vain to call for Help when the Enemy is landed. Clearly I hold the King to be the sole Judge of the Danger: And the Danger being certify'd by his Majesty, I hold it not traversable; and in such a Case he may charge the Subject without Parliament, so that the very Cause be effectually expressed upon the Records, that the Kingdom was in Danger. But if a Parliamentary Advice may be called, and the Danger not so imminent, then regularly no such Charge can be laid out of Parliament: legally and rightly, I hold, things done by the Advice of Parliament were the best Way: But if it be so, the Necessity will not admit the Delay of a Parliament, when the Enemy is in View, and expectant; that is such a Danger as we did certify to the King in our Opinion to be the time when he might so charge the Subject. In *Edw. III's* time Writs issued, sitting the Parliament. To say, that there cannot be Incurfions, but that they may be known within seven Months time, wherein a Parliament might be had, is a great Hazard to the Kingdom. It is possible the Danger may be discovered before it comes; but it is possible it may come unexpected. In 88, when that great Invasion was, at which time if the Queen should not have used her Royal Power, without calling a Parliament, perhaps the Kingdom might have been lost by Delays; and yet then great Expectation was of a Parliament. So *William I.* (not *William the Conqueror*, for he did not conquer the Kingdom, he conquer'd the King of the Kingdom) his coming was sudden, he landed at *Hastings*; and was not the King advised of this at *York*? Did he not then make all haste by Post, raised a sudden Army, and bad him Battle? And *William the Conqueror* had the Victory, not of the Kingdom, but against the King. *Lambert* saith, That he came not in *per conquestum*, but *per acquisitionem*. After he was crowned, and received by the *Londoners*, he sent forth Commissions to all the Counties of *England*, to enquire, *per sacramentum*,

what the antient Laws of *England* were, and of the State of the Kingdom; and Certificates being made thereof, that of *Danegelt* was certify'd to be a Tribute enforced. I say, in times of Necessity, the King may command this Aid by his Writ under the Great Seal, when the Danger is instant; nay, the Expectation of it is not traversable.

Object. Then upon every Certificate that the King makes, that he is of Opinion that the Danger is instant or expectant, this Charge may come to be annual.

Solut. No: we need not fear, that the King will require it but upon just Occasion, the Law presumes it; and legally it cannot be laid upon the Subject, but in such Cases of Necessity, as aforesaid. By the Charters of *William I.* King *John*, *Hen. III.* no Charge without Parliament: by the Statute of 10 *Edw. 3.* none is forc'd to go out of his County, except it be in Case of Necessity. 14 *Edw. 3.* I hold to be a general Statute, and it doth bind, but doth not bind in Case of Necessity; for they are not to be understood to be binding in all Cases. The Charter of King *John*, as it is inrolled, not as it is printed, according to *Mag' Cbar'*, saving two Clauses that are not now in *Mag' Cbar'*, hath this Exemption in it to the Subject of these and these Immunities; no Tax nor Taillage, but by Parliament; but he excepts three Cases: 1. *Nisi ad redimendum corpus nostrum.* 2. *Pur faire Fitz Chevalier.* 3. *Pur Fille marier.* These Prerogatives of the King are not bound up by the Parliaments; the very Commons themselves did agree to these three Cases. As for the Statute *de tallagio non concedendo*, I hold it to be a good Statute, and much for the Liberty of the Subject. But if you come to a Case of Necessity, they will not stand in force. There is one Omission in the printed Statute, 25 *Edw. 3.* which is in the Records at the *Tower* (as it was observed by my Brother *Hutton*) *Car ceo est encounter le droit del Royalme*: How this comes to pass, I know not. I caused it to be searched, and I find these Words only in the Articles upon the Roll, where they do complain for the finding of Hobbellers, and are aggrieved for it, and give this as a Reason, *Car ceo est encounter le droit del Royalme*: And the Answer which the King gave unto it, was a Royal Answer to the thing proposed; but those Words are left out of it. But if it were the Right of the Subject (*le droit del Royalme*) as *Littleton* saith, that cannot die.

And certainly, in Case of Necessity, there is a Right belonging to the King to prevent Danger; for legally, when the Safety of the Kingdom is in Danger, in Danger apparent, in that case the King hath a Power of Prerogative to compel Aid. And if an Act of Parliament should be made to restrain such a Charge on the Subjects in case of Necessity, it would be *Felo de se*, and so void; for it would destroy that *Regale jus*. So this great Question of imposing this Charge, I am of Opinion it may be done without Parliament, as it was in 88, so long as the present and apparent Danger continueth. And I am of Opinion, (as I was when we gave in our Certificates to his Majesty) that the King is the sole Judge of the Danger, and how to provide against it.

But however, I do conceive upon this Record, upon which I am to give Judgment, that the Mandates in the Writ 4 *Aug.* are not good in Law, nor according to the Laws and Customs of the Kingdom of *England*, nor well grounded upon the

away by several Statutes, as 25 *Edw. 1, &c.* That same *Danegelt* which was heretofore imposed on the Kingdom by the Terror of the *Danes*, continued still, tho the Name be altered ; it is mentioned in the Red Book in the *Exchequer* to be used in *Hen. I's* time ; but after the time of *Hen. 2.* I hold that it is taken away by the Statutes before mentioned of *Edw. 1, &c.* and therefore if for private Danger this Assessment be imposed, it is not according to the Laws and Customs of this Realm.

I am over-troublesom, and I fear shall hardly hold out ; give me leave to proceed to the second Consideration. And admitting those Charges in the first Writ to be legal, the next Consideration to be had is, whether the *Certiorari* and the *Mittimus* do legally revive the first Writ, it being a Writ irreturnable, and not executed according to the Tenure of it within the time limited and prefixed to be done.

This *Certiorari* issued long after the first Writ, dated a Year and a half after. And in my Opinion this cannot be ; for the Nature of a Writ not returnable, is to command a positive thing to be done within such a time ; if it be not done accordingly, there is an end of the Force of that Writ : So that here in our Case, the Power given to the Sheriff being not executed in due time by him, but done out of time, cannot be renewed now ; for otherwise you will make a Man an Offender by a Relation, which being a Fiction in Law, cannot so operate, nor be made penal to him for non-performance : and tho afterwards by the *Mittimus*, these Words *Salus regni periclitabatur* come in, yet will they not revive or make good the Commands of the first Writ. If the first Writ had been returnable, and a Return made, and a Default according to the Return, the Writ had been still continued, and must have been referred by another Court, and the Party presented by a Jury upon Default ; and upon Presentation and Indictment, the King shall have his Remedy : But not being so, it is but a Suggestion, upon which a *Sci' Fa'* cannot issue, as in *Butler and Baker's Case*, Report 3. and being not returnable, is but dead in Law ; and being certify'd upon the second Writ, it is not good, it cannot be to relate to make him a wrong Doer ; to that purpose is the Case cited, 26 *Edw. 3. Leicestershire Case*, reciting ; Whereas one Sir *John de Lamston*, that he had deliver'd certain Moneys to *Robert de &c.* and that he had wasted such a Manor, and taken away Goods to the Value of 2000*l.* and thereupon it was commanded he should be attached by his Body, he appeared at his Day, and because, *&c.* he was discharged of it ; and according to that I find it, 7 *Edw. 3.* there it was suggested to be made in one King's time ; and whereas it was not, and there abated, then the Question, Whether the King may do it or no ? He giveth the Answer, That where it concerneth the King in his own Right, there he may do it ; but when the Title came to the King from another Party, there it was otherwise.

Upon this I do conceive this *Brev' irreturn'* falleth short of making him punishable, as if it had been a Writ returnable ; let the Writ 4 *Aug.* be never so good, the Writ thereupon is not legally issued.

The next thing is upon the *Sci' Fa'* ; the Question upon this Record is, Whether this doth appertain to the King ; and I conceive, it doth not

appertain to the King : My Reason is this, because in the very Writ 4 *Aug.* it is expressly provided, that it shall be employ'd to no other Use, but the Preparation of the Ship therein-mentioned, and by no means to any other purpose. It doth not now appear, who were Collectors therein appointed to receive the Money, whereby to become chargeable over to the King. It doth not appear upon this Record, that any Ship was provided, or that any Fault was in them that were employ'd, or of Surplufage in the Collectors Hands : tho it was a worthy and gracious Act in his Majesty, yet this is not so legally executed, as the King may have a Writ of *Sci' Fa'.*

If Judgment be for the King, it must be with this Limitation, that it must not go to the proper Coffer of the King, as my Brother *Jones* observed. And in my Conscience, if it were paid to him, he would be a Loser by it. You see what the Writ is, you should be charged upon *onerare & satisfacere* one Ship ; *non constat* there was any Ship, or any Collector, or any Act, concerning it : This Money was pre-ordained only to prepare a Ship, and to be employ'd merely upon that, and for no other Purpose ; and this appeareth not at all, whether any Ship was made, yea or no ; now how shall we give Judgment ? The *Sci' Fa'* is, That Mr. *Hampden* should shew cause why he should not satisfy the Sum imposed upon him ; but whom he should satisfy, or to whom the Money should be paid, *non constat*, as was well opened upon the Demurrer : for it is not, *Si Dominus Rex valet aut debeat onerare* the Defendant, but that the Defendant *oneretur & inde satisfac'* : Nothing is put into the Record to bring this to the King ; therefore *quod oneretur* cannot be executed at all ; and according to the Books of 39 *Edw. 3.* and 49 *Edw. 3.* if Judgment be to be given, and it cannot be executed, there it shall not be given at all : So the Judgment required on this Demurrer, is upon the Matter *oneretur*, and shall by no Colour come to the King. God knows it belongs to him, and that deservedly ; but in a legal Course *non constat* ; therefore to give Judgment, *quod oneretur*, and not know to whom (for to the King it cannot) would be wrong ; for this Reason I cannot see how Judgment can be given, *quod oneretur.*

But hereupon another thing troubleth me very much, and which, in my Opinion, makes it clear, that Execution cannot be made upon this *Sci' Fa'* ; and that is the *Mittimus* to us in the *Exchequer*, which by *Recordum ipsum* is not certified, but only the Tenor of the Record. I do conceive the Law to be so upon this Difference, as it is taken in a Case excellently well argued, 33 *Hen. 6.* where it is said, if the Record be in any other Court, whence Execution may be awarded, and the Tenor of that Record is by *Mittimus* sent into another Court, where Execution may be likewise awarded ; in such a Case a *Sci' Fa'* cannot issue upon such a Record ; for this is but an Extract of a Record. So if a Man should sue out Execution upon a Judgment given before the Justices of Assize, what will you do with this ? And if he have no Goods within the Precinct, you must remove this. How do you remove it ? Not by certifying the Tenor of the Record, but *ipsum Recordum* : But if the Record itself be certify'd into the *Chancery*, and sent by *Mittimus* into the *Common Pleas*, that is good, and we are Judges of the Record : No other Court can give Judgment upon the Record, but we.

Here

Here is sent unto us the Tenor of the Writ, and not the Record itself that I can find ; and so two Executions may be upon one Judgment. 37 Hen. 6. A Transcript or Tenor of a Recognizance came out of the Chancery into the Common Pleas, to have executed, & non allocatur : and so it is Dyer, 4, & 5, & 22, of the Queen, there was a Transcript there of a Recognizance, to the intent that they might have a *Sci' Fa'* upon it, and held clearly by the Court, that upon the Tenor of a Record no *Sci' Fa'* could lie. So all this appearing upon the very first Branch of the Record, that this was merely a Tenor of the Record, and not *Recordum ipsum*, I do not know how upon this Record there can be Execution.

Thus have I done with the several Discussions of the Writ and Record, which upon my Reasons before alledged, I conceive it not sufficient in Law to charge Mr. Hampden.

I come now to the great Question concerning the Danger of the Kingdom, and our Certificate to his Majesty. Give me leave, according to our former Resolution made in Answer to his Majesty's Question proposed, to speak of what we did certify : and in my Conscience truly, and I hold it real, that when any Part of the Kingdom is in Danger, actually in Danger, or in expectancy of Danger, and the same expressed by his Writ ; I agree, the King may charge the Subjects without Parliament, towards the Defence thereof ; for *necessitas est lex temporis*, in vain to call for Help when the Enemy is landed. Clearly I hold the King to be the sole Judge of the Danger : And the Danger being certify'd by his Majesty, I hold it not traversable ; and in such a Case he may charge the Subject without Parliament, so that the very Cause be effectually expressed upon the Records, that the Kingdom was in Danger. But if a Parliamentary Advice may be called, and the Danger not so imminent, then regularly no such Charge can be laid out of Parliament : legally and rightly, I hold, things done by the Advice of Parliament were the best Way : But if it be so, the Necessity will not admit the Delay of a Parliament, when the Enemy is in View, and expectant ; that is such a Danger as we did certify to the King in our Opinion to be the time when he might so charge the Subject. In Edw. III's time Writs issued, sitting the Parliament. To say, that there cannot be IncurSIONS, but that they may be known within seven Months time, wherein a Parliament might be had, is a great Hazard to the Kingdom. It is possible the Danger may be discovered before it comes ; but it is possible it may come unexpected. In 88, when that great Invasion was, at which time if the Queen should not have used her Royal Power, without calling a Parliament, perhaps the Kingdom might have been lost by Delays ; and yet then great Expectation was of a Parliament. So William I. (not William the Conqueror, for he did not conquer the Kingdom, he conquer'd the King of the Kingdom) his coming was sudden, he landed at *Hastings* ; and was not the King advised of this at *York* ? Did he not then make all haste by Post, raised a sudden Army, and bad him Battle ? And William the Conqueror had the Victory, not of the Kingdom, but against the King. Lambert saith, That he came not in *per conquestum*, but *per acquisitionem*. After he was crowned, and received by the Londoners, he sent forth Commissions to all the Counties of England, to enquire, *per sacramentum*,

what the antient Laws of England were, and of the State of the Kingdom ; and Certificates being made thereof, that of *Danegelt* was certify'd to be a Tribute enforced. I say, in times of Necessity, the King may command this Aid by his Writ under the Great Seal, when the Danger is instant ; nay, the Expectation of it is not traversable.

Object. Then upon every Certificate that the King makes, that he is of Opinion that the Danger is instant or expectant, this Charge may come to be annual.

Solut. No : we need not fear, that the King will require it but upon just Occasion, the Law presumes it ; and legally it cannot be laid upon the Subject, but in such Cases of Necessity, as aforesaid. By the Charters of William I. King John, Hen. III. no Charge without Parliament : by the Statute of 10 Edw. 3. none is forc'd to go out of his County, except it be in Case of Necessity. 14 Edw. 3. I hold to be a general Statute, and it doth bind, but doth not bind in Case of Necessity ; for they are not to be understood to be binding in all Cases. The Charter of King John, as it is inrolled, not as it is printed, according to *Mag' Cbar'*, saving two Clauses that are not now in *Mag' Cbar'*, hath this Exemption in it to the Subject of these and these Immunities ; no Tax nor Taillage, but by Parliament ; but he excepts three Cases : 1. *Nisi ad redimendum corpus nostrum*. 2. *Pur faire Fitz Chevalier*. 3. *Pur Fille marier*. These Prerogatives of the King are not bound up by the Parliaments ; the very Commons themselves did agree to these three Cases. As for the Statute *de tallagio non concedendo*, I hold it to be a good Statute, and much for the Liberty of the Subject. But if you come to a Case of Necessity, they will not stand in force. There is one Omission in the printed Statute, 25 Edw. 3. which is in the Records at the Tower (as it was observed by my Brother Hutton) *Car ceo est encounter le droit del Royaulme* : How this comes to pass, I know not. I caused it to be searched, and I find these Words only in the Articles upon the Roll, where they do complain for the finding of Hobbellers, and are aggrieved for it, and give this as a Reason, *Car ceo est encounter le droit del Royaulme* : And the Answer which the King gave unto it, was a Royal Answer to the thing proposed ; but those Words are left out of it. But if it were the Right of the Subject (*le droit del Royaulme*) as *Littleton* saith, that cannot die.

And certainly, in Case of Necessity, there is a Right belonging to the King to prevent Danger ; for legally, when the Safety of the Kingdom is in Danger, in Danger apparent, in that case the King hath a Power of Prerogative to compel Aid. And if an Act of Parliament should be made to restrain such a Charge on the Subjects in case of Necessity, it would be *Felo de se*, and so void ; for it would destroy that *Regale jus*. So this great Question of imposing this Charge, I am of Opinion it may be done without Parliament, as it was in 88, so long as the present and apparent Danger continueth. And I am of Opinion, (as I was when we gave in our Certificates to his Majesty) that the King is the sole Judge of the Danger, and how to provide against it.

But however, I do conceive upon this Record, upon which I am to give Judgment, that the Mandates in the Writ 4 Aug. are not good in Law, nor according to the Laws and Customs of the Kingdom of England, nor well grounded upon the

This his Majesty required for his own private Satisfaction; and this I dare boldly say was so delivered by us, that no one Judge knew the Opinion of the rest.

When his Majesty found Slackness in some of his Subjects in contributing to this Charge, and thinking that it proceeded rather from Misunderstanding of the Law, than for want of Duty, as desirous out of his princely Love to avoid all Mistakes, he did upon 2 Feb. 1636. send a Letter to all his Majesty's Judges and Barons of the Exchequer, thereby requiring our several Opinions: about which we all conferred, and the Particulars, wherein our Opinions were required, had been considered of before, or else we were much to blame; for we had time enough to think upon it. And tho' our Answers were returned the 7th of the same Month, yet we had it in our Consideration from June 1635, which was fifteen Months before the Answer returned; so there was no Surprise. I will spare to name our Opinion then delivered; for it hath been repeated before. When we came to the Debate and Voting of this, we brake the Writ into several Parts.

1. When the Good and Safety of the Kingdom in general is concerned, and the whole Kingdom is in Danger, Whether it ought not to be defended at the Charge of the whole Kingdom? And agreed it was *una voce, nullo contradicente*, that it ought.

2. Whether the Charge of the Defence might not be commanded by the King? Which was also agreed, that it might.

3. Whether the King was not the sole Judge, both of the Danger, and when and how it was to be prevented? Wherein my Brothers *Hutton* and *Crooke* did agree it likewise, that he was sole Judge of the Danger. What their Opinions are now, and wherein they differ, with their good leave I shall examine, and their Reasons and Differences; (tho' indeed of the King's being the sole Judge, in their Arguments, my Brother *Crooke* spake nothing of his Opinion therein, nor my Brother *Hutton* nothing against it.) But we deliver'd not our Opinion upon the by; nor was it so required of his Majesty.

It was then also declared by all of us, that we did not deliver our Opinions as binding, nor were they so required by his Majesty; of all which I dare boldly say, his Majesty was truly informed. And this was also soon after published by his Command, and seconded by my Lord Keeper and Lord Privy-Seal, the first of them using many Arguments and sound Collections, deliver'd it in Charge to his Majesty's Judges, to deliver it in their Circuits, which might have satisfy'd any that did not respect their own private Benefit. And Mr. *Hampden*, I think, of all hath the least cause to complain, being assessed but 20 s. a contemptible Sum, in respect of his annual Revenues, to bring this Case to Judgment: yet his Majesty's Clemency appears to be great herein, in that he would not debar any to question the Lawfulness of it, tho' he hath permitted *Arcana Imperii*, nay *Imperium ipsum*, (I would to God I could not say even too licentious) to be debated at this Bar; yet I speak it not by way of Reprehension, but Admonition to the Counsel, who are to be commended, in that they have done their Duty faithfully for their Client: yet I may say, such a ravelling and diving into the King's Revenue, and secret Estate of Princes, and what succeeding

Kings may be, or may do, it doth not well become these present Times; it would not have been endured in the best preceding Times.

It was not well done to doubt succeeding Posterity, that promise as much as any of their Predecessors have done for the Good of the Commonwealth.

It is not well to clog the Case with so many Precedents, impossible to be thoroughly observed; but our Example, I hope, shall be a Bar hereafter, and our Care shall be to prevent it, being a great Hindrance of Justice, and Cause of great Expence to the Subjects long Attendance about their Causes here; which may prove a greater Charge than in providing Ships for the Realm.

I come to the Case now, as it stands in Judgment before us; wherein my Method shall be,

I. To examine what the Case is.

II. I will give my Opinion of the Case, with the Reasons thereof.

III. I will answer the Objections made against it.

IV. I will speak to the Legality and Form of the Writ 4 Aug. the *Certiorari*, the *Mittimus*, and *Sci' Fa'* out of the Exchequer. And to all these, with what Brevity I can, I will speak according to the Weight of the Case, where Variety of Opinions gives just Cause to ballance them: the Case must arise out of the Record, and must stand or fall upon that.

I. For the Case itself; and therein, 1. I will shew what Danger there is, that is the Ground of the Charge. 2. What things there are to maintain it: As for other things, they tend to the Destruction of the Case.

1. I am of opinion, that the Danger of the whole Kingdom ought to be expressed clearly; for else the Ground-work faileth; for if no Danger, no Reason of the Charge. And I am of Opinion, that in the Writ 4 Aug. it ought to be expressed, and not in the *Mittimus*; tho', as my Brother *Jones* observed, the *Mittimus* comes time enough to Mr. *Hampden* to give him notice, yet he was not liable to the Charge, but by the Writ 4 Aug.

(1.) It is objected, the Danger is not clearly expressed; for it is not upon Words of Certainty, but by way of Uncertainty, *Quod datum est nobis intelligi*.

(2.) For the Causes of the Writ, that it hath not relation to the Danger of the Kingdom, but to defend the Sea-Coasts against Pirates, &c. And they are not worthy of a Royal Navy, as Brother *Crooke* also observed.

But I hold first, that the Danger is sufficiently expressed, *Certum est sicut res habet; Datum nobis est intelligi*: A thing very ordinary with us; and in all former Writs, *Ex relatione*, &c. *Quod vulgaris opinio est*, &c.

Altho' my Lord Chief Baron parallel'd this to the Case of Patents, *ex certa scientia*, &c. which is nothing a-like; for there before the King pass away Land, he may be informed if he may do it: but I hold, as this Case is, the Danger will not permit it to be examined, whether there be just Cause of Fears; for then it might receive Delay, which is dangerous, and the Kingdom be lost whilst we are disputing.

And then for the Phrase itself, *Datum est nobis intelligi*. It is sufficient that the King knows there is

is a Danger; and therefore, if it had been only *Intelligimus*, none can deny but it had been sufficient. And what difference is there between *Intelligimus* and *Datum est nobis intelligi*? That sets forth the Knowledge of the Danger, and this shews the Means whereby he doth know it; *Ut datum est nobis intelligi*. This goes farther than *ex auditu*, *Rumor est*, &c. Therefore, unless the King should go out of the Kingdom to see the Danger, can it be otherwise expressed?

(3.) I hold, that the Danger itself, with the Motives in the Writ, are sufficient.

The Motives are, great Depredations of the Subjects Goods, and Lives: but it is not upon this I rest, for this hath relation to Pirates leading many Christians into Captivity. These are good Motives and (as one of my Brothers said well) tho these have relation to Pirates, yet *Bellum Piraticum* points at as much Terror as *Hannibal ad Portas*.

I shall not rely much upon that, that the Enemies of Christendom and of this Nation did prepare *ad Mercatores nostros ulterius molestari*, nor *Ad Regnum gravandi nisi citius remedium apponatur*, &c. But this *Consideratis periculis quæ undique his guerrinis temporibus imminentibus ita quod nobis & subditis nostris defensionem maris & Regni nostri omni festinatione qua poterimus convenit*, &c. shews otherwise than for the Pirate, this Defence was requisite. Therefore the next Clause is, *Nos volentes defensionem Regni, tuitionem maris, securitatem subditorum nostrorum*, &c. And therefore,

that *Salva conductione Navium & Merchandizarum quæ ad Regnum nostrum Angliæ venerint, & de eodem regno ad partes externas transeunt*, &c. takes not away the former Words, nor limits them.

As for the Clause in the *Mittimus*, I stand not upon it, nor that *Salus Regni & populi nostri Angliæ periclitabatur*, &c.

(4.) Admit there had been no Preamble nor Expressment of Danger, I hold the Command itself is sufficient for setting forth the Danger, which is, that the Ship be with other his Majesty's Ships, and the Ships of other his Majesty's Subjects at *Portsmouth* the first Day of *March* next following; the Words of the Record be, *Exinde cum navibus nostris & navibus aliorum fidelium subditorum nostrorum pro tuitione maris & defensione nostrorum & vestrorum*, &c. And particularly to express the Danger, is not necessary; for the King, the sole Arbitrator both of Peace and War, best knows it; and it was the Practice in former Times: and so no Wisdom for the King to express the Danger in particular, when Arms usually go before Heralds; nor is it the Use of Princes to complement, to tell the Enemy they will, or intend to invade their Lands. And therefore I hold, tho it might be more clear, yet *satis est quod sufficit*: I in my own Conscience am satisfied that the Danger is certain enough expressed in the Writ. And so I have done with the first Particular, the Danger, which was the Ground of this Writ.

(2.) As to the second Particular, What is alleged to be for the preventing of that Danger; my Brother *Hutton*, and my Brother *Crooke*, would have it to be raising of Money, by reason of that Clause in the Writ, for the Distribution of the Surplusage. But the Record is, *Ad assidendum omnes homines & ad contribuendum navem vel partem navis non habentes*, &c. which shews it cannot be for Money, neither is there any colour of Money;

for it is to find a Ship: And if they have not of their own, they must build, or buy one with their Money. But there is a great deal of difference between Payment of Money and finding of a Ship. As if my Brother *Crooke* be required to find a light Horse and Arms, he must buy one, or hire with his Money, if he hath none; but yet the Charge is not for Money, but that he find a light Horse.

But my Brother *Crooke's* Objection is, If any Surplusage remain, it shall be divided; and so the Sheriff is to detain no part of it, but employ it for the publick Good, and not convert it to his own proper Benefit.

To this I answer, That this shews the Equality of the Charge, which is fittest to be by Payment of Money.

My Brother *Crooke* hath farther objected, That an Inland County cannot build a Ship: A great Trouble for the County of *Bucks*, so far from the Sea to build a Ship.

To this I answer, That those of *Buckinghamshire* may hire a Ship, if they cannot build one; and the Words are but *parare*, not for the building but preparing a Ship; and it is not meant that they should build it there, but that they should contribute to the building of a Ship in a most fit and convenient Place.

II. I shall now give my Opinion of the Case, with the Reasons thereof. The King knowing and declaring the whole Kingdom to be in danger, and necessarily requiring his Subjects to defend and provide for this Danger at Sea, he may thereupon command all his Subjects to prepare Ships to join with his Navy Royal against the Enemies of the whole Realm, to defend the whole Realm: and it is clear in the Case, and it was the meaning of us all, that the King must join in the Charge, it being far from us to excuse the King from his ratable Part.

My Reasons that the King may thus charge his Subjects to join with him in the defence of the Kingdom, are these.

1. The Defence of the Kingdom must be at the Charge of the whole Kingdom in general.

2. The Power of laying this Charge is, by the Policy and Fundamental Laws of this Kingdom, solely invested in the King.

3. The Law that has given this Power to the King to do these things, hath given him Means to put these things in execution.

And as to all these I shall ground myself upon Authorities in Law, and Precedents in all Ages.

1. That the Defence of the Kingdom must be at the Charge of the Kingdom, I shall prove, (1.) From the Law of Nature, which is, that every thing in Nature ought to defend itself.

(2.) From the Rule of Reason: for *Quod omnes tangit, ab omnibus supportari debet*.

(3.) From the true Use of all that we enjoy, which must be abused, if not employed to and for the Good also of those that come after us; and necessary it is for our Posterity to have all sure and safe. A good Patient will spare some Blood to preserve his own Health; and a good Husband will spare some of his best Ground for Ditches and Fences to preserve the rest; and he is an ill Husband that finds not safety in that he doth.

(4.) From the Law of Property: as every one hath a particular Property in his own Goods, so every one hath a Property in general in another

Man's Goods, for the common Good. For the Commonwealth hath a Property in every Man's Goods, not only in time of War, but also in time of Necessity in time of Peace. Therefore if any Man take away my Goods without my Consent I have my Action, and recover Damage. *Doctor* and *Student* saith, both a Trespass of Lands and Goods is punishable by Indictment, and Trespass at the King's Suit as well as at the Subject's: And this is by reason of the publick Interest the King hath in every Subject's Goods for the common good.

Now the Rule and Maxim before so clearly and fully put and agreed by all, is, that in case of Necessity that is apparent, the Subject ought to defend the Kingdom. And my Brother *Crooke* agrees in Case of Danger, so it be imminent, all Men are bound in their Persons and Estates to defend the Kingdom; and he says then they must *exponere se & sua*: I think he means a Man that takes a Journey may carry his Money with him, *se & sua*: or else he means the King cannot command their Money without their Consent: of which I will speak in its proper Place.

2. I come now to the second Part of my general Head, which is the Power of laying this Charge. By the fundamental Laws and Policy of this Kingdom, the sole Interest and Property of the Sea, &c. is in the King. I will not speak of this Monarchy, this is rather fit for Civilians, Historians, or the Pen of a Divine, than a Judge at *Westminster-Hall*: Nor will I speak of the Division of Monarchies: The Poets say that *Saturn* was the first Founder of Kingdoms. Only this I will say, that for the Excellency of the Government of this Kingdom, thro' God's Blessing, none are more happy than we. Look and see in other Nations, and tell me if you can find out any Place where they can and do enjoy those Mercies of Peace and Plenty which we do; so as we may justly say, *O fortunatos nimium bona si sua norunt Britannos!* Nor will I perplex myself with the Original of the Nation and Monarchy; some Stories are fabulous, others doubtful, not any so clear as to set it forth certainly, tho they speak truly what is sufficient for us to know; nor is he the poorest, *Qui non potest numerare Pecus*, nor he one of the worst Gentlemen that cannot shew the Original of his Pedigree. The Excellency of this Monarchy is, that it is sufficient it is a Monarchy; and that it is most true what *Fortescue* saith of our Laws. I agree that *Fortescue* was a Lord Chief Justice in *Hen. VI's* time, but not Chancellor of *England*. Sea and Land make but one Kingdom, and the King is *Sponsus Regni*; *Magdalen College Case*, *Sir Job. Davie's Reports*, Stat. 24 *Hen. 8.* 1. *Eliz.* and 1 *Jac.* The Soil of the Sea belongs to the King, who is Lord and sole Proprietor of them; and good reason why he should, as is well maintained by Mr. *Selden*, that worthy and learned Author of *Mare Clausum*; and I hope shall be by his Majesty maintained, with the Sovereignty of the Sea: and without a Navy this Authority can do but little good.

The King holds this Diadem of God only, all others hold their Lands of him, and he of none but of God: But this is but to light a Candle for others. From hence only I will observe, that none other can share with him in his absolute Power.

A Parliament is an honourable Court; and I confess it an excellent Means of charging the Subject, and defending the Kingdom; but yet it is

not the only Means. An Honour the last Parliament was pleased to bestow on me, which never any shall with more respect remember than myself, when they were pleased to chuse me for their Speaker. And as my Brother *Hutton* said, I conceive it a fit way to charge the Subject; and I wish that some for their private Humour had not sowed the Tares of Discontent in that Field of the Commonwealth, then might we have expected and found good Fruit. But now the best way to redeem this lost Privilege (for which we may give those Thanks only) is to give all opportune Appearance of Obedience and Dutifulness to his Majesty's Command.

The two Houses of Parliament without the King cannot make a Law, nor without his Royal Assent declare it: he is not bound to call it but when he pleaseth, nor to continue it but at his Pleasure. Certainly there was a King before a Parliament, for how else could there be an Assembly of King, Lords and Commons? And then what Sovereignty was there in the Kingdom but this? His Power then was limited by the positive Law; then it cannot be denied but originally the King had the Sovereignty of the whole Kingdom both by Sea and Land, who hath a Power of charging the whole Kingdom.

3. The Law that hath given that Power, hath given Means to the King by this Authority to put it in execution. It is a very true Rule, The Law commands nothing to be done, but it permits the Ways and Means how it may be done; else the Law should be imperfect, lame and unjust: therefore the Law that hath given the Interest and Sovereignty of defending and governing the Kingdom to the King, doth also give the King Power to charge his Subjects for the necessary Defence and good thereof. And as the King is bound to defend, so the Subjects are bound to obey, and to come out of their own Country, if Occasion be, and to provide Horse and Arms in foreign War; and such are compellable now to find Guns instead of Bows and Arrows, so Ammunition, as Powder, Shot, &c. Then if Sea and Land be but one entire Kingdom, and the King Lord of both, the Subject is bound as well to the Defence of the Sea as of the Land; and then all are bound to provide Ships, Men, Ammunition, Victuals, and Necessaries for that Defence. And for us Islanders, it is most necessary for us to defend ourselves at Sea: therefore it was the great Argument in 88, whether it was best to fight with the Royal and Invincible Navy or *Armada* of *Spain* at Sea, or suffer them to land; and it was resolved clearly, that it was better to fight with them at Sea, tho we lost the Battle and our Ships, than to suffer them to land.

But then there was *Hannibal ad portas*.

To this I shall answer afterwards. But here the Maritime Towns shall not help the Inland, nor the Inland the Maritime, but each of them bear their own Charge, and defend themselves. But of this I shall likewise speak hereafter; yet undoubtedly it is reasonable that both should join to defend the Kingdom in case of Necessity.

Now I shall endeavour to prove this clearly by Authority in Law, and Precedents in all Ages. And, (1.) It is a great Authority in Law, that there is no express Authority against it: tho there have been some Books cited by my Brother *Hutton* and my Brother *Crooke*, (which I shall answer in their due place, amongst other Objections) yet there is not one Authority or Opinion, much less

Resolu-

Resolution or Judgment, in necessary time of Danger, that says, the King may not charge the Subjects for Defence of the Kingdom.

2. All these Authorities that prove the King is trusted with the Defence of the Kingdom, and in divers Cases give him Aid, Taxes, Subsidies, &c. prove that the Subject is bound in case of Danger and Necessity, to pay them to the King for Defence of the Kingdom.

(3.) All the Authorities of Murage, Pontage, Salt-Peter, &c. shew that for the good of the Publick the King is interested in the Estates of the Subject, and may charge them much more, if for the Well-being, than where the Being itself of the Commonwealth is at stake and in Danger.

(4.) The Authority of commanding the Persons of the Subjects to come out of their own Countries proves it. The Power of commanding the Person of the Subject into foreign Parts is in the King; much more the State of Men should be at his Command, in case of necessary Defence of the Kingdom.

(5.) All the Commissions of arraying Men in *Ed. 1. Ed. 2. Ed. 3. Ed. 4. Hen. 7. and Hen. 8.* times, &c. are grounded upon the same Reason, and went out for the necessary Defence of the Kingdom. These Writs are not to command the Person, but a Ship only, *juxta facultates suas*; which are answerable in reason to the antient Precedents.

From Authorities I come to Precedents; tho they be not Judgments, yet they shew the Practice of the Law: and what better Book have we in the Law than the Book of Precedents, or what is there of more Authority than that, for we have not the twelve Tables for our common Laws.

The Common Law is but the common Usage of the Land; and therefore the Precedents alledged by the King's Counsel are of good Authority to prove the Laws in this Case; wherein I shall not name the Particulars, they have been well remember'd by Mr. Attorney and Mr. Solicitor: but I will mention the Substance of them.

The first sort of Precedents were before the Conquest, in the Times of *Edgar, Alfred, Ethelred, &c.* the Use was to defend the Kingdom at the Charge of the whole Kingdom, by the Edict of the King. A strong Inference from the Precedent of the Grant to the Clergy and Church of divers Privileges, with these Exceptions of *Pontium, &c.* in the Times of *Edgar, Alfred, and Ethelred, &c.*

The Council of *Enoch* in *Edgar's* Time about 606, mentioned by the learned Antiquary *Sir Henry Spelman*, fo. 510. And after those follows *hæ sunt constitutiones, &c.* fo. 523. in which are excellent Things, good for Church and Commonwealth. *Cap. 23. Navales Expeditiones*, if it be no Act of Parliament, yet nothing is more like an Act of Parliament: take the Phrase of those Times, and certainly it was either an Act of Parliament, or a Proof of the King's Power, that without Parliament he might charge the Subject for the Defence of the Kingdom in case of Danger. And the Word Expedition is used for War, and sometimes for an Army, as *Cassiodorus* giving the Reason of the Name says. In the third place, it shews the Practice of the Kings of *England* to charge their Subjects for the Defence of the Kingdom in case of Danger.

Now if this Charge of *Danegelt* be not taken away by any of the Acts of Parliament, it remains still, saith my Brother *Hutton*. And so I think it doth, or something in lieu of it; for it is not taken away by any Act of Parliament.

In these Precedents, observe, (1.) That they are all upon the same common Reason that this is.

(2.) These Writs are not limited for their Number or Time; so they prove the Power was in the King to charge his Subjects.

(3.) In these Precedents, some were to Inland Counties, as *Bucks, Huntingdon, Bedford, Leicesters, Oxford, Berks, &c.* And tho they went not generally to all Counties at one time, yet they went to them as occasion was. And if the Danger had required it, the King might, if he pleased, have sent to all as well as to some.

But because there was never any time, when all the Ammunition in the Kingdom was drawn at one time to one Place, may it not therefore be done? The commanding sometimes of one, sometimes of another, is an Argument they may be all commanded as occasion requires. I do not build my Opinion upon confused Notions, but on Matters digested, on Precedents of Weight, the chiefest in respect of Time: and after the making of *Magna Charta*, 9 *Hen. 3.* 13 *Hen. 3. m. 48.* 18 *Hen. 3. m. 7.* 13 *Ed. 3. m. 77.* 23 *Ed. 3. m. 4.* 28 *Ed. 1. m. 23.* and many others in *Ed. 1.* Time, there is proving Contribution towards the Maintenance of the Sea-Coasts from Inland Towns, as 25 *Ed. 1. m. 13.* the Abbot of *Robertsbridge* Case is a full Precedent, notwithstanding all that hath been said against it. So 9 *Ed. 2. pars 1.* 20 *Ed. 2. m. 7.* 2 *Ed. 3. Scot. Roll.* 7 *Ed. 3. m. 9.* 10 *Ed. 3. m. 16, 17.* 11 *Ed. 3.* 12 *Ed. 3.* 14, 15, 16. 18 *Ed. 3.* 46 *Ed. 3. m. 34.* 25 *Ed. 3. Rot. Franc' m. 9.* 29 *Ed. 3.* 1 *Ric. 2.* 1 *Hen. 4.* Yet *Hen. 4.* had as much reason to please the People as any King of *England*. So in *Hen. V's* Time, tho buſied in the glorious Conquests of *France*, or rather Recovery of *France*; God forbid we should see such Times. So in the Times of *Ed. 4. Hen. 6. Hen. 7. and Hen. 8.* by way of offensive War, Writs and Commissions to their Subjects to contribute toward it. So in Queen *Eliz.* Time, Commissions towards the Maintenance of the Kingdom. 11 *Eliz.* 41 *Eliz.* a Commission to the Earl of *Nottingham*. In 88, Letters from the Lords of the Council, which Letters had the Queen's Writs in them.

But my Brother *Crooke* answer'd all these with this Rule of Law, *Judicandum est legibus non exemplis*. To this I answer, that Examples and Precedents are good Law; they are Authorities out of the Law, and what of more Certainty? Digest of Writs, these are *inter Oracula Legis*, Precedents drawn up by Clerks; tho they pass sometimes *sub Silentio*, yet are they good Authorities in the Law. The Abbot of *Robertsbridge's* Case is a Precedent of great Authority.

But it is alledged, no Precedent goes to Inland Counties.

I answer, in truth the Precedents are quite otherwise; for ordinary Defence they go to Maritime Counties only, but when the Danger is general, to Inland Counties also, and after another manner. For this I refer you to my Brother *Weston's* Argument: These could not be so frequent; for first, Such Danger was but seldom: Secondly, We had then double Hostility, one from *France* by Sea, another

another from Scotland by Land. Examine the Precedents therefore.

Another Observation that my Brother Crooke made, is this, that we are compellable by our Persons and Arms, but not with any Sum of Money.

I answer with my Brother Jones, that *bona Corporis* are above *bona Fortunæ*: but this Power of Liberty to command the Persons of his Subjects, he agrees, is in the King; then I say, more reason that their Estates should be in his power in this Case of Defence.

Besides, the Precedents warrant the quite contrary, and Wages have been paid the Soldiers by the Subject in this Case.

III. The third thing I shall do in this Case, is the answering of all the Objections which have been made against it, which were three.

1. That this Writ was against the Common Law.

2. That it was against the Statute Law.

3. That many Inconveniences will grow thereby.

1. It is against the Common Law, because it is without Precedent: this is the first of this kind since the Conquest; and where there is no Precedent, the Law will not bear it; *Littleton* fol. 32. Lord Coke's Comment upon it: and they put divers Cases to the same Purpose.

I answer, that there are Precedents for it, and the Law is so, that the King may charge his Subjects towards the Defence of the Kingdom in this Case.

2. The second Objection is, that it is against the Freedom of the Subject, who hath a true Property in his Goods, which cannot be taken away without his actual or implied Consent. *Lambert* fol. 294. *Mag. Char.* 17 King John, *Mat. Paris* fol. 242. *Fortescue* fol. 9. cap. 13, &c. 13 Hen. 4. the Chamberlain of London's Case, *Reg'* fol. 127. *Fitz-herb. Na. Br. &c.*

I answer, That the Authority of *Lambert* rehearsing the Laws of the Conqueror, is, *Volumus & concedimus ut omnes liberi homines totius Monarchiæ Regni nostri habeant & teneant terras suas & possessiones suas bene & in pace, liberas ab omni exactione injusta, & ab omni tallagio, ita quod nihil exigatur vel capiatur nisi per commune concilium, &c.* It cannot be construed that they should not be charged, but that they should be free from all unjust Taxes. The King is not concluded by the subsequent Words *omne Tallagium*; this cannot be so general, but the King may impose just Charges towards the necessary Defence of the whole Kingdom. For this is meant, as by the word *Tallage* plainly appeareth. *Tallagium* is derived from a French Word, and is indeed a cutting Word, and therefore *injusta Exactio*; which shews that for the most part it is taken in the worst Sense, and as my Brother Crooke said it, the manner of expounding it must be from the Law.

But my Brother Crooke quite left out these Words following, that declare and expound the former, *viz. Statuimus & firmiter præcipimus ut omnes liberi homines totius regni præd' sint fratres conjurati ad monarchiam nostram pro viribus suis & facultatibus contra inimicos pro posse suo defendend' & viriliter servand' &c.* Whereby it is apparent,

(1.) That the Kingdom is to be defended by the whole Kingdom *pro facultatibus* with their Goods, as well as *viribus* with their Persons.

(2.) It comes after the Chapter of Tenure and Services, by which they are bound to defend. *Terras & honores suos, &c.* which shews that he meant not to discharge any from the general Charge of defending the Kingdom in case of Necessity.

The next Objection is the Charter of King John, *Nullum tallagium imponatur nisi per commune concilium.*

I answer, The Words, are concerning the Defence of his own Person, and not the Kingdom; and therefore it is excepted, *nisi ad redimendum corpus nostrum*; and in the original Act these Words are left out. Scutage, Murage, and other Aids there mentioned, shews that only those were meant, that were of private Benefit. They were not to be imposed by the King upon any Subject, without Parliament, but not to bar himself from laying such as were for the Publick Good,

The next Authority that was objected, was *Fortescue*, which was most press'd and insisted on by my Brother Crooke.

Before I come to the Words themselves, note (1.) The Time when he wrote that Book, it was after all the Acts of Parliament that took away the Royal Power; yet it did not mention them, so as must needs relate to the Common Law. It was writ when the Civil Wars were between the two Houses of York and Lancaster, and he himself was in Exile; no time then to displease the People.

(2.) It shews the Difference between Kingdoms, when a Monarch rules, that challengeth all Power over his Subjects, and a Monarch that governs according to the positive Laws. The Words that seemed to be against this Charge are, *fol. 9. Cap. 26. Rex Angliæ politice imperans genti suæ nec legem ipse sine subditorum assensu mutare poterit, nec subiectum populum renitentem onerare impositionibus peregrinis. Cap. 13. fol. 32. Rex caput corporis politici mutare non potest leges corporis illius nec ejusd' populi substantias proprias subtrahere reclamantibus eis aut invitis. And Cap. 36. fol. 84. which my Brother Crooke says is the express Authority in hoc individuo: The Words are, *Rex regni Angliæ ibidem per se aut ministros tallagia subsidia aut quovis onera alia imponit legibus suis aut leges eorum mutat vel novas condit sine concessione vel assensu totius regni sui in parlamento suo expresso, &c.**

From them all, I take the true Meaning of him to be; and I hold, (1.) That the Kingdom ought to be govern'd by the positive Laws of the Land; and that the King cannot change or make new Laws without a Parliament.

(2.) That the Subject hath an absolute Property in his Goods and Estate; and that the King cannot take them to his own Use.

(3.) That for his own Use he cannot lay any Burden upon his Subjects, without the Subjects Consent in Parliament.

(4.) That for the Benefit of Trade, the King may lay fitting Impositions, and may command that which is for the necessary Defence of the Kingdom; which is no Command of Charge, but Command of employing.

(5.) I answer therefore to the great Objection, That the Liberty of the Subject is lost, and the Property is drown'd which they have in their Estates.

First, I say, all private Property must give way to the Publick; and therefore a Trespass to private Men may be punished by Indictment, because

it is an Offence of the publick Weal : and tho every Man hath a Property in his Goods, yet he must not use them in detriment of the Commonwealth. A Man may give his Grasse or Corn away in the Field, or when it is in his Barn : But if he will cut it unusually, or burn or destroy his Corn, or if he throw his Goods into the Sea, that they may perish, these are Crimes punishable by the Common Law ; so is transporting of Goods, Commodities, against the publick Good : Therefore the Directions of Statutes, for the Restraint hereof, are from the Common Law. And the Reason of this is, because the publick Property must take place : And if in petty Business it may be, then much more in time of publick, and great Necessity and Danger. And it is rather an Averment of the Subjects Property, that in case of Necessity only they may be taken away, than contrary to it.

My Brother *Hutton* and my Brother *Crooke* agree, that all are bound in case of Necessity, *exponere se & sua*, to defend the Kingdom ; and may not the King command a Part, with more Reason than all ?

In the next place, I shall remove a Scandal that hath been put upon the King, how that his Majesty hath meant to make a private personal Profit of it.

What he hath done is well known ; and I dare confidently say, all hath been spent, without any Account to himself, and that his Majesty hath been at great Charge besides towards the same : And I heard it from his own Royal Mouth, he spake it to me, and my Lord *Brampton* can testify as much, that he said, it never entered into his Thoughts to make such use of it ; and therefore said, he was bound in Conscience to convert it to the Use it was received for, and none other ; and that he would sooner eat the Money, than convert it to his Use. Therefore, he that thinks the King made a Revenue of it, doth highly slander his Majesty. But let Kings be as *David* was, Men after God's own Heart, yet they will not want a *Shimei* to rail on them.

But tho (blessed be God) his Majesty is so gracious and loving to his Subjects, and so just, that we need not fear he will charge them but upon urgent Necessity ; yet we know not what succeeding Ages will do.

It is not well to blast succeeding Ages ; and if they should hereafter charge unreasonably without Cause, yet this Judgment warrants no such thing. Again, it is no Argument to condemn the true Use of a thing, because it may be abused. And again, The Law reposes as great Trust in the King as this. The King may pardon all Offences ; but if he should, then none should be safe. The King may make Peace and War at his pleasure : but yet should he make Peace, when Peace would ruin us ; or War, when War would undo us ; it would be worse than this. Therefore it cannot be suspected, that the King will do any thing against Law and the publick Good of the Kingdom : Therefore the Law says, the King can do no Wrong ; for he is *Sponsus Regni*, as in *Magdalen-College Case*.

Then they object *Clark's*, and the Chamberlain of *London's Case*. These Cases are nothing against this, but rather for it.

The Record of 14 Ric. 2. Rot. 60. B. R. *Lever's Case*, in an Action of Trespass, for taking

away his Goods without his Consent, had Judgment to recover in *Durham*.

But the Case was this : One *Lever* of *Durham* brought his Action against another for entering into his House, and taking away his Goods, and 60*l.* in Money ; the Defendant pleaded not Guilty, and the Jury upon a special Verdict found that the Defendant took away his Money, but upon this Occasion : The *Scots* had invaded the Realm, and were in *Durham*, and could not be gone without a certain Sum of Money : Whereupon the Inhabitants assembled, and amongst the rest, the Plaintiff was one ; and they made an Order to abide the Ordinance of the greater Part, which was to give the *Scots* the Money desired ; and because the Money was to be paid presently, ready down, therefore they made another Order, to search in all Men's Houses, and take away what Money they found ; according to which the Defendant searched the Plaintiff's House, and took away 60*l.* and because it was without Consent the Plaintiff had Judgment in *Durham* : but upon the special Verdict it was reversed in the *King's-Bench*, because it was with his consent. Indeed the Reasons were, 1st, because he had sufficient Remedy against the Commonalty of *Durham*, and 2^{dly}, because he did it as a Servant.

But I answer, 1st, Tho the Ordinance was good by Consent, yet it followed not that it was void without Consent ; the Question is there only, whether good by Consent. 2^{dly}, It follows not but that all Men without Consent are bound to contribute towards a general Charge for necessary Defence.

Another Objection made by my Brother *Crooke* was 2 Ric. 2. Pars 1. where all the Lords and Sages met together after Parliament, and it was agreed by them, that they could not charge the Commons without Parliament ; that this was a Declaration of the Law in Parliament, and almost equivalent to an Act of Parliament.

I answer, (1.) that this was no Act, but a Declaration in Parliament of the Law, and indeed no Declaration, but a Relation by the Chancellor.

(2.) If it had been a Declaration, yet it had not been binding without the King.

(3.) It is no Precedent of a good look, it was when the King was young, and the Parliament had the Regency : Counsellors, Treasurers, and all his Officers about his Person, were chosen by the Parliament ; and therefore, no wonder if they endeavour'd to please the Parliament.

(4.) It is a Precedent that they, *i. e.* the Lords, could not charge the Commons by themselves.

Again, the Case was not for the Defence of the Realm, but for Wars in *France*, *Scotland*, and *Ireland* ; these were the many Wars. Tho Subjects may be charged for necessary Defence of the Kingdom, yet if Foreign Wars be together with them, it is otherwise. And therefore in the Parliament before, they said such Charge belongs not to them ; and therefore they hold, they ought not to bear it : and so that Rule of *Gascoigne*, 24 Hen. 4. fol. 4. That no Man shall be charged without Parliament, where Bulwarks were built, &c. it proves not, tho it implies, that if it had concern'd the Kingdom, it had been otherwise.

3. The next general Objection was, the great Inconveniency that would hereupon ensue ; if such a Charge might be, then none knows what his Charge will be, for the King may command it as often as he

he pleases, an Example hereof they put in *Danegelt*, that in eleven Years grew from twelve to forty-eight thousand Pounds: therefore the Law hath provided against that Uncertainty, and limited it to a Parliament.

I answer to this, (1.) That if Danger increase, so must the Charge; again, the King may command all Persons when there is necessity, and as often as he pleases he may do it. Is not this as great an Inconveniency as in this Case, and yet that abates not the Writ? My Brother *Crooke* shewed how Subsidies increased, and yet no Inconveniency in that he conceived; and indeed this shews the Provision of Charge must be according to the Danger.

Besides, No Abuse of any thing, must take away the true and lawful Use thereof. But we cannot suspect that there will be such Abuse. *Ubi confidit Deus & lex, & nos etiam confidemus.* God and the Law hath trusted his Majesty, and we should not distrust him.

In time of imminent Danger, *tempore belli*, any thing, and by any Man may be done, Murder cannot be punished: yet, says my Brother *Crooke*, the King cannot charge his Subjects in any Case without Parliament; no, not when the Kingdom is actually invaded by the Enemy. But truly I think, as he was the first, so he will be the last of that Opinion, especially having delivered his Opinion, that the King is sole Judge of the Danger before, as indeed he is; and that the King is sole Judge of the Danger, not any have denied it, and therefore else it should be no Danger, but when every one shall say, you shall judge that the Kingdom is in Danger.

(2.) There hath been and may be, as great Danger when the Enemy is not discerned, as when in Arms and on the Land.

In the time of War when the Course of Law is stopped, when Judges have no Power or Place, when the Courts of Justice can send out no Process, in this Case the King may charge his Subjects, you grant. Mark what you grant; when there is such a Confusion as no Law, then the King may do it. *Dato uno absurdo, infinita sequuntur.*

Then there may be a time of War in one Part of the Kingdom, and the Courts of Justice may sit; as in 14 *Hen. 3. Rich. 2.* and *Hen. 7.* time, Wars were in some parts of the Land, yet the Judges sat in *Westminster Hall*.

(1.) Now, whether a Danger be to all the Kingdom, or to a Part, they are alike perillous, and all ought to be charged.

(2.) the King may charge the Subjects for the Defence of the Land. Now the Land and the Sea make but one intire Kingdom, and there is but one Lord of both, and the King is bound to defend both.

(3.) Expectancy of Danger, I hold, is sufficient Ground for the King to charge his Subjects; for if we stay till the Danger comes, it will be then too late, it may be.

And (4.) His Averment of the Danger is not traversable, it must be binding when he perceives and says there is a Danger; as in 88, the Enemy had been upon us, if it had not been foreseen, and provided for, before it came.

But I will not determine the Danger now. Do not we see our potent Neighbours, and our great Enemies heretofore, were they not prepared for War; and was there not another Navy floated upon the Sea? and was not the Dominion of the Sea

threatned to be taken away? As long as this Danger remains, I shall blefs God for such a King as will provide for the Defence of the Kingdom timely, and rejoice to see such a Navy as other Nations must veil to; and we are not in Case of Safety without it, and should lose our Glory besides.

The next Objection of my Brother *Crooke* was, that there is a Means provided by Parliament, which will not with-hold Aid for the Defence of the Kingdom, and it were a Sin to deny it in Case of Necessity. And in *Ed. 1's* time, *Ed. 2's* time, and 4 *Ed. 3.* a Parliament was to be held every Year for the Defence of the Kingdom, & *propter ardua Regni.*

I answer, that might well be, but then, in the time of *Edw. 1. Edw. 2. Edw. 3.* there were Pleas in Parliament, but those are now laid aside; and that the Subjects ought to give the King Subsidies; I will not say that, inferring they will not do it, nor am I apt to believe it; but I hold, Parliaments are the excellent Means to raise Aid for the Defence of the Kingdom, and yet they are not the only Means, for then the Parliament and not the King should be the only Judge, and have the Defence of the Realm; or else it should give the King a Charge of Defence, without Power or Means.

The Objection of the King's Revenues Tenures and Perogative, they have been unfitly remembred, and they have been fully answered.

The Statute of Tonnage and Poundage given to the King, for and towards the Defence of the Sea, and the other Acts of Parliament, that restrain the King's Power, so that he cannot now charge the Subject without his Consent in Parliament, I shall answer in the next place; and before I come to the particular Acts, I will shew what, in my Opinion, they may do.

1. Acts of Parliament may take away Flowers and Ornaments of the Crown, but not the Crown itself; they cannot bar a Succession, nor can they be attained by them, and Acts that bar them of Possession are void.

2. No Act of Parliament can bar a King of his Regality, as that no Lands should hold of him; or bar him of the Allegiance of his Subjects; or the Relative on his Part, as Trust and Power to defend his People: therefore Acts of Parliament, to take away his Royal Power in the Defence of his Kingdom, are void (as my Lord Chief Baron said;) they are void Acts of Parliament, to bind the King not to command the Subjects, their Persons and Goods, and I say, their Money too: for no Acts of Parliament make any Difference. Now to the particular Statute objected.

(1.) 25 *Ed. 1. Chap. 5. Confirmatio Chartarum*, the Words are these, 'Aids or Taxes, granted to the King shall not be taken for a Custom or Precedent: and *Cap. 6.* Moreover, we have granted for us and our Heirs, that for no Business from henceforth, we shall take such Manner of Aids, Taxes, nor Prizes, due and accustomed.' And *Cap. 7.* a Release of Toll upon every Sack of Wool 'And grant, that we will not take such things without their common Assent and good liking, saving to us and our Heirs, the Customs granted by the Commons aforesaid.'

As to the other Statute, *de Tallagio non concedendo*, *Cap. 1. Nullum tallagium imponetur nisi per commune concilium regni nostri. Cap. 2, 3, 4, 5, &c.*

First, These Words must have relation to the Aids before, and there be divers Aids; as some by

by Taillage, some by way of Prize upon Goods, and Ransom of his Majesty's Person, &c. the King thereupon makes this Grant, which hath relation to such Aids as were granted voluntarily. Secondly, Antient Aids are there reserved, as redeeming the King's Body, *pur faire fitz Chevalier, & pur marier son file eigne*; and so all other antient Aids, which are to be understood with an *ad redimendum corpus*, &c.

And to the Statute *de Tallagio non concedendo*, in some Books it is not in Print, but mentioned in *Mag' Char' Rastal*, and the Petition of Right, 3 *Car.* 1628, to be in 24 or 25 *Edw. I.* And therefore I answer, It is not in the Parliament Roll, and there is Variance about it; and therefore it is but an Abstract, and no substantial Statute.

But since it hath passed for a Statute, and possibly may be one, I agree with all the rest of my Brothers, that it is a Statute: And then I answer, (1.) That *nullum tallagium imponetur*, &c. that is, no unlawful Taillage shall be imposed upon the Subject without his Consent; or else the Aids *pur faire Fitz Chevalier & pur file marier*, had not been excepted.

(2.) No Aids shall be imposed but by Contribution of the King and People; and here the King is taxed as well as they.

(3.) An Act of Parliament can by no Means take it away, much less by those general Words.

Obj. In 14 *Edw. 3. cap. 1.* No Man from henceforth shall be chargeable, but by common Consent in Parliament.

To this I answer, That tho it be but temporary in some Parts, yet it is binding only *secundum subjectam materiam*: And the Words are general, as in the other Statute *de tallagio*, &c. besides, the Practice in that King's Time, and after, best interprets it.

Obj. 25 *Edw. 3. cap. 8.* No finding of Men at Arms, unless by Consent, much less finding of Ships.

Ans. This takes not away any former Law; and therefore, the Precedents following, 4 *Hen. IV.* shew that it does not reach to this Case.

Obj. 2 *Hen. 4. m. 2.* which is absolute in the Point, saith my Brother Croke, where a Commission went forth for the Defence of the Sea, whereof Complaint was made in Parliament, with Desire that it might be repealed, and it was done.

Ans. I am of the contrary Opinion; for the Petition was, that it might be released; and the Answer was but this, that it should, but the King would treat with his Council about it; and it was but a Repeal of his Commission then only.

Obj. 1 *Ric. 3. cap. 2.* where the King grants, that he would not hereafter charge them by Benevolence, or any such Charge, but that they should be dampned by the Law, by no such Charge or Imposition, *i. e.* by no such Charge of Money.

Ans. That Statute was only against Benevolences, and made by a King that had Reason, as we all know, to please the People for his own Ends.

Obj. 1. The Statute of *Tonnage and Poundage*, granted for the Defence of the Sea, the Words are, That no Taillage or Aid shall be without Act of Parliament. 2. That the King hath Means to defend the Kingdom, with a Protestation not to draw it into Example, 4 *Hen. 14.* 13 *Hen. 4.* Parl. Roll, m. 10.

VOL. V.

Ans. I will not argue whether *Tonnage and Poundage* was before this Act of Parliament, nor that time out of Mind they were granted to the King: But my Answer is, They are only for the ordinary Defence of the Sea. And the Protestation of 4 *Hen. 4.* is a Protestation of the Commons only; and this Charge is not taken away thereby, and *Tonnage and Poundage* is for and towards the Defence of the Sea: so all the Acts are, and so I agree. But for Extraordinaries, and but solely in case of Danger of the whole Kingdom, that they should not be granted, cannot be collected out of these Grants.

The Last Objection is the Petition of Right, 3 *Car.* That no Charge shall be imposed upon the Subject, but by Parliament.

Ans. I was then Speaker of the Lower House, and I have reason to remember what then was made. And I say, 1. There is no mention of this Case. 2. There was no new thing granted, but only the antient Liberties confirmed, taking notice of the Commons Protestation, not to bind the King from his antient Rights. 3. Look upon the Prayer what is desired; and the main Scope was, (1.) Generally against Loans, and this could not be included in these Words. (2.) Imprisonment without shewing Cause. (3.) Billeting of Soldiers. And (4.) Mariners lying within the Land.

IV. I have now done with my third general Head, I come to the last, touching the *Form and Legality* of the Writ.

First, For the Legality of the Writ, and the Objections touching the Necessity, I have answered before; the main Objection is to the Body of the Writ.

It is said, [1.] The Command to charge the Sheriff to levy and assess Money according to his Discretion, is not legal; for that the Sheriff should make it *per sacramentum*, by the Oaths of a Jury, as in the Writs of Partition, Distribution *pro rata*, &c. This Assessment is not warranted by the Precedents, (say my Lord Chief Baron and my Brother Croke) they do it not upon their Knowledge, but Presumption of Mens Estates; and from thence they speak against the too vast Power given to the Sheriff, to inhanse it as he pleases.

[2.] The Inconvenience is great hereby; for by this means there is a great Inequality in the Assessment.

I answer, first, to the Assessment *per sacramentum*, No Reason why it should be here; for it is not done in the Commissions to levy Subsidies, much less should it be done here for a Matter of great haste: And besides, the Sheriff is trusted with more; for he hath the Trust of the whole County, and takes an Oath to execute his Office justly, whereof this is one part.

As to what they say, that there is no Precedent for it. (1.) I say, That there is no Precedent that it hath been done by Jury, but always by the Sheriff, or such whom the King was pleased to trust; and since one must be trusted, none more fit than he.

(2.) By Example, we see, he speeds all, and is most ready for it.

(3.) I say the Writ leads not the Assessment, it commands the Ship to be provided; so if that be done, there is no Necessity of Assessment: And if the Towns and Counties say they will provide a Ship, and do it, then no Assessment is requisite;

N n

but

but if they do it not, then the Sheriff is to levy it, that the Defence may be seasonable: so that the Clause of the Assessment shews the Manner of it. When a Multitude is to join, none more fit than he to do it; and no way better, than to write to him to do it according to Mens Abilities.

(4.) The Clause of the Assessment is not only to the Sheriff, but to the Head Officer of the Town and Borough; and tho the Discretion of the Clause be to the Sheriff, yet it appears not, that it is limited to him only.

And whereas it was said, That the Sheriff cannot assess himself, and the Precedents warrant not this Assessment by the Sheriff.

I answer, All the Precedents are not against it, but commonly it is not so; and yet there have been a Multitude of Precedents thus. As to the Inequality of it, Mr. *Hampden* had the least Cause of any Man in *England* to complain, considering how he was rated.

Again, all that the Writ commands, is but an Assessment *juxta facultates suas, ita quod omnes &c.* and if the Sheriff do otherwise, and wrong the Subjects, he is answerable. By divers antient Precedents it appears, where the Sheriffs have been faulty this Way, they have been punished; and Sir *Walter Norton's* Case, now depending in the *Star-Chamber*, concerns this, for an Abuse in levying this Charge, when High Sheriff of *Lincolnshire*.

Truly, I think, as my Lord Chief Baron said, if there had not been an Inequality by the Abuse of the Assessors, the Charge had not been complained of; yet the like Inequality is in Subsidies: And this is no just Cause of Exception against it, but of Accusation against the Sheriff who is to answer it. And I can say truly, his Majesty hath been very careful to prevent and remedy the Abuses therein, and hath often sat daily in the *Council-Chamber* to give his Advice herein himself; and upon his Command Reformation hath been in divers Parts; and it hath been given in Command to all his Judges in their Circuits, to endeavour the same in all Parts: And I myself, by his Command, have rectify'd Rates in this Kind, that have been unequal. And I doubt not, if the Necessity of Danger shall still require it, or again, hereafter it may be done with all Equity.

The *Second* Objection is, That the Sheriff cannot tax himself, for then he should be Judge and Party in one Case; nor can he commit himself: and if he be omitted out of the Assessment, then it cannot be equal, nor cannot be according to the Writ that commands all should be assessed according to their Abilities rateably.

I answer, This *prima facie* carries some Shew with it; but examine Causes of less Consequence, and it is easily answered. The Justices of Peace, in levying Subsidies, make Rates for themselves. The Commissioners of Sewers tax their own Lands; and so if by Jurors it were done, it would be the like. There must be either new Assessors appointed, or they themselves must do it: That would bring Delay, and this requires Hasten and Expedition; and therefore the Sheriff is fittest for this Business. Authorities in Law there are divers herein, as the Writs for the levying Expences for Knights of the Shire, Direction is to the Sheriff to do it, who assesses himself, and yet he is to execute it: So in a Writ of Recovery *de bonis habitantium*, the Sheriff is chargeable with his Part; yet he is to execute it. If a Fine be laid upon the

whole County, he levies it, yet is chargeable with his Part towards it.

Obj. The Writ is directed *probis hominibus*, and these cannot be charged in an Inland County.

Ans. What difference there is *inter probos homines*, between Inland Counties and Maritime Counties, I know not. 24 *Edw.* 3. a Writ whereby they were charged in case of necessity; as to *Yarmouth* it was *probis hominibus*, &c. True, a grant by the King *probis hominibus* generally is void. 1 *Hen.* 7. *Dyer Phil' & Mar'* 7 *Edw.* 4. 14. But a Commission or Writ to assess them good enough. *Probi homines*, that they know not, nor see not, it is not material, for that would make them sole Judges of the Danger, when as the King only is, and this not traversable neither.

Obj. The Writ commands an Inland County to find a Ship and Mariners, which is impossible; and *lex non cogit ad impossibilia*; and for this my Brother *Crooke* puts the common Cases, that a general Return, 49 *Ed.* 3. 6. and Impossibilities are void; a Covenant for impossible things is void, but a Bond may be good.

I answer now to the point of Impossibility. And possibly the Ship may be built in an inland County, tho to carry it to *Portsmouth* is impossible; but it's possible to provide a Ship and Mariners, as the Writ commands, which may very well be done with Money.

Obj. But we have none but trained Soldiers, no Mariners; our Country consists in Tillage, and our Men are trained up to the Plough and Husbandry.

I answer, We have the like occasion of Ploughs and Husbandry in *Kent*, and we have in many places no Maritime Towns; some lie 20 Miles from the Sea, and yet we are justly charged to find a Ship. Precedents we have as well as you in *Oxon* and *Bucks*, or else none should be charged but Port Towns, and in particular no Law or Statute to exempt them. Until *Alfred's* time, there was no distinction of Maritime or Inland Counties, for then all *England* was but one Maritime County.

Then they objected, the Payment of Soldiers Wages for 26 Weeks, to be in the King's Service, is against many Precedents, as 16 *Edw.* 2. 10 *Edw.* 3. and entirely for Wages to be paid by the County is against all the Precedents: and Tenants by Knights Service after 40 Days, are to be paid by the King. And other Precedents my Brother *Crooke* cited, when divers refused to go out of their own County till paid, and Order taken for their Pay by the King. And whereas the County had given Bond for Payment of Soldiers Wages, they were cancelled, and Order made in Parliament, that Soldiers should be at the King's Pay, 2 *Edw.* 3. 16. 18 *Edw.* 3. cap. 7.

These are easily answered, for these Precedents prove no more than Payment of Wages *de facto*, and so the King may pay it where it is not due; and for their refusal, I have nothing to do with that now: but 10 *Edw.* 3. M. 2. there is mention made of *Berkshire* Men, commanded to carry their Soldiers forth of their County at their own Costs; and when the Soldiers refused to go thence, no Charge or Payment; for Soldiers used to be paid by their County, as in that Case; and they were forced to go, and did go, and stay there three Years: so 13 *Edw.* 3. M. 8.

Obj.

Obj. 1 *Ed.* 3. *m.* 14. None compelled to go out of their County without Wages paid. 18 *Ed.* 3. *m.* 6, 7. that none should go out of their Countys: And not only those that had Offices and Patents to serve the King, but all with this Proviso, that the King should pay them their Wages.

Ans. 1 *Edw.* 3. It is clear, and hath in it the exception in Case of Necessity, and to be done as in times past.

18 *Ed.* 3. It is expressed in the Act, when they go to the King's Wars out of the Kingdom: so 19 *Hen.* 7, &c. These are all but declarative to the Common Law, *Corbet's Case*; the Reason is, because the Allegiance of the Subject is not natural, but local.

But that the King shall give Wages within his Kingdom, there is no Act of Parliament for it. Now it was resolved in the Exchequer, that the Sea and Land made but one entire Kingdom, and so no going out of the Kingdom here; and consequently the Payment of the Soldiers Wages within the Kingdom is not against Law.

The last Objection is, that the Writ is illegal, because contrary to *Mag' Cbar'*, *nullus liber homo imprisonetur*.

Ans. As touching the Objection of the Nobility, that they are privileged from Imprisonment, it might well have been spared; and I know not wherefore it was spoken of, unless to make them think they were more interested than the rest of his Majesty's Subjects in this Case.

Obj. But yet, I say, Noblemen may be imprisoned upon Contempt, as my Brother *Crooke* knows well; and it was resolved in the *Earl of Lincoln's Case*, in the *Star-Chamber*. It is true, that upon ordinary Process, they are not to be brought to Trial or imprisoned.

Now I answer, there is no Imprisonment in question, but the Assessment only, why he should not pay the Money assessed, or shew Cause to the contrary.

Secondly, Were the Writ illegal for Form and Circumstance, yet this makes not the Command itself illegal for Substance.

The Exceptions to the *Certiorari* are these.

1. The Direction of it to two Sheriffs, one out of his Office, when as the Sheriff in being ought only to return it.

Ans. Of this there is little doubt, nothing more frequent than for a *Certiorari* to issue out of the Chancery to two Parties, as to the Executors, or the Judge that took the Fine, and is removed. And so upon Commission to take a Fine by *dedimus potestatem*; in this Case the Writ is *inter brevia irretornabil'*: and this must remain with the old Sheriff, and are never deliver'd over by the Jury to the new Sheriff. In *Hobart's Case*, in the *King's Bench*, being convicted of *Heresy* before Sir *Julius Caesar* Judge of the Admiralty, Certificate to him after Master of the Rolls, and directed to him: so in the Case of my Lord *Paget*.

Obj. The Writ is without Return, saith my Lord Chief Baron; and the *Certiorari*, which is a Year and a half after, cannot renew it.

I answer, That shall not be the determining of it only; for the time limited expiring, shall not deprive one of his just Debt.

It is not sufficient, because it appears not, that Mr. *Hampden* was Tenant or Ter-Tenant, or that *Stoke Mandeville* is within the County of *Bucks*.

2. It appears not that there was any Ammunition or Ship prepared.

VOL. V.

I answer, It doth sufficiently appear, that Mr. *Hampden* was Ter-Tenant, for the *Certiorari* was to the Sheriff, who certifies that he was Tenant; for it was in pursuance of the Writ: the Words are, *Virtute brevis Domini Regis buic schedul' annexat. certifico quod virtute & secundum exigentiam ipsius, &c.* Assessavi, *Anglicè* have assessed, *super separales homines & terræ tenentes Com' Bucks præd' quorum nomina subscribuntur, &c.* It relates to the Place there, Tenants in the County of *Bucks*, and makes Mr. *Hampden* one. And thus the business of Knighthood was done, and in no other manner.

Then it appears not that the Ship was prepared.

To this I answer, 1st, That the Ship was done according to the Command of the Writ. 2^{dly}, It was prepared. 3^{dly}, If none had been prepared, the Fault was in them, for that they paid not in their Money.

For the Exceptions to this *Mittimus* I say nothing, because I told you the Case rests not upon these Words, *Salus Regni periclitabatur*, which is only to bring it to issue.

Then they except against the *Sci' Fa'*, 1st, That the King is not intitled to bring the *Sci' Fa'*. So there is no *cui oneretur*, to whom he should pay the Money, for whose Good or Benefit Mr. *Hampden* should satisfy the Money assessed.

I answer, the King is interested in all Actions for publick good, and shall recover accordingly, as in Case of *High-ways, Pontage, Murage, &c.* much more when it is for the general Defence of the Realm. In a *quare impedit* between two common Persons; tho the King be neither Plaintiff nor Defendant, the King shall recover therein. Many times in Case of a common Informer, the King recovers the one Moiety tho no Party; so it was in the Case of Knighthood, tho Suit was depending.

Again, all Writs in the Kingdom are the King's Writs, tho no Fine, much more here for the Defence of the Realm. And it is usual for the King's Attorney to compel Men to perform Charitable Uses; and the King may question any one for them, in the Case of *Aurum Reginæ*, by Process out of the Exchequer.

Again, where it is said, *Quare ipse de præd' summa specificat' onerari & inde satisfac' debeat, prout ulterius ibi præcept' &c.* for tho the Writ be in the King's Name, yet it is but for the performance of the Work and Charge; and tho it appears not, who were Collectors or Assessors, yet it appears it was done. Upon publick Service, Process goes forth in the King's Name; but then it is not so fit it should be expressed in particular for the King, when it is for the general Good only.

Was not this Objection made by my Brother *Denham*? Tho none more chearfully did subscribe to his Majesty's Letter, neither was the *Sci' Fa'* without his Advice, being the aptest Course, and better than *Trespas*: but the Objection that he made was, That the King cannot do any Wrong, nor take without Record, as in Seizure upon Outlawry, Attainder, or the like; and in this Case there is no Record upon the Writ 4 *Aug.* no Judgment, &c.

I answer, This *Sci' Fa'* is not annexed to the Writ, and is a new Action, that Mr. *Hampden* *oneretur & inde satisfaciet*, and after that Judgment upon the Writ, and upon his saying nothing, why

N n 2

revocetur,

revocetur, there shall be a good Record whereupon he shall be charged. 3 *Eliz. Dyer* 156. *Ignoramus* is sufficient Title for the King, and Ground for a *Melius inquirendum*.

No *Sci' Fa'* lies upon the Tenor of a Writ, say they: 39 *Hen. 6. fol. 34.* 21 *Eliz. Dyer fol. 205.*

I answer, a *Sci' Fa'* upon a Recognizance will not lie in *Chancery* but upon the Record there; yet in debate, an Action of Debt lies upon the Tenor of the Record. 39 *Hen. 6.* the doubt was, because the Party might be subject to a double Execution, one upon the Record there, and the other upon the Tenor of the Record in another Court. 33 *Edw. 3.* Title Tenure by transcript. 8 *Hen. 5. Fitz-Her' Error Sci' Fa' Reg' fol. 51.* The Record was before the Justices of the King's-Bench, the Tenure was of the Treasury to the Barons of the Exchequer; and it is the usual Order, if a Recognizance be forfeited, to certify the Tenor of a Recognizance; so of a Fine of Amerciament, &c. to certify the Transcript thereof. So the Transcript was sent from Ireland of an Act of Parliament; a *Sci' Fa'* thereupon went against a Baron in England: so in Debt, upon the Transcript of a Record from Ireland, a *Sci' Fa'* here went forth.

Objected it was in the last place by my Lord Chief Baron, that Judgment in this Case would be fruitless, and none should take Benefit thereby; upon this Record he put several Cases, wherein Judgment in such a Case ought to pass.

I answer my Lord Chief Baron with a Judgment of his own, in Case of Knighthood, resolved here in this Court; the Case was this, The King by Writ *Jan. 1* of his Reign, commanded the Sheriff of *Berkshire*, that all that had 40 *l.* should be in the *Chancery* 31 *January* following, to take upon them the Order of Knighthood. Sir *John Dayxel*, Sheriff of *Berkshire*, made his return, (as the Sheriff of *Bucks* here) all that are not Knights under the Name of *Illorum*, and sets down their Names. A *Mittimus* thereupon went out of the *Chancery*, reciting the Substance of the former Writ, *Vobis Mittimus presentibus*, &c. with a Clause to enquire after such as were not returned, and to fine them. And upon this a Writ of *distingas* to the Sheriff. My Lord Chief Baron and my Brother *Denham* know what Judgment was given; when I observed, 1st, Not the Record, but the Tenor of the Record, was sent into the *Exchequer*, yet returnable in the *Chancery*. 2^{dly}, For the returning of the Names of the Defaulters as here: 3^{dly}, Upon the *distingas* thereupon was had Execution, much more than here, upon the *Sci' Fa'*. 4^{thly}, There was no more Judgment of Record to warrant than here in this.

Now I come to conclude. I have been somewhat too bold, in taking more time than is usual, but I did it to satisfy my own Heart, according to which I must give my Judgment. What I have omitted I refer to the rest of my Brothers that went before me, and to my Lord Chief Justice that comes after me. The Reasons I shewed whereupon I conceive by the Common Law, and the Fundamental Policy of the Kingdom, that the King may charge his Subjects for the Defence of the Kingdom, and that the King may charge his Subjects towards the Defence thereof when it is in danger; and I hold that the King is sole Judge of the Danger, and ought to direct the means of Defence.

And therefore this Writ of *Sci' Fa'*, and all the Proceedings in this Case, are well grounded according to Law.

My Opinion therefore is, That Mr. *Hampden* shall be charged with 20 *s.* assessed, and that my Lord Chief Baron ought to give Judgment accordingly.

The Argument of Sir John Brampton Kt. Lord Chief Justice of his Majesty's Court of King's-Bench, in the great Case of Ship-Money.

Quarto Aug. 11 Car. a Writ issued out of the *Chancery*, being directed to all Counties of the Realm of England, both Inland and Maritime; and among the rest it was directed to the Sheriff of *Bucks*, for the making and building of a Ship of 450 Tons, and to provide a certain Number of Men with Ammunition and Victuals, to be brought to *Portsmouth*, and from thence to be employed in his Majesty's Service, for Defence of the Realm, and of the Sea.

Mr. *Hampden*, in the County of *Bucks*, was assessed at 20 *s.* for his Manor of *Stoke Mandeville*, who refused to pay the same; whereupon a *Certiorari* issued to the Sheriff of *Bucks*, to return the Defaulters; amongst whom Mr. *Hampden* was returned to make Default of Payment of the 20 *s.* assessed upon him.

Whereupon it was by *Mittimus* sent into the Exchequer, and a *Sci' Fa'* thereupon issued out of the Exchequer against Mr. *Hampden*, to shew Cause why he made Default of Payment of the said 20 *s.* Whereupon Mr. *Hampden* appeared in Person, and demanded Oyer of the Writs, and Returns thereof, and demurred in Law, with whom Mr. Attorney joined in Demurrer.

Now three Points have been debated already at large in this Matter, viz. 1. Whether the King may command this general Charge of his Subjects by Law, or no, without their Consent in Parliament? 2. Whether this Kind of Assessment be warrantable by Law, or no? and, 3. Whether the *Sci' Fa'* did well issue or not?

In all these Matters, so much hath been already spoken, that if I should not say what hath been already spoken, I should say little to purpose. I will not be long; for if I had intended it, my Lord *Finch* hath prevented me in it; for he hath taken from me very much that I should have said, and insisted upon.

That which this Case resteth upon, in my Opinion, the Vote of the Court hath passed already by the greater Number of Voices, that mine will do nothing which way soever I go: yet being to deliver my Opinion, I shall shew my Reasons; and that I shall do without any other Defence.

Concerning the first Point, Whether his Majesty may impose that general Charge upon his Subjects by Law or no? I am of Opinion, that whensoever the whole Kingdom is in danger, his Majesty may command all his Subjects to join with him in this Case for the Defence of the Kingdom.

My Brother *Finch* hath insisted so fully upon this Matter, that I shall need to say but little: But yet something I must say, as well as my Brothers that have spoken before me, to discharge my Conscience: And for that which I shall say, my Intent is to insist upon some few of the principal Statutes, which have been already recited.

For

For this Point, in my Opinion, will rest upon the several Statutes and Acts of Parliament that concern this Case; and I take these Statutes to be merely Declarations in affirmance of the Common Law. And I shall begin with the Statute 1 *Edw.* 3. cap. 5. and I shall not go far from the Intent of the Statute; I shall scarce make use of any Precedents, tho many have been used, but only so far as they may seem to expound and declare the true Meaning of those Statutes.

And whereas it is objected from the Statute 1 *Edw.* 3. That no Man shall be compelled to go out of his County wherein he liveth, except in case of Invasion, and Necessity requireth, and then it shall be done as in times past.

I answer, That this is merely declarative, and spoken in affirmance of the Common Law, and this Use is declared by this Statute to be the antient Law of the Realm. Now what that Use was, will be a very great Question in this Case. Indeed it hath been much insisted upon, both by Mr. *Hampden's* Counsel and my Brother *Crooke*, that the Subjects going forth of the Shire shall be at the King's Charge, which they have affirmed by divers Statutes: But that which will go far in this Case, as my Brother *Barkley* well observed, is out of the Precedents of *Edw.* 1. *Edw.* 2. and *H.* 3. times; and in them you shall find it to be for foreign Wars, or else for ordinary Defence, as for pillaging of Burroughs or private Towns by Pirates, when the Subjects have not given their Aids in such Cases. And there is no doubt but the King hath paid the Charge in such a Case, for the Defence of the Realm; but the Subjects gave the King Subsidies to do it withal.

But the Question is, What the Subject in this Case, *secundum legem Angliæ*, may be compelled to in case of Necessity, for Defence of the Kingdom?

I answer, They may be compelled to this Charge, *sumptibus propriis*, for the Soldiers Wages; but to go out of the Realm, or their Shire, must be at the King's Pay, according to the Common Law of *England*: But in times of sudden Defence, there is no time to stand upon Wages. It appears both in *Fitz-Herb. Na. br. fol.* 28. and also in my Lord *Coke* in *Calvin's Case*, the King may command his Subjects upon their Allegiance, to go with him, as well in Wars without the Realm, as in his Wars within, and with him, and without him, in the King's Service.

By the Statute of 18 *Edw.* 3. and 11 *Edw.* 3. Men of Arms, as Hobbellers, Archers, &c. are to go in the King's Service, as in *England*, so out of *England*, was the Matter of these Laws.

And my Lord *Finch* said, This was the very Common Law of *England*; so that it is clear, these two Statutes are declaratory Laws in affirmance of the Common Law. In 7 *Hen.* 4. Title *Tenure* 44. there it is said, a Man is not to go with the King in his Wars, out of the Realm, without Wages. And so 7 *Hen.* 4. Title *Tenure* 73. the Subjects of *England* are not to go with the King beyond the Seas, without their Wages: But in the Realm they are at his Command, and there is no Wages to be given. So it is in going out of *England*, when they are at the King's Charges; but within, at their own. And if the going out of the County be at their own Charges, I know not but that should put an end to the Case, that the Defence of the Realm must be at the Subjects Charge.

It is of dangerous Consequence for Judges, in their Judgments, to rely too much upon Precedents, that perhaps went forth thro' the Necessity of the present Times. But that is not our Case here; we are here directed to know what was used in times past, in this Case, before the making of this Statute: So that in this Case we take the Usage not to declare or prove a Law, but that Use is declared by this Statute to be a Law. Now therefore, we must know what the Use was: now that the Use was, that the Subjects of this Realm ought to be charged in time of common Danger, appears by a Multitude of Precedents applied rightly to the Statute of *Edw.* 3. which do declare the Law upon the Statute.

And to shew what the Use was, I shall rely chiefly upon those Precedents that are most judicial. First, that of 25 *Edw.* 1. Term' Mich' Rot. 72. *Banc' Regis*, in the Abbot of *Robertsbridge's* Case; compare that and this together, and I know not what more can be answered, than that this Use for the Subject to maintain their Peace, was an Usage, Law, and Custom of the Realm. 10 *Edw.* 3. m. 2. fo. 18. the King by his Writ sent a Command to send to *Portsmouth* one hundred Foot and twenty Horsemen to guard the Sea-Coasts. They refused to do that Service, and would not go without Wages. The King sent Answer in these very Words, *That no Wages were due, for it was a publick Danger.* And so 25 *Ed.* 3. cap. 8. it is generally assented to by Parliament.

But there we have a general Law in the first Statute 1 *Edw.* 3. which was grounded merely on the Common Law, and so was the Statute 25 *Edw.* 3. and the rest to the same purpose, because it was against the Right of the Realm. And this Statute of 25 *Edw.* 3. was merely grounded upon the Petition of the Commons; then certainly this finding of Arms was intended by that Statute, to be against the Right of the Realm.

Besides all this, to keep ourselves to that which is legal and authentical, so the Parliament Roll 13 *Ed.* 3. M. 9. & 11. It is there apparent, that it is not against the Right of the Land to charge the Subject; then how comes it to be against the Right of the Realm 25 *Edw.* 3. for then there was no Statute?

Now to bring it down to our Times. In 26 *Ed.* 3. M. 44. every Maritime Town was charged to keep a petty Watch, there being some imminent Danger; therefore they pray, not to be discharged, but that it might be reduced to a lesser Charge, being it was but a petty Watch to guard the Sea-Coast; much less then is there cause for the Subject to seek to be discharged when the Enemy is approaching. 5 *Ed.* 3. there was a Commission issued out, to distrain every one *secundum potestatem*, in Matters of Array; here is now the Judgment of the whole House of Parliament, that Men according to their Abilities are to be charged to join in charge with the King, to defend the Realm *sumptibus propriis*. Thus much for Defence upon the Land; now for Defence upon the Sea.

In the Statute 18 *Ed.* 3. cap. 7. that they who serve the King out of the Kingdom, serve for Wages; but in case of necessity, without the Realm, in times past, by no Precedents, saith my Brother *Crooke*, can it be proved it was done before.

I answer, that the Sea is within the Kingdom; see 2 *Ed.* 3. cap. 10. *Protest.* 46. *Brasf lib.* 2. fol. 365. there the Sea is made part of the Kingdom.

Doctor and Student, cap. 51. It is the antient Custom of England, that the King is Lord of the narrow Seas. But that which I most rely upon, is from the Statutes of 1 and 18 Ed. 3. for they both meet in one, which is according to the Common Law, for all the difference thereof is, the Subject to go out of his own County whether to defend the Land or the Sea.

In the Statute of 1 Ed. 3. it is objected, that there is no Precedent for Inland Counties.

But I answer, if not from Inland Counties, yet there is for Maritime, as in 14 Ed. 3. *Term Mich.* But I rely not upon Precedents for either, but only upon those Precedents that went out to the Ports and Maritime Towns: for it was well observed by the King's Counsel, that they were not grounded upon any Precedents or Charters, but only upon antient Customs. But if the Precedents to the Maritime Towns were directed in Case of Necessity, then I see no Reason but that it may be done now; which was indeed intended by the Statute of 1 Ed. 3. as the Precedents do plainly declare; and they were then more common than Writs of this nature issuing forth in this Case, and the Commons were then bound to Land-Service, and the Mariners to Sea-Service; and they were compelled to it at their own Charge, merely upon their Allegiance, both in *Bedford, Bucks, Lincoln*, with many other Counties. If then they may be compelled to go out of their own proper Counties, to defend that Part of the Realm that they live near unto, why may they not also be compelled to go to defend the Sea-Coast? The Sea-men were willing to bear some Part of the Charge for the Defence of the Sea, because the Inland Counties did bear their Charge of the Land Service and of the Ports: And if they may be compelled in the Inland Counties to defend their Inland Counties, and the Sea-Men to defend the Sea-Coast; then I know no Reason but that they may be compell'd all in general to bear a publick Charge in Case of Necessity.

I am still upon the Statute 1 Ed. 3. wherein I find Mr. *Selden* in his *Mare clausum*, says it was an antient Use to charge the Inland and Maritime Counties in Case of Necessity; and therefore in my understanding, I hold it to be *secundum legem Anglie*.

But here my Brother *Crooke* objects, there is no Statute or Precedent to shew that any Inland Counties were charged.

I answer that Statutes and Precedents do not extend to our Case, for this was in use many Years before the making of any Statute. See the Statutes of 1 Ed. 1. and 1 Ed. 3. they cannot cross one another, for then could not the Statute of Ed. 1. be confirmed by the Statute of Ed. 3.

Again, concerning the Statute of finding of Men and Arms, it is true, it is merely the Common Law of England, and that merely without common consent in Parliament, as my Brother *Barkley* saith, that the Statute 9 Hen. 3. and 25 Ed. 3. cap. 11. are the great Charters rather than Statutes; and in King *John's* time it was not taken for a Statute, but only for a Declaration. And so it was taken in the time of Hen. 4.

But now if concerning the charging of the County, the said Statutes were nothing but according to the Common Law of England, I cannot see how they should cross another now; for there is no difference, but only in such things as are given as a Benevolence to the King, as in 1 Ed. 3. cap. 5, 6.

As for the Statute *de Taliagio non concedendo*, we deny it not; but the difference is in the occasion of the Statute of 14 Ed. 3. There was a pretty Case put by Mr. *Hoborne* about the Office of Alnage, where there was but a Fee to be paid out of it, and held a Taillage; but there is great difference between the Taillage and this Service, which every Subject is bound to do by his Allegiance to his Sovereign Lord. *Fitz-Her. Na. Br. 103.* The King may impose this Charge upon the Subject in Case of Necessity, *pro bono publico*; and it is nothing but what every Subject owes to the Common-wealth in a time of common Danger. And after King *Edward the Confessor*, it was ordered by several Statutes, Let every one have their own Goods and Lands free from Taillage, and let nothing be taken from them. But in this Case of Necessity in common Danger is another thing, the King may then compel his Subjects to this Charge; and I may add the Reasons strongly insisted upon by the King's Counsel. My Lord *Coke* saith, it could never be the meaning of the great Charter of the Liberty of the Subjects by this Statute to take away the Power of the King's Prerogative, and so to exempt themselves from this Charge of Defence: for there is a difference between a Taillage upon the People, and a Service in a Case of Necessity, which they may be compelled unto. My Brother *Jones* cited a most excellent Case 4 Jac. upon the Opinion of *Coke* and *Popham*, that the Taillage-Statute taketh not away: And shall it take away this Royal Power of the King, so inherent in the Crown, the Protection and Preservation of his Kingdom?

From this Statute 1 Ed. 3. Mr. *St. John* raised this Objection. Here is 7 Months from the Date of the Writ, to the time the Ship was to be brought to *Portsmouth*, in which time there might have been a Parliament and therefore it ought to have been done in a Parliamentary Way.

But this will not admit the calling of a Parliament; but if the Danger be not sudden, you must have it in a Parliamentary Way.

My Lord *Finch* gave a full Answer to this: There must be a Preparation before the Enemy come, else the Defence is too late: there is a Necessity to prevent a Necessity, and who shall give Warning in such a Case but the King? Saith *Littleton*, who gives Warning? not the Tenant by Castle-guard, but the Lord; and so consequently in this Case our Sovereign Lord the King: And therefore in such a Case the Subject is bound by his Allegiance to the King, to assist in Case of publick Danger. My Lord *Coke* tells us the Reason of the Warning: He saith, there must in that Case be a Preparation before hand, lest your Defence come too late: Enemies are more easily kept out than overcome when they are got in.

By the Statute of 8 Ed. 4. there Bulwarks may be made in another Man's Ground; but this Preparation cannot be without Warning, and none can give the Warning but the King, and the Subjects are to be at his Command, and none other; for there must be a Preparation of the Subjects in the Realm, to meet the Enemy before he enter the Land. No Subjects can take upon them to build Bulwarks, &c. It is an Assuming of the Royal Power, for it must be done *juxta preceptum Domini Regis*.

Now I come to the second Part, whether this Assessment be warranted by Law or not. The Writ was dated 4 Aug. to prepare a Ship against the

the 1st of March. Therefore we see it is not against the great Laws concerning the Subjects Liberty, because it is no Taillage but a Service: for howsoever it must be granted, it must be a general Danger that causeth a general Defence; and there must be Matter in the Body of the Record to satisfy therein; there must be, I say, a publick Danger, and then it is *secundum legem & consuetudinem Regni Angliæ*, as appears 20 Ed. 3. m. 21. And also in *Doctor and Student*, cited before, that when Necessity doth require, the King may compel his Subjects to this publick Service and Charge. Tho the King be the sole Judge, and his Certificate is not traversable and cannot be denied, yet there must be Matter apparent within the Record, to satisfy the Conscience of the Court, or else we cannot be Judges of the Case at all. If the Danger be general, then the Defence must be general; but if ordinary Danger, as robbing of Merchants by Pirates, &c. it must be at the King's Charge. And we do see by the Petitions of the Commons in many Parliaments, that they never conceived themselves subject to the Charge of ordinary Defence.

Now upon all that which hath been observed by my Brothers, there is enough in the Record to satisfy them fully (as if the King were not sole Judge) that it was a Publick Danger, being *pro defensione regni & tuitione maris*, &c. It did issue to all the King's Subjects, as a general Charge and not to the County of Bucks alone: Therefore I may conclude, when the whole Kingdom is in Danger, the King may compel his Subjects to assist in such publick Danger.

Then for the Assessment; many Exceptions have been taken to it, and to the Record and *Sci' Fa'*: I had provided myself to have given a full Answer thereunto, but my Lord Finch hath prevented me, and hath cited the very Authorities that I myself did rely upon.

But for the Assessment itself to the Sheriff, I do not say that I do find he hath like Power in any other Case of Law: Commissions of Sewers may be directed to the Sheriff, but not to give Power to assess Men's Goods.

I answer, that this is in Case of Necessity; for the very main Case is but a Case of Necessity, the ordinary and usual Way is *per sacramentum*. My Lord Finch gave an excellent Answer to that, and warranted it by Law, that the Sheriff hath no such unlimited Power granted him; he is not made Judge of the Estates of Men, but only to pursue the Direction of the Writ, to assess them as he is commanded, and not *secundum discretionem suam*; but as my Lord Coke 5 Rep. 99. saith, he must do it *secundum legem & secundum arbitrium*; that is to say, according to Law and Reason. But it is impossible, in such a Case of Necessity, to put it into such an Equality, to make it without Exception; but in as much as in him lieth, he ought to order it proportionably, his Power is unlimited; for by his Discretion he is to discern between Right and Wrong, between Substance and Shadow; and he must go within the Bounds of Law and Right. In the Chamberlain of London's Case, they might rate and assess *in bono publico*, as in making a High-way to a Church, and the like, wherein the Subject is brought to no Distress or Inconvenience, so as the greater Part, in such a Case as this, shall ever bind the lesser, it being *pro bono publico*. Yet this Assessment cannot make a Law a Debt or a Duty, but is only a Means to bring this Duty to a Certainty, and so make it

a Duty, so that he be rated in an equal Proportion. Hath the Sheriff rated Mr. Hampden disproportionately, according to his Estate and Degree? If he hath, let him tell. If the Sheriff hath followed his own Will, and done corruptly, then he hath done contrary to the Intent of the Writ; it turneth upon the Sheriff himself; and a great Offence it is for a publick Minister of Justice to abuse himself in such a Place of Justice. The Sheriff returns, he hath assessed 20 s. which is no great Sum; and also confesseth upon the Record, that it is an equal Assessment. When Mr. Hampden appeared upon the *Sci' Fa'* he demanded Oyer of the Writs, and so demurred in Law; which upon the Matter, being a general Demurrer, is a Confession.

And as for the *Sci' Fa'*, my Lord Finch hath handled it fully, and hath cited the same Books and Authorities that I intended to have cited; and so hath prevented me in that. And also in *Bodmin's Case in Cornwall*, and upon the Exceptions *super tenorem recordi* in 9 Hen. 6. fol. 23. And the Reason why he should not have Execution *super tenorem recordi* is, because otherwise the Subject might be charged double. And divers Cases were put upon suing forth Execution upon the Tenor of the Record; and yet no Execution can go out of the Chancery at the first, because it is not returnable by the Sheriff, but it is sent out of the Chancery, by *Mittimus* into the *Exchequer*, 24 Hen. 6. 4 Hen. 6.

But it is true, it doth concern every one to be satisfy'd in the Truth of the Case; for if the Sheriff should not assess *per sacramentum*, it might be made another way.

And as for the *Certiorari*, my Lord Finch hath likewise cited the same Books and Authorities, which I also intended; therefore I forbear to insist upon that.

There is another Exception to the Record, *Quod oneretur*, and not know to whom it should be, no Money demanded to the King by the first Writ, no, nor by the second Writ; therefore can give no Judgment *quod satisfaceret domino regi*: then if Judgment shall not be given for the King, then for whom? *non constat*, it doth not appear to whom it is due, for any thing I can see in this Record.

Truly for my own part, of all the Exceptions that I have heard, none sticketh with me but this Exception; for I do not know any Precedent, that a Judgment was given, and not say to whom. This Scruple, I confess, still remaineth with me. I must needs say, That in my Opinion, I do rather incline, as far as I am well satisfy'd, that this is a good Exception, according and upon those Reasons which my Lord Chief Baron gave; and yet I am not so far satisfy'd, that it is Law.

I must rather incline as my Opinion inclines than go against the Inclination of my own Opinion: as I have gone thro' all the rest with the Warrant of my own Conscience, I cannot go upon any String in a thing of the least Weight, but I must deliver my Opinion as it inclines; and therefore, upon those Reasons that I have heard, and upon Consideration taken with myself, I do rather incline to the Opinion of my Lord Chief Baron, and upon his Reasons, which I think was in that with the lesser Number: But for my Opinion in all other Points, I agree with the general Vote of the Court.

Upon

Upon the 12th of June, 14 Car. Mr. Attorney moved the Court of Exchequer for Judgment against Mr. Hampden, and after he had opened the Record he said,

YOUR Lordship and the Court, in respect of the Greatness of the Cause, did adjourn it into the *Exchequer-Chamber*, that your Lordship and the Court might receive Advice of all the Judges; whose Advice and Opinions your Lordship hath already received, and the Plurality of their Voices is, that Judgment should be given against Mr. Hampden, and accordingly I do pray Judgment. To which my Lord Chief Baron answered:

It is very true, it was referred from hence to the *Exchequer-Chamber*; to receive the Advice of all the Judges of the Land. We do not take them to assist only by way of Advice, but for a judicial Direction: For admitting we four were of one Opinion, and the rest of the Judges of another, (though the Cause properly depend in this Court) yet we must apply ourselves to their Resolution, and our four Voices are involved in theirs; and therefore accordingly, *secundum legem, &c. onere-tur Johannes Hampden.*

The Copy of the Order, as it was drawn up upon the Motion of Mr. Attorney-General, and now remains entered in the Exchequer.

Remem'
Regis.

Termin. Sta' Trin' Anno 14 Car.
12 die Junii.

Bucks. **W**Hereas several Sums of Money by virtue of the King's Majesty's Writ under the Great Seal of *England*, bearing Date the 4th Day of *August* in the 11th Year of his Majesty's Reign, were assessed and charged upon several Persons, for and towards the Provision of a Ship of War, together with the Furniture and other things thereunto belonging, in the said Writ particularly mentioned; which said several Sums of Money, so assessed and charged, and not being satisfied and paid, the Names of the said several Persons, together with the several Sums charged upon them, were returned into the *Chancery*, whereby his Majesty's Writ of *Certiorari*, bearing date the 9th Day of *March* in the 12th Year of his Majesty's Reign, certified into his Court of *Chancery*, and by his Majesty's Writ of *Mittimus*, under the same Seal, bearing date the 5th Day of *May* in the 13th Year of his Majesty's Reign, were sent into the Court of *Exchequer* for further Process to be had thereupon, as by the said several Writs may appear: And whereas Process of *Sci' Fa'* was the 20th Day of *May*, in the said 13th Year of his Majesty's Reign, awarded to the Sheriff of the County of *Bucks*, directing to garnish the several Persons, in a Schedule to the said *Sci' Fa'* annexed contained, to shew Cause the Octaves of the Holy Trinity then ensuing, why they should not be charged, and satisfy the said Sums of Money assessed upon them; in which Schedule it was contained, amongst divers others, that *John Hampden Esq;* was assessed at 20 s. as by the said *Sci' Fa'* and Schedules thereunto annexed, may also more fully appear: Whereupon the said *John Hampden Esq;* being garnished by Sir *Anthony Chester* Baronet, then Sheriff of the said County of

Bucks, appeared, and demanded Oyer of all the aforesaid Writs; which being read unto him, he thereupon demurred in Law. And thereupon Sir *John Banks* Knight, his Majesty's Attorney-General, joined in the said Demurrer: And the Record thereof being made up, it pleased the Barons of this Court (the same Matter being a Matter of great Consequence and Weight) to adjourn the Arguing of the same Matter into the *Exchequer-Chamber*, and to desire the Assistance and Judgment of all the Judges of *England*, touching the same. Now upon the Motion of his Majesty's Attorney-General this Day, informing this Court, that seeing the said Matter hath been so solemnly debated and argued, as well by the Council of the said Defendant, and by some of his Majesty's learned Counsel, and also by all the Judges of *England*, and by the Barons of the *Exchequer*, and that the major Part of the said Judges and Barons have deliver'd their Opinions and Judgments that the said *John Hampden* ought to be charged with, and to satisfy the said Sum of 20 s. and therefore the said Mr. Attorney moved the Court, That Judgment might be entered accordingly: It is thereupon ordered by this Court, that Judgment shall be forthwith entered, that the aforesaid *John Hampden* ought to be charged with, and satisfy the aforesaid Sum of 20 s.

A Copy of the Judgment in English, as it is enter'd upon Record, in pursuance of the said Motion, and according to the major Votes.

* **A**ND because the Barons here will advise themselves of and upon the Premises, before they give Judgment thereupon, a Day is given to the aforesaid *John Hampden*, in the same State as now here, upon the Octave of St. Michael, that the said Barons in the mean while of the said Premises may advise, and with the Justices of both Benches may thereupon deliberate: for the said Barons here, not yet thereupon, &c. And upon this it is agreed between the Barons here, as well with Consent of the said Attorney-General of our said Lord the King, as of the said Attorney of the aforesaid *John Hampden*, and the Counsel learned in the Law of the said *John Hampden*, that some Persons learned in the Law as well of Counsel, and on the behalf of our said Lord the King, as of Counsel and on the behalf of the said *John Hampden*, of the aforesaid Matter in Law and the other Premises, in the Chamber of this *Exchequer* commonly called the *Exchequer-Chamber*, before the said Barons, together sitting with the aforesaid Justices of both Benches, should in the mean time be heard publickly to argue: At which said Octave of St. Michael, came the aforesaid *John Hampden* here as before. And because the Barons here further will advise themselves of and upon the Premises, before they give Judgment thereupon, a Day is further given to the aforesaid *John Hampden* in the same state as now here, until the Octave of St. Hilary, that some Persons learned in the Law, as well of Counsel and on the behalf of our said Lord the King, as of Counsel and on the behalf of the said *John Hampden*, of the aforesaid Matter in Law, and the other Premises in the Chamber of this *Exchequer*, com-

monly

“ monly called the *Exchequer-Chamber*, before the
 “ said Barons together sitting with the aforesaid
 “ Justices of both Benches, should in the mean
 “ time be heard publickly to argue, and the said
 “ Barons with the said Justices deliberate there-
 “ upon; so that no Person learned in the Law,
 “ either of the Counsel of our said Lord the King,
 “ or of the Counsel of the said *John Hampden*, is
 “ yet heard, and the Barons here thereupon are
 “ not advised, &c. And afterwards in the time
 “ between the aforesaid Octave of *St. Michael*,
 “ and the aforesaid Octave of *St. Hilary*, as well
 “ the Attorney and Solicitor of our said Lord the
 “ King, as two learned in the Law of the Coun-
 “ sel of the aforesaid *John Hampden* in the Pre-
 “ mises, being on the Part of the said *John Hamp-*
 “ *den*, twelve several days in the aforesaid *Exche-*
 “ *quer-Chamber*, before the Barons of this *Exche-*
 “ *quer*, sitting with them then there the aforesaid
 “ Justices of both Benches, were openly and sin-
 “ gly heard to argue at large, and particularly of
 “ the said Matter in Law, and other the Pre-
 “ mises (the aforesaid Record being recited) and
 “ what thereupon they could or would say. And
 “ the aforesaid Attorney, and Solicitor-General,
 “ divers and very many Records, Writs, Com-
 “ missions and Precedents, as well of this *Exche-*
 “ *quer*, as of the Court of *Chancery*, the Court of
 “ *King's-Bench* and *Common-Pleas*, the Matter in
 “ Law, and other Premises in the several Writs,
 “ Returns, and Schedules aforesaid contained, on
 “ the Part of our said Lord the King, to prove,
 “ confirm, and maintain, then and there produ-
 “ ced, shewed, and expounded. And on the
 “ aforesaid Octave of *St. Hilary*, the said *John*
 “ *Hampden* came here as before; and because the
 “ Barons here further will advise themselves of,
 “ and upon the Premises before they give Judg-
 “ ment thereupon, a Day is further given to the
 “ aforesaid *John Hampden*, in the same state as
 “ now here, until from the Day of *Easter*, on
 “ fifteen Days, that the said Barons in the mean
 “ while, with the aforesaid Justices of both
 “ Benches, may further thereupon deliberate, for
 “ that the said Barons have not yet thereupon, &c.
 “ At which Day, the said *John Hampden* came
 “ here as before; and because the Barons here
 “ further will advise themselves of, and upon the
 “ Premises, before they give Judgment thereup-
 “ on, a Day is further given to the aforesaid *John*
 “ *Hampden* in the same state as now here, until
 “ upon the Morrow of the Holy Trinity, that the
 “ said Barons in the mean while, with the aforesaid
 “ Justices of both Benches, may further thereup-
 “ on deliberate, for that the said Barons here not
 “ yet thereupon, &c. At which Day the afore-
 “ said *John Hampden* came here as before; and
 “ upon this, the Premises being seen, and by the
 “ Barons here plainly understood, and mature
 “ Deliberation thereupon being had with the a-
 “ foresaid Justices of both Benches, and after the
 “ Arguments, as well by the said Justices, as by
 “ the aforesaid Barons singly, in the aforesaid
 “ *Exchequer-Chamber*, publickly thereupon made,
 “ it appeareth thereupon to the Barons, by Ad-
 “ vice of the Justices aforesaid, that the several
 “ Writs aforesaid, and their Returns, and the
 “ Schedules aforesaid to the same annexed, and
 “ the Matter therein contained, are sufficient in
 “ the Law to charge the aforesaid *John Hampden*

“ with the aforesaid 20 s. assessed upon him in
 “ the Form and for the Cause aforesaid. It is
 “ therefore agreed by the said Barons, that the
 “ aforesaid *John Hampden* be charged with the
 “ said 20 s. and thereof make Satisfaction, &c.”

This Judgment in the Case of Ship-Money gave much Offence to the Nation, and occasioned great Heart-burnings in the House of Commons: It was particularly taken notice of in Mr. *Waller's* Speech in that House April 22 1640, which was as follows.

Mr. Speaker,

I Will use no Preface, as they do who prepare Men for something in which they have a particular Interest. I will only propose what I conceive fit for the House to consider; and shall be no more concerned in the Event than they that shall hear me.

Two things I observe in his Majesty's Demands.

First, the Supply.

Secondly, our speedy Dispatch thereof.

Touching the first: His Majesty's Occasions for Money are but too evident. For to say nothing how we are neglected abroad, and distracted at home; the calling of the Parliament, and our sitting here (an Effect which no light Cause could have in those times produced) is enough to make any reasonable Man believe, that the Exchequer abounds not so much in Money, as the State does in Occasions to use it: and I hope we shall all appear willing to disprove those who have thought to dissuade his Majesty from this way of Parliaments, as uncertain; and to let him see it is as ready, and more safe for the Advancement of his Affairs, than any new or pretended old Way whatever.

For the speedy Dispatch required, which was the second thing, not only his Majesty, but *Res ipsa loquitur*; the Occasion seems to importune no less; Necessity is come upon us like an armed Man.

Yet the Use of Parliaments heretofore (as appears by the Writs that call us hither) was to advise with his Majesty, of all things concerning the Church and Commonwealth. And it hath ever been the Custom of Parliaments, by good and wholesome Laws, to refresh the Commonwealth in general, yea and to descend into Remedies of particular Grievances, before any mention made of a Supply. Look back upon the best Parliaments, and still you shall find, that the last Acts are for the free Gifts of Subsidies on the Peoples part, and general Pardons on the King's part. Even the wisest Kings have first acquainted the Parliaments with their Designs, and the Reasons thereof; and then demanded the Assistance both of their Counsel and Purse. But Physicians, tho they be called of the latest, must not stomach it, or talk what they might have been, but apply themselves roundly to the Cure. Let us not stand too nicely upon Circumstances, nor too rigidly postpone the Matter of Supply, to the healing of our lighter Wounds. Let us do what possibly may be done with Reason and Honesty on our Parts, to comply with his Majesty's Desires, and to prevent the imminent Ills which threaten us.

But consider, Mr. *Speaker*, that they who think themselves already undone, can never apprehend themselves in Danger: And they that have nothing left, can never give freely. Nor shall we ever discharge the Trust of those that sent us hither, or make them believe that they contribute to their own Defence and Safety, unless his Majesty be pleased, first to restore them to the Property of their Goods and lawful Liberties, whereof they esteem themselves now out of Possession. One need not tell you that the Property of Goods is the Mother of Courage, and the Nurse of Industry; makes us valiant in War, and good Husbands in Peace. The Experience I have of former Parliaments, and my present Observation of the Care the Country has had to chuse Persons of Worth and Courage, makes me think this House like the *Spartans*, whose forward Valour required some softer Musick to allay and quiet their Spirits, too much mov'd with the sound of martial Instruments. 'Tis not the Fear of Imprisonment, or if need be, of Death itself, that keeps a true-hearted *English* Man from the Care to leave this Part of his Inheritance as entirely to Posterity, as he received it from his Ancestors.

This therefore let us first do, and the more speedily, that we may come to the Matter of Supply; let us give new Force to the many Laws which have been hitherto made for the maintaining of our Rights and Privileges, and endeavour to restore this Nation to its fundamental and vital Liberties, the Property of our Goods, and the Freedom of our Persons: no way doubting, but we shall find his Majesty as gracious and ready, as any of his Royal Progenitors have been, to grant our just Desires therein. For not only the People do think, but the wisest do know, that what we have suffered in this long Vacancy of Parliaments, we have suffered from his Ministers: that the Person of no King was ever better beloved of his People, and that no People were ever more unsatisfied with the Ways of the levying Monies, are two Truths which may serve, one to demonstrate the other; for such is their aversion to the present Courses, that neither the Admiration they have of his Majesty's native Inclinations to Justice and Clemency, nor the pretended Consent of the Judges, could make them willingly submit themselves to the late Tax of Ship-money: And such is the natural Love and just Esteem of his Majesty's Goodness, that no late Pressure could provoke them, nor any Example invite them, to Disloyalty or Disobedience.

But what is it then, that hath bred this misunderstanding betwixt the King and his People? How is it, that having so good a King we have so much to complain of? Why, we are told of the Son of *Solomon*, that he was a Prince of a tender Heart; and yet we see, by the Advice of violent Counsellors, how rough an Answer he gave to his People. *That his Finger should be as heavy as his Father's Loins*, was not his own but the Voice of some Persons about him, that wanted the Gravity and Moderation requisite for the Counsellors of a young King. I love not to press Allegories too far; but the resemblance of *Job's* Story with ours holds so well, that I cannot but observe it to you. It pleased God to give his Enemy leave to afflict him more than once or twice, and to take all he had from him; and yet he was not provok'd to rebel so much as with his Tongue; tho he had no very good Example

of one that lay very near him, and felt not half that which he suffered. I hope his Majesty will imitate God in the benigner Parts too: and as he was severe to *Job* only while he discoursed with another concerning him, but when he vouchsafed to speak himself to him, began to rebuke those who had mistaken and mis-judged his Case, and to restore the patient Man to his former Prosperity; so now, that his Majesty hath admitted us to his Presence, and spoken face to face with us, I doubt not but we shall see fairer Days, and be as rich in the Possession of our own as ever we were.

I wonder at those that seem to doubt the Success of this Parliament, or that the Misunderstanding between the King and his People should last any longer, now they are so happily met. His Majesty's Wants are not so great, but that we may find Means to supply him, nor our Desires so unreasonable, or so incompatible with Government, but that his Majesty may well satisfy them. For our late Experience, I hope, will teach us what Rocks to shun, and how necessary the Use of Moderation is: and for his Majesty, he has had Experience enough, how that prospers which is gotten without the concurrent Good-Will of his People: Never more Money taken from the Subject; never more went into the *Exchequer*. If we look upon what has been paid, it is more than ever the People of *England* were wont to pay in such a time: If we look upon what has been effected therewith, it shews as if never King had been worse supplied. So that we seem to have endeavoured the filling a Sieve with Water. Whosoever gave Advice for these Courses, has made good the Saying of the wise Man; *Qui conturbat domum suam, possidebit ventum*. By new Ways they think to accomplish Wonders; but in truth they grasp the Wind, and are at the same time cruel to us, and to the King too. For if the Commonwealth flourish, then he that hath the Sovereignty can never want, nor do amiss; so as he govern not according to the Interest of others, but go the shortest and the safest Ways to his own, and the common Good.

The Kings of this Nation have always govern'd by Parliaments; and if we look upon the Success of things since Parliaments were laid by, it resembles that of the *Gracians*,

*Ex illo fluere & retro sublapsa referri
Res Danaum*—————

especially on the Subject's Part. For tho the King hath gotten little, they have lost all.

But his Majesty shall hear the Truth from us, and we shall make appear the Errors of those Divines, who would persuade us, that a Monarch must be absolute, and that he may do all things *ad libitum*; receding not only from their Text (tho that be a wandring too) but from the Way their own Profession might teach them, *state super vias antiquas*, and remove not the antient Bounds and Land-marks which our Fathers have set. If to be absolute, where to be restrained by no Laws, then can no King in Christendom be so; for they all stand obliged to the Laws *Christian*, and we ask no more: for to this Pillar are our Privileges fixed, our Kings at their Coronation taking a sacred Oath not to infringe them.

I am sorry these Men take no more care to gain our belief of things, which they tell us for our Souls

Souls Health; while we know them so manifestly in the wrong, in that which concerns the Liberties and Privileges of the Subjects of *England*: But they gain Preferment, and then 'tis no matter, tho they neither believe themselves, nor are believed by others. But since they are so ready to let loose the Conscience of their Kings, we are the more careful to provide for our Protection against this Pulpit-Law, by declaring and reinforcing the municipal Laws of this Kingdom.

It is worth observing, how new this Opinion is, or rather this Way of Ruling, even among themselves. For Mr. Hooker, who sure was no refractory Man, (as they term it) thinks that the first Government was arbitrary, till it was found, that to live by one Man's Will, became the Cause of all Mens Misery: (these are his Words) concluding, that this was the Original of inventing Laws. And if we look farther back, our Histories will tell us, that the Prelates of this Kingdom have often been the Mediators between the King and his Subjects, to present and to pray Redress of their Grievances; and had reciprocally then as much Love and Reverence from the People.

But these Preachers, more active than their Predecessors, and wiser than the Laws, have found out a better Form of Government. The King must be a more absolute Monarch than any of his Predecessors; and to them he must owe it, tho in the mean time they hazard the Hearts of his People, and involve him in a thousand Difficulties: For suppose this Form of Government were inconvenient, and yet this is but a Supposition; for these five hundred Years, it hath not only maintain'd us in Safety, but made us victorious over other Nations: But, I say, suppose they have another Idea of one more convenient, we all know how dangerous Innovations are, tho to the better: and what Hazard those Princes must run, that enterprize the Change of a long establish'd Government. Now, of all our Kings that have gone before, and of all that are to succeed in this happy Race, why should so pious and so good a King be expos'd to this Trouble and Hazard? Besides, that Kings so diverted can never do any great Matter abroad.

But while these Men have thus bent their Wits against the Laws of their Country, whether they have neglected their own Province, and what Tares are grown up in the Field, which they should have tilled, I leave to a second Consideration; not but that Religion ought to be the first thing in our Purposes and Desires: but that which is first in Dignity, is not always to precede in Order of Time, for Well-being purports a Being. And the first Impediment, which Men naturally endeavour to remove, is the Want of these things, without which they cannot subsist. God first assigned to Adam Maintenance of Life, and gave him a Title to the rest of the Creatures, before he appointed a Law to observe. And let me tell you, if our Adversaries have any such Design, as there is nothing more easy, than to impose Religion on a People depriv'd of their Liberties; so there is nothing more hard, than to do the same upon Freemen.

And therefore, Mr. Speaker, I conclude with this Motion, That there may be an Order presently made, That the first thing this House will consider of, shall be the restoring this Nation in general to its Fundamental and Vital Liberties, the Property of our Goods, and Freedom of our

Persons; and that then we will further consider of the Supply desired.

And thus we shall discharge the Trust reposed in us by those that sent us hither: his Majesty will see, that we make more than ordinary Haste to satisfy his Demands; and we shall let all those know, that seek to hasten the Matter of Supply, that they will so far delay it, as they give Interruption to the former.

Afterwards the House of Commons took the Affair directly under Consideration, in calling those Judges to an account, who had given their Opinions for the Ship-Money; at which time Lord Falkland deliver'd himself in the following manner:

Mr. Speaker,

THE Constitution of this Commonwealth hath established, or rather endeavoured to establish to us the *Security of our Goods*, and the *Security of those Laws* which would secure us and our Goods, by appointing for us Judges, so settled, so sworn, that there can be no oppression, but they of necessity must be accessary; since if they neither deny nor delay us Justice, which neither for the great nor little Seal they ought to do, the greatest Person in this Kingdom cannot continue the least Violence upon the meanest. But this Security hath been almost our Ruin; for it hath been turned, or rather turned itself into a Battery against us: and those Persons who should have been as Dogs to defend the Sheep, have been as Wolves to worry them.

These Judges, to instance not them only, but their greatest Crime, have delivered an Opinion, and Judgment in an extrajudicial manner, that is, such as came not within their Cognizance, they being Judges, and neither Philosophers, nor Politicians. In which when that is so absolute and evident, the Law of the Land ceases; and of general Reason and Equity, by which particular Laws at first were framed, returns to his Throne and Government, where *Salus Populi* becomes not only *suprema*, but *sola lex*; at which, and to which end, whatsoever should dispense with the King, to make use of any Money, dispenses with us to make use of his, and one another's. In this Judgment they contradicted both many and learned Acts and Declarations of Parliaments; and those in this very Case, in this very Reign: so that for them they needed to have consulted with no other Record, but with their Memories.

2. They have contradicted apparent Evidences, by supposing mighty and imminent dangers, in the most serene, quiet, and halcion days that could possibly be imagined, a few contemptible Pirates, being our most formidable Enemies, and there being neither Prince nor State, with whom we had not either Alliance, or Amity, or both.

3. They contradict the Writ itself, by supposing that supposed Danger to be so sudden, that it would not stay for a Parliament, which required but forty days stay, and the Writ being in no such haste, but being content to stay seven times over.

It seemed generally strange, that they saw not the Law which all Men else saw but themselves. Yet tho this begot the more general Wonder, three other Particulars begot the more general Indignation.

When they had allowed to the King, the *sole Power in Necessity*, the *sole Judgment of Necessity*,

and by that enabled him to take both from us, what he would, when he would; and how he would, they yet continued to persuade us, that they had left us our Liberties and our Properties.

And, which I confess moved most, that by the Transformation of us from the state of Free-Subjects (a good Phrase under Dr. Heylin's Favour) unto that of Villains, they disable us by legal and voluntary Supplies to express our Affections to his Majesty; and by that to cherish his to us, that is, by Parliaments.

The Cause of all the Miseries, we have suffer'd, and the Cause of all the Jealousies we have had, that we should yet suffer; is, That a most excellent Prince, hath been most infinitely abused by his Judges, telling him that *By Policy he might do what he pleased*.

We must now be forced to think of abolishing of our Grievances; and of taking away this Judgment and these Judges together, and of regulating their Successors by their exemplary Punishment.

Hereupon the Opinions of the Judges, the Ship-Writs, and the Judgment against Mr. Hampden being read openly in the House on Monday Dec. 7. 1640. after long Debate these four several Votes were agreed to by the House, *nemine contradicente*.

1. **T**HAT the Charge imposed upon the Subjects for the providing and furnishing of Ships, and the Assessments for raising of Money for that purpose, commonly called *Ship-Money*, are against the Laws of the Realm, the Subjects Right of Property, and contrary to former Resolutions in Parliament, and to the Petition of Right.

2. That the extra-judicial Opinions of the Judges, published in the *Star-Chamber*, and inrolled in the Courts at *Westminster*, in *hæc verba*,

The CASE.

Charles Rex.

WHEN the good and safety of the Kingdom in general is concerned, and the whole Kingdom in danger, whether may not the King by Writ under the great Seal of England command all the Subjects in this Kingdom at their Charge to provide and furnish such number of Ships, with Men, Victual, and Munition, and for such a time as he shall think fit, for the Defence and Safeguard of the Kingdom from such Danger and Peril, and by Law compel the doing thereof, in case of Refusal or Refractoriness; and whether in such Case is not the King the sole Judge both of the Danger, and when and how the same is to be prevented and avoided?

C. R.

Their Opinions.

MAY it please your most excellent Majesty, We have according to your Majesties Command, severally, and every Man by himself, and all of us together, taken into serious Consideration the Case and Questions signed by your Majesty, and inclosed in your Letter: And we are of Opinion, that when the Good and Safety of the Kingdom in general is concerned, and the whole Kingdom in danger, your Majesty may by Writ under the Great Seal of England, command all the Subjects of this your Kingdom, at their Charge to provide and furnish such number of Ships, with Men, Victual, and Munition, and for such time as your Majesty shall think fit for the Defence and Safe-

guard of the Kingdom from such Danger and Peril, and that by Law your Majesty may compel the doing thereof in case of Refusal or Refractoriness. And we are also of Opinion, that in such Case your Majesty is the sole Judge both of the Danger, and when and how the same is to be prevented and avoided.

In the whole, and in every part of them, are against the Laws of the Realm, the Right of Property, and the Liberty of the Subjects, and contrary to former Resolutions in Parliament, and to the Petition of Right.

3. That the Writ following in *hæc verba*, viz.

CHARLES by the Grace of God, King of England, Scotland, France and Ireland, Defender of the Faith, &c. To our Right Trusty and Well-beloved Counsellor, Thomas Lord Coventry, Keeper of our Great Seal of England, greeting. These are to will and require you, that for the Safeguard of the Seas, and Defence of the Realm, you issue forth, or cause to be issued forth of our High Court of Chancery these ensuing Writs in the Form following, with Duplicates of them, under our Great Seal of England, unto the Counties, Cities, Towns, and Places hereafter ensuing, and for so doing this shall be your Warrant.

And the other Writs, commonly called the Ship-Writs, are against the Laws of the Realm, the Right of Property, and the Liberty of the Subjects, and contrary to former Resolutions in Parliament, and to the Petition of Right.

4. That the Judgment in the Exchequer in Mr. Hampden's Case, a Transcript whereof followeth in *hæc verba*: (*viz. Quod separalia brevia prædicta & retorna eorundem, ac schedul. prædict. eisdem annexat. ac materia in eisdem content. sufficien. in lege exist. ad præf. Joh. Hampden de prædictis viginti solidis super ipsum in forma & ex causa præd. assessis, onerand. Ideo consideratum est per eosdem Barones, quod præd. Johannes Hampden de eisdem viginti solidis oneratur, & inde satisfaciatur.*) In the Matter and Substance thereof, and in that it was conceived that Mr. Hampden was any way chargeable, is against the Laws of the Realm, the Right of Property, the Liberty of the Subjects, and contrary to former Resolutions in Parliament, and to the Petition of Right.

These Votes were afterwards transmitted by the House of Commons to the Lords, and delivered by Mr. Saint-John (afterwards his Majesty's Solicitor-General) at a Conference of both Houses of Parliament, held 16 Car. 1640.

Mr. St. John addressed himself to the Lords as follows.

My Lords,

THE Knights, Citizens, and Burgeses of the Commons House, have entrusted me with a Message to your Lordships of a general and very high Concernment; so general, that the whole Body of the Kingdom, both Peers and People, are interested in it; of so high a Consequence, as that there is nothing that can concern us nearer.

It's one of the *Grandia Regni*, so great, as that I shall not need to present it to your Lordships in a magnifying Glass; it will appear too big in its own Dimensions.

It's

It's not that Ship-money hath been levied upon us; but it's that Right whereby Ship-money is claimed, which, if it be true, is such as that makes the Payment of Ship-money the Gift and earnest Penny of all we have.

It's not that our Persons have been imprisoned for Payment of Ship-money, but that our Persons, and (as it is conceived) our Lives too, are upon the same Grounds of Law, delivered up to bare Will and Pleasure.

It's that our Birth-right, our Ancestral Right, our Condition of continuing free Subjects, is lost; that of late there hath been an Endeavour to reduce us to the State of Villainage, nay to a lower.

It's true, the Lord might tax his Villain *de haute & de basse*, might take all his Lands and Goods; the Villain had no Property against the Lord, the Villain he could not *ire quo voluit*, he had no liberty of Person, the Lord might imprison him at his pleasure: but the Villain's Life was his own, and not his Lord's, the Law secured him that. But, my Lords, as the Law stands now declared, it's disputable whether it doth so much for us.

My Lords, the Subject of this Message is, to present the Sense of the Commons to your Lordships; that the Laws of the Realm instituted at first, and freely assented unto, and chosen by their Ancestors for the Preservation of themselves and us their Descendents, in our Persons, Lives and Estates, have been of late entrusted unto such Hands, as have endeavoured to force upon them a contrary End to that for which they were ordained; from defensive to turn them to offensive; and instead of protecting us, to make the Laws the Instrument of taking from us all we have. Those Carriages which have produced this Sense of the Commons, I am commanded at this present to declare to your Lordships.

They are certain extra-judicial Opinions delivered by the Judges at several times; the one in November 1635, the other a Year after, in February 1636.

The Ship-Writs, that have issued to all the Counties of England for these many Years last past without Intermission: The principal thing in these Writs which I am to present to your Lordships, is not the Charge and Burden which hath been thereby imposed upon the Subjects, tho that be great, but the Declarations in them of the Law, and of the Right whereby this Burden may be imposed.

The last is, the Judgment in Master Hampden's Case in the Exchequer upon these Ship-Writs.

My Lords, the two last, that is, the Ship-Writ and the Judgment, because they are very long, I am only to open them without reading, and to deliver them to your Lordships; the other two I am to read them, and then to deliver to your Lordships.

The first Opinion in November 1635. was read as followeth.

I Am of Opinion, that as where the Benefit doth more particularly redound to the Good of the Ports or Maritime Parts, as in case of Piracy or Depredations upon the Seas, there the Charge hath been, and may be lawfully imposed upon them according to Precedents of former Times; so where the Good and Safety of the

Kingdom in general is concerned, and the whole Kingdom in danger, (of which his Majesty is the only Judge) there the Charge of the Defence ought to be borne by all the Realm. This I hold agreeable both to Law and Reason.

My Lords, these Opinions were delivered by the Judges severally and apart, they were procured by the Solicitation of my Lord Finch. The Judges, as he severally procured their Hands, were by him enjoined Secrecy: accordingly these Opinions walked in the dark for a Year and upwards. Afterwards the Procurer of them, my Lord Finch, liked them so well, as that he presumed to deliver them to his Majesty. By his Procurement, a Letter was directed from his Majesty to the Judges, for the delivery of their Opinions in these and some other Additional. The former that hath been read is more modest; it's only that his Majesty is the sole Judge of the Danger, and that the Inland as well as the Maritime Towns are chargeable to the Defence of the Kingdom.

It's not declared in these, that this Charge may be imposed by his Majesty alone; for the Expression is only, that the Charge may lawfully be imposed; say not by whom.

In the other Opinions they proceed *a malo ad pejus*, and speak plain English, which followeth in *hæc Verba*.

The Case.

Charles Rex,

When the Good, and the Ease and Safety of the Kingdom in general is concerned, and the whole Kingdom in Danger, whether may not the King, by Writ under the Great Seal of England, command all the Subjects in this Kingdom, at their Charge, to provide and furnish such number of Ships with Men, Victuals and Ammunition, and for such Time as he shall think fit, for the Defence and Safeguard of the Kingdom from such Danger and Peril; and by Law compel the doing thereof in case of Refusal or Refractoriness? and whether in such Case, is not the King the sole Judge, both of the Danger, and when and how the same is to be prevented and avoided?

The Judges Answer.

MAY it please your excellent Majesty, we have, according to your Majesty's Command, severally, and every Man by himself, and all of us together, taken into serious Consideration the Case and Questions signed by your Majesty, and inclosed in your Royal Letter; and we are of Opinion, that when the Good and Safety of the Kingdom in general is concerned, and the whole Kingdom is in Danger, your Majesty may by Writ under the Great Seal of England, command all the Subjects of this your Kingdom at their charge to provide and furnish such Number of Ships, with Men, Victuals and Ammunition, and for such time as your Majesty shall think fit, for the Defence and Safeguard of the Kingdom from such Danger and Peril; and that by Law your Majesty may compel the doing thereof, in case of Refusal or Refractoriness: And we are also of Opinion, that in such case your Majesty is the sole Judge, both

‘ both of the Danger, and when, and how the same is to be prevented and avoided.’

These Opinions were subscribed by all the Judges in *Serjeants-Inn-Hall*; they were afterwards published in the *Star-Chamber*, that the Subjects might take notice of them; and that they might never be forgotten, they are enrolled in all the Courts of *Westminster-Hall*, in *perpetuam rei memoriam*. Your Lordships will be pleased to give me leave to repeat them in their plain and legal sense, which I conceive to be thus.

That his Majesty, as often as himself pleaseth, may declare that the Kingdom is in Danger; that so often, for prevention of such Danger, his Majesty, by his Writ under the Great Seal of *England*, may alter the Property of the Subjects Goods, without their Consent in Parliament, and that in such Proportions, as his Majesty shall think fit; and besides the altering of the Property of their Goods, for the prevention of such Danger, may deprive them of the Liberty of their Persons, and of their Lives, and that in such manner as himself shall please.

1. The first of these, viz. That his Majesty may declare the Danger as often as he pleaseth, is made good in these Words, That the King is the sole Judge of the Danger, and when the same is to be prevented and avoided.

2. The second, that so often he may alter the Property of the Subjects Goods, without Consent in Parliament, in these Words; That his Majesty may, by Writ under the Seal of *England*, command and compel all the Subjects of the Realm, at their charge, to provide and furnish Ships.

3. That this may be in what proportion his Majesty shall please, in these Words; That his Majesty may command them to provide and furnish such number of Ships, with Men, Victuals, and Ammunition, and for such time as his Majesty shall think fit.

4. The last, viz. that which concerns our Persons, in these two Clauses:

1. That his Majesty in case of Refractoriness may compel the doing of it. This Compulsion in case of Refractoriness, includes the Person as well as the Estate; nay, it sounds more in the Personality than otherwise. For the other, viz. whether this personal Compulsion may extend so far as to Life, I humbly leave it to your Lordships Consideration, upon the other Clause; that is, that his Majesty is the sole Judge of such Danger, and when, and how the same is to be prevented: Whether the Words, how it is to be prevented, in this Case of personal Compulsion, doth not leave the manner of it wholly in his Majesty's Breast.

My Lords, if these Opinions extend only to Ship-Money, it is enough his Majesty takes what he will, and when he will. If all be taken to Day, and afterwards by Descent or my own Labour I get a new Stock or Livelihood, that is no more mine than the former, so that there is no Property left unto the Subject, tho the Opinions go no further: But, my Lords, Ship-Money is not the whole Extent of them; Ship-Money, by these Opinions, is not due by any Peculiarity in Ship-Money; But Ship-Money is therefore due, because his Majesty is the sole Judge of the Danger of the Kingdom, and when, and how the same is to be prevented; because his Majesty for the Defence of the Kingdom, may at his Will and Pleasure

charge the People. This is the Ground; and upon the same Reason the Compulsion may be as well for the making and maintaining Castles, Forts and Bulwarks, making of Bridges, for transporting his Armies, for Provision of Wages and Victuals, for Soldiers, for Horses and Carriages; it may be multiplied in infinitum.

It may be done when the Good and Safety of the Kingdom is concerned; this extends to all Things, and at all Times: *Qui jacet in terra, non habet unde cadat*.

If these Opinions be Law, I humbly leave it to your Lordships Considerations, whether the Government be not *Imperium legibus solutum*. The next thing I shall offer to your Lordships is the Ship-Writ: a Transcript of one of them directed to the Sheriff of *Dorsetshire*, I shall deliver; all the rest being of the same Form. Because the Writ is long, I shall open it briefly; 'tis to this Effect.

There is a Declaration in it, that *Salus Regni periclitabatur*; That the Safety of the Kingdom was in Danger.

Therefore the Inhabitants of the several Counties are commanded, for the Defence of the Kingdom, for the Custody of the Seas, for the Safeguard of the Merchants from Piracy inward and outward, that they should provide a Ship of War, furnished with Guns, Gunpowder, double Tackle, and all other Necessaries; and this Ship thus furnished at a day set, to be brought to *Portsmouth*, to be provided for 26 Weeks of Mariners Wages, Victuals and other Necessaries: and for the doing of this, Authority is given to the Sheriffs of the several Counties, to assess every one of the Inhabitants *secundum statum & facultates suas*, according to their Estates and Means; and further Power given him, by distraining and selling of the Distress, to levy these Monies; *si contrarios invenerit*, then to imprison their Persons: And further declares, that all this may be done, *secundum Legem & Consuetudinem Regni*. The Sense I conceive is briefly thus: That by the Laws of the Kingdom, when his Majesty shall declare that the Kingdom is in Danger, he may alter the Property of the Subjects Goods, and imprison their Persons; nay, that not only his Majesty, but the Sheriffs may imprison their Persons. By the Law the Lord might imprison his Villain, but could not transfer that Power to the Bailiff, or to any other, it was personal. That the Execution of this Power over the Persons of the Subjects hath gone no farther than their Imprisonment, whether therein we be not beholden to his Majesty's Grace and Goodness, and nothing at all to the Opinions of the Judges, I leave it to your Lordships Considerations.

The last thing is, the Judgment in the *Exchequer*, in the 13th Year of his now Majesty's Reign, against Mr. *Hampden*. The Record is very long: I shall briefly open it to your Lordships. *Quarto Aug. 11 Car.* there issued Ship-Writs to the several Counties; amongst the rest to the County of *Bucks*. The Sheriff assessed the Inhabitants; some of them made Default, and did not pay. Upon a *Certiorari* out of the Chancery, directed to the Sheriff, he certifies the Persons that made default, together with the Sums assessed upon them. From the Chancery, by *Mittimus*, these Certificates were sent into the *Exchequer*, to the intent Processes might issue against the Defaulters. A *Scire facias* issued to the Sheriff of

Bucks,

Bucks, who thereupon, amongst other Returns, returns that Mr. Hampden hath been assessed 20 Shillings, for some Lands in *Stoke-Mandeville* in that County, which he had not paid. Mr. Hampden appeared, and upon his Appearance, demands Oyer of the Ship-writs, and the other Proceedings. After his hearing thereof, and understanding the Contents, he demurs in Law, that is, demands the Judgment and Opinion of the Judges, whether this Writ was sufficient in Law, and to force him to pay the said 20 Shillings.

This being a great and general Case, the Barons of the Exchequer desired the Assistance of the rest of the Judges, who did join accordingly. The Case came to be argued; there were four Arguments, two on Mr. Hampden's Side, and two on the other Side: The first was in *Michaelmas* Term, after *All-Hallontide*; and all the four Arguments were speeded before *Christmas* Day, two of them in the Term; and no longer Time could be procured for the rest, but the short Vacation between *Michaelmas* Term and *Christmas*. It was a Case of so little Concernment, that whereas in *Westminster-Hall*, Term after Term is usually given to argue any Demurrer, this must be argued betwixt *All-Hallontide* and *Christmas* thro'out. After the Arguments, the Counsel on both sides were commanded to bring before the Judges the Records and Authorities cited: They were brought; and for the Ease of the Judges, many of them on Mr. Hampden's part were abbreviated on the back-sides: Those Abbreviations were commanded to be expounded. Afterwards the Case came to Argument at the Bench; there the Case was judged, and by the greater part of the Judges, Judgment was given against Mr. Hampden. When the Judges had delivered their Opinions, it was the Barons part to give Judgment; the Judgment was, *Quod separalia brevia prædictæ & return' eorundem ac Schedulæ prædictæ eisdem annexæ ac materia in eisdem contentæ sufficiunt in lege existunt ad præfatum Johannem Hampden de prædictæ viginti solidis super ipsum in forma & ex causa prædictæ. assessis onerand' Ideo consideratum est per eosdem Baron' quod prædictus Johannes Hampden de eisdem viginti solidis oneratum exinde satisfaciatur.*

My Lords, this Judgment is a full and plenary Execution of the former Opinions of the Judges, and of the Ship-Writs, for so much as it concerns our Propriety: It was given in Mr. Hampden's Case only, but binds all the Subjects; for so binding it is, as that an honourable Person, now in my Eye, in a Case depending in the King's Bench, was denied any Argument or Debate concerning the Right of Ship-Money, for no other Reason, but that it had been by the former Judgment adjudged already in the Exchequer.

My Lords, these extra-judicial Opinions of the Judges, these Ship-Writs, and this Judgment, are those Carriages, which have introduced this Sense of the Commons, That the fundamental Laws of the Realm concerning our Property and our Persons are shaken.

My Lords, The Commons have taken the extra-judicial Opinions published and inrolled, and the rest, severally into Consideration; they have been read openly in the House, and after long Debate, and long rather in consideration of the Greatness of the Matter than of the Difficulty of it, they came to vote; four several Votes passed upon them, the Votes passed without so much as one negative Voice to any of them.

The Votes were in Substance, that they were against the Laws of the Realm, the Right of the Property, the Liberties of the Subject, contrary to the former Resolutions of the Parliament, and to the Petition of Right.

The extra-judicial Opinions inrolled, they voted in the whole, and every part of them, to be contrary to all these; for they did conceive, that in these Opinions there was not any one Clause that was agreeable to the Law, but that throughout they were contrary to the Laws.

My Lords, The Things which the Commons took into their Consideration, before they proceeded to their Votes, were the Proceedings in the Parliament held 3 Car. when the Petition of Right was framed.

The Commons went no higher; the Reasons inducing them thereto were, because in that Parliament all those three had been debated, Property of Goods, Liberty of Persons, and Security of our Lives.

Two of them, that is, Property of Goods and Liberty of Persons, by the Occasion of the Commissions for the Loan, and the Instruction where-with these Commissions were accompanied; that concerning our Lives, by Occasion of the Commissions that had issued for the executing of Martial Law.

They conceive, that if any thing concerning these had passed both Houses and his Majesty, or the Judgment of both Houses without his Majesty, it would be in vain to look further, that it would be *actum agere*; Nay, my Lords, they had further Consideration, that if those were already settled in that Parliament, it would not only be derogatory to the Jurisdiction of Parliament, but dangerous to look higher, as that they would infer a Defect in those Proceedings, and cast an Aspersions upon that Parliament. I am commanded now to present to your Lordships Consideration, those things which satisfy the Commons, which are these three:

1. The Commissions for the Loans, with the Instructions.
 2. A Commission call'd, *The Commission of Excise*.
 3. An Addition of Saving, which was desired by your Lordships to have been added to the Petition of Right, at the time of the framing of it.
- The Case upon the Commission for the Loans, standeth thus;

13 Octob. 2 Car. divers Commissions were directed to sundry Commissioners, to the number of sixty or seventy Lords and Gentlemen, in the several Counties issued, whereby a compulsory Aid, by way of Loan, was required of the Subject: The Causes and Grounds of this Command, are in the Commissions expressed to be these.

The King found the Crown engaged in a War, by the Advice of both Houses in Parliament; that not only the King and the Subject, but also his Allies beyond Sea were in danger.

The Parts beyond Sea, where our Cloth is vented, and from whence we have most of our Provision for Shipping, were endangered; his Majesty's Treasures were exhausted, and his Coffers empty. A Parliament had been summoned, but no Supply.

Unavoidable Necessity both at Home and Abroad, multiplied the Enemies. Great and mighty Preparations, both at Sea and Land, threatened the Kingdom daily.

Not only the King's Honour, but the Safety and very Subsistence of the King and People, and of the true Religion abroad, are in apparent danger of suffering irreparably, unless not only a speedy, but also a present Stop be made; which cannot admit so long Delay as the calling of a Parliament: The Pope assured on the Royal Word of a King, that not one Penny should be bestowed, but upon those publick Services only, wherein every one of them, and the whole Body of the Kingdom, their Wives, Children, and Posterity, have their personal and common Interests.

The Commissioners Diligence commanded, as they tendred the King's Honour and Safety of the Realm. Here *Salus regni periclitabatur*, the whole Kingdom was in danger, as in the Judges Opinions, and as in the Ship-Writs, and Judgments in the Exchequer. Nay, my Lords, further, the Safety and very Subsistence of the King, People, and true Religion, were in danger of suffering irreparably; the dangerous Instance, not a speedy, but present Stop must be made; the Supply could not stay for a Parliament; at this time his Majesty's Coffers were exhausted, the King found the Crown engaged in this War, before the Access of it to himself, and that by Advice in Parliament; all this expressed, only lending of Monies for Prevention required; but it was a compulsory thing, and became compulsory, by the Instructions to bind over to the Board, and Imprisonment for Refusal. These Commissions were, in the Parliament 3 Car. first resolved in the Commons House to be against Law, afterwards by your Lordships, and consented unto by his Majesty; and are declared to be so in the *Petition of Right*; and the Imprisonment of the Subjects for Refusal, declared in the *Petition of Right* to be against Law.

My Lords,

The next is the Commission called, *The Commission of Excise*. This was dated *ultimo Febr.* it was dated after the Summons to that Parliament: This Commission issued to 33 Lords, and others of his Majesty's Privy-Council; the Commissioners are thereby commanded to raise Monies by Impositions, or otherwise; as in their Judgments they shall find to be most convenient.

The Causes wherefore these Monies are to be raised, are expressed to be these.

The Defence and Safety of the King and People, which without extremest Hazard of the King, Kingdom, and People, and of the King's Friends and Allies beyond Seas, cannot admit any longer Delay; inevitable Necessity, wherein Form and Circumstance must rather be dispensed withal, than the Substance lost.

The Commissioners not to fail therein, as they tendred his Majesty's Honour, and the Safety of the Kingdom and People.

Here *Salus regni periclitabatur*, the whole Kingdom declared to be in danger, in greater and nearer, than in the Opinions of the Ship-Writs, or Judgment in the Chequer.

In the Parliament 3 Car. this Commission was adjudged by the Commons to be against the Laws of this Realm, and contrary to the Judgment given in the *Petition of Right*; and after a Conference with your Lordships, desired his Majesty, that it might be cancelled. The then Lord-Keeper shortly after brought it cancelled to your Lordships in the House, and there said it was cancelled

in his Majesty's Presence: You sent it cancelled to the Commons to be viewed, who afterwards sent it back to your Lordships.

My Lords, The last is the Addition of Saving, desired to be added to the *Petition of Right*, which was in these Words:

'We humbly present this Petition unto your Majesty, not only with a Care of preserving our own Liberties, but with due Regard to leave entire the sovereign Power, wherewith your Majesty is trusted, for the Protection, Safety, and Happiness of your People.' Your Lordships Desire of this Addition to the *Petition of Right*, was taken into consideration by the Commons; and after Debate, it was thought fit by them to be rejected. A Conference was had with your Lordships, and Mr. Noy appointed by the Commons to declare the Reasons of their Resolution. Your Lordships not receiving Satisfaction at that Conference, whether this Addition should be rejected or not; it was again debated in the Commons House, they ventur'd upon the same Bottom again: It was thereupon resolved to be rejected; the Reasons of their Rejection were these in Sum.

First, They confess, that if these Words were taken as a bare Proposition only, without any further reference to the *Petition of Right*, that it was a true Proposition.

That is, That the Law hath trusted the King with sovereign Power for the Protection, Safety, and Happiness of the People.

But if it should be added to the *Petition of Right*, as was desired, then was it not true, but would make the *Petition of Right*, *fela de se*, and wholly destructive to itself in all the Parts of it; that it would proceed *a bene divisus ad mala conjuncta*: for then the *Petition of Right*, as they resolved, would have this Sense.

Whereas in the *Petition of Right* it is said, That no Aid, Tax, Taillage, or other Charge whatsoever, may be imposed upon the People, without their free Consent in Parliament; it would have this Construction. 'Tis true, it cannot be done by the King's ordinary Power, but it may be done by that sovereign Power wherewith the Law hath entrusted his Majesty for the Protection, Safety, and Happiness of the People.

So likewise for Imprisonment, that they ought not to be imprisoned without due Process of Law. It is true ordinarily, but the King may imprison by his sovereign Power, wherewith the Law hath intrusted him for the Protection, Safety, and Happiness of the People.

So that, for that Martial Law, that the Subjects Lives ought not to be taken away, unless by due Process of Law. 'Tis true ordinarily, but the King may do it by his sovereign Power, wherewith the Law hath intrusted him for the Protection, Safety, and Happiness of the People. Whereby they conceived that it would not only make the *Petition of Right* to be wholly destructive of itself, but likewise this *Petition of Right* would leave the Subject in a far worse Condition than it found them; for it would necessarily infer, that which is against the Law, *viz.* That the King by his sovereign Power, when he pleased to declare that it was for the Good of the People, might do all this.

Your Lordships, at a Conference of both Houses, engaged on the Part of the Commons by Serjeant *Glanville*, and Sir *Henry Martin*, received

Satisfaction from these Reasons, and consented to the leaving out of this Addition; and accordingly the Petition of Right passed, and is printed without it.

My Lords, These were the things I was commanded to present unto your Lordships; other things there were, as the Sentence against Bishop *Manwaring*: But these weighed so much with the Commons, as that they conceived they needed no more.

My Lords, These Precedents of that Parliament, and these Opinions of the Judges, the Ship-Writs, and the Judgments in the *Exchequer*; they are like the two Buckets of a Well, if one go up, the other must go down: *Non bene conveniunt.*

My Lords, we have not cited these Precedents out of diffidence that your Lordships had forgotten them, but because others have; or that we distrust your Lordships Justice, if you had forgot them: for before these were, your Lordships concurred in Opinion with your worthy Ancestors, that first gave them: Their noble Blood runs in your Veins. It's now to confirm your own Judgments as well as theirs: In your Lordships Breasts, there are the same Magazines and Fountains of Honour and Justice as were then; these Judgments and Proceedings were the Actions of both Houses, the Danger by the Violation is equal.

The Commons see nothing in the Judges Opinions or Judgment, why they should recede from their former Judgments; they hope the same from your Lordships.

Besides, *my Lords,* that the Case is now much varied from what it was then; not only in the Matter, but as it concerns the Honour and Jurisdiction of this great Judicatory, the Parliament.

The Breach of Privileges in the Members is tenderly resented; because that without this Freedom, they cannot advise and consult concerning the *Ardua Regni.*

But when they have done all, to have their Judgments, and their Acts of Parliament overthrown by the Judges afterwards, this makes Parliaments to be nothing; this sets up the Judges above the Parliament, this puts us out of hope of Redress: if they may overthrow the Proceedings of that Parliament of 3 Car. they may by the same Reason overthrow the Actions of this, and of all future Parliaments.

My Lords, This was not the Practice of their Predecessors, tho' but in private Causes; if difficulty of Law arose, they always consulted this Oracle, and thence received their Answer how to give Judgment. Judgments in the highest Court of *Westminster-Hall*, I mean in the *King's-Bench*, where the Proceedings are *coram Rege*, are here reverfable by Writ of Error. In Causes of great and general Concernment, they ever adjourned them hither, as things too high for them.

Qui consulta patrum, qui leges juraque servat, doth well; they have taken that in their hands they had not to do withal; and how they have handled the Matter, your Lordships have heard.

The Judges, as is declared in the Parliament Roll of *Rich. II.* are the Executors of the Statutes, and of the Judgments and Ordinances of Parliament; they have here made themselves the Executioners of them; they have endeavoured the Destruction of the Fundamentals of our Laws and Liberties. *Holland* in the *Low-Countries* lies under

the Sea, the Superficies of the Land is lower than the Superficies of the Sea: It's capital therefore for any Man to cut the Banks, because they defend the Country.

Besides our own, even foreign Authors, as *Commynes*, observe, that the Statute *de Tallagio*, and other old Laws, are the Sea-Walls and Banks which keep the Commons from the Inundation of the Prerogative.

These Pioneers, they have not only undermined these Banks, but they have levelled them even with the Ground.

If one that was known to be *hostis Patriæ*, had done this, tho' the Damage be the same, yet the Guilt is less.

But the *Conservatores Riparum*, the Overseers intrusted with the Defence of these Banks, for them to destroy them, the Breach of Trust aggravates, nay alters the Nature of the Offence.

Breach of Trust, tho' in a private Person, and in the least things, is odious amongst all Men; much more in a publick Person, and in things of great and publick Concernment, because great Trust binds the Party trusted to greatest Care and Fidelity.

It's Treason in the Constable of *Dover* Castle to deliver the Keys to the known Enemies of the Kingdom; because that Castle is the Key of the Kingdom: Whereas if the House-keeper of a private Person deliver'd Possession to his Adversary, it's a Crime scarce punishable by Law.

The Judges under his Majesty are the Persons trusted with the Laws; and in them, with the Lives, Liberties, and Estates of the whole Kingdom: This Trust of all we have, is primarily in his Majesty, and from him delegated to his Judges.

His Majesty, at his Coronation, is bound by his Oath to execute Justice to his People according to the Laws; thereby to assure the People of the faithful Performance of this great Trust. His Majesty again, as he trusts the Judges with the Performance of this part of the Oath, so doth he likewise exact another Oath of them, for their due Execution of Justice to the People, according to the Laws: Hereby the Judges stand entrusted with this part of his Majesty's Oath.

If therefore the Judges shall do wittingly against Law, they do not only break their Oaths, and therein the common Faith and Trust of the whole Kingdom, but do, as much as in them lies, smear and blemish the sacred Person of his Majesty, with the odious and hateful Sin of Perjury.

My Lords,

The Heinousness of this Offence is most legible in the severe Punishments which former Ages have inflicted upon those Judges, who have broken any part of their Oaths wittingly, tho' in things not so dangerous to the Subject, as in this Case in question.

Sir *Thomas Wayland*, Chief Justice of the *Common-Pleas*, *Edw. I.* was attainted of Felony for taking Bribes, and his Lands and Goods forfeited, as appears in the Pleas of Parliament, 18 *Edw. I.* and he was banished the Kingdom as unworthy to live in that State, against which he had so much offended.

Sir *William Thorpe*, Chief Justice of the *King's Bench*, in *Edw. III.*'s time, having of five Persons received five several Bribes, which in all amounted to 100 *l.* was for this alone adjudged to be

hanged, and all his Lands and Goods forfeited. The Reason of this Judgment is entred in the Roll, in these Words :

Quia prædictus Willielmus Thorpe, qui sacramentum Domini Regis erga populum suum habuit ad custodiendum, fregit malitiose, false & rebelliter, quantum in ipso fuit; because that he, as much as in him lay, had broken the King's Oath made unto the People, which the King had intrusted him withal.

There is this notable Declaration in that Judgment; that is, That this Judgment was not to be drawn into Example against any other Officers who should break their Oaths, but only against those *qui prædictum sacramentum fecerunt & fregunt, & habent leges Angliæ ad custodiendum*; that is, only to the Judges Oaths, who have the Laws entrusted to them.

This Judgment was given 24 *Edw. III.* The next Year in the Parliament 25 *Edw. III.* it was debated in Parliament, whether this Judgment was legal; & *nullo contradicente*, it was declared to be just, and according to the Law; and that the same Judgment may be given in time to come upon the like Occasion. This Case is in point, that it's Death for any Judge wittingly to break his Oath, or any part of it.

This Oath of *Thorpe* is entred in the Roll, and is the same *verbatim* with the Judges Oath in 18 *Edw. III.* and the same which the Judges now take.

Your Lordships will give me leave to observe the Differences between that and the Case in question.

First, That of *Thorpe* was only a felling of the Law by Retale to those five Persons; for he had only five several Bribes of those five Persons; the Passage of the Law to the rest of the Subjects, for ought appears, was free and open.

But these Opinions are a Conveyance of the Law by wholesale, and that not to but from the Subject.

In that of *Thorpe*, as to those five Persons, it was not an absolute Denial of Justice; it was not a damming up, but a streightning only of the Channel.

For whereas the Judge ought *judicium reddere*, that is, the Law being the Birth-right and Inheritance of the Subject, the Judge, when the Parties in Suit demand Judgment, should *redare*, freely restore this Right unto them; now he doth not *dare*, but *vendere*, with the Hazard only of perverting Justice; for the Party that buys the Judgment may have a good and honest Cause.

But these Opinions, besides that they have cost the Subject very dear, dearer than any; nay, I think I may truly say, than all the unjust Judgments that ever yet have been given: Witness the many hundred thousand Pounds which under Colour of them have been levy'd upon the Subject, amounting to seven hundred thousand Pounds and upwards in Money paid unto the Treasurer of the Navy; besides what the Subjects have been forced to pay to Sheriffs, Bailiffs, and others, which all together, as is conceived, amounts not to much less than a Million; besides the infinite Vexation of the Subjects by Suits in Law, binding them over to Attendance at the Council-Board, taking of them from their necessary Employments in making of Assesses, and Collections, and Imprisonment of their Persons: I say, *my Lords*, besides what is past, to make our Miseries complete,

they have as much as in them lies made them endless; for by these Opinions they have put upon themselves and their Successors an Impossibility of ever doing us Right again, and an Incapacity upon us of demanding it so long as they continue.

My Lords, In that fore Famine in the Land of Egypt, when the Inhabitants were reduced to the next door to Death, for there they say, *Why should we die for Bread?* First they gave their Money; next, their Flocks and Cattle; and last of all, their Persons and their Lands, for Bread; and all became *Pharaoh's*. But by this *Lex Regia*, there is a Transaction made, not only of our Persons, but of our Bread likewise, wherewith our Persons should be sustained. That was for Bread, this is of our Bread. For, *my Lords*, since these Opinions (if we have any thing at all) we are not at all beholden to the Law for it, but are wholly cast upon the Mercy and Goodness of the King.

Again, There the *Egyptians* themselves sold themselves and all they had to the King; if ours had been so done, if it had been done by our own free Consent in Parliament, we had the less Cause to complain: but it was done against our Wills, and by those who were trusted, and that upon Oath, with the Preservation of those things for us.

My Lords, The Laws are our Forts and Bulwarks of Defence. If the Captain of a Castle, only thro' Fear and Cowardice, and not from any Compliance with the Enemy, surrender it; this is Treason, as was adjudged in the Parliament, 1 *Ric. 2.* in the two Cases of *Grymes* and *Weston*, and in the Case of the Lord *Gray*, for surrendring of *Berwick Castle* to the *Scots* in *Edw. III.*'s time, tho good Defence had been made by him, and that he lost his eldest Son in maintenance of the Siege; and yet the Loss of a Castle only loseth not a Kingdom, but the Place and adjacent Parts, without Trouble to the whole.

But by these Opinions, there is a Surrender made of all legal Defence of Propriety; that which hath been preached is now judged, that there is no *meum & tuum* between the King and the People, besides that which concerns our Persons.

My Lords, The Law, it is the Temple, the Sanctuary whither the Subject is to run for Shelter and Refuge. Hereby it is become *Templum sine Numine*, as was the Temple built by the *Roman* Emperor, who after he had built it, put no Gods into it.

We have the Letter of the Law still, but not the Sense.

We have the Fabrick of the Temple still; but the Gods, the *Dii Tutelares* are gone.

But, *my Lords*, this is not all the Case (that is) that the Law now ceaseth to aid and defend us in our Rights, for then Possession alone were a good Title, if there were no Law to take it away; *occupanti concederetur, & melior esset possidentis conditio*. But this (tho too bad) is not the worst; for besides that which is privative in these Opinions, there is somewhat positive: for now the Law doth not only not defend us, but the Law itself is made the Instrument of taking all away.

For whensoever his Majesty or his Successors shall be pleased to say, That the Good and Safety of the Kingdom is concerned, and that the whole Kingdom is in danger, then when and how the same is to be prevented, makes our Persons and all we have liable to bare Will and Pleasure.

By this Means, the Sanctuary is turned into a Shambles: The Forts are not slighted, that so they might neither do us Good or Hurt; but they are held against us by those who ought to have held them for us, the Mouth of our own Cannon is turned upon ourselves.

My Lords, in these Expressions there is no Reflection upon his Majesty: It is only that those Judges would have forced upon the Law an unnatural and contrary Motion; his Majesty's Carriage in the Business clears his Justice.

The first Opinion of the Judges under their Hands, was procured by my Lord *Finch's* Solicitation only, and by him brought to his Majesty. These Opinions procured the Letter from his Majesty for the Opinions inrolled, wherein, as likewise in the Case in the *Exchequer*, the Judges were left free, as was acknowledged by two of the Judges in the *Exchequer-Chamber*, who argued against those Opinions, with this Protestation, that if there were any Miscarriages in that Business it must fall wholly upon themselves; that the King was blameless.

My Lords, we know his Majesty's Justice is the fairest, the richest Diamond in his Crown; the Dust which these Men would have blown, and forced upon it, is fallen short; and with your Lordships helping Hands, it will, we hope, be cast upon their own Faces, a fitter place for it than the other.

My Lords, the Oaths of the Judges, as they bind them to the due Administration of Justice to the Subjects, according to the Laws, so as they be of the King's Council by their Oaths, they are bound lawfully to counsel him; that is, when their Opinions are demanded, they are to deliver them according to the Law.

I shall therefore put your Lordships in mind of the memorable Proceedings against those Judges who have broken this part of their Oath, in that notable Parliament held the eleventh of *Richard* the Second.

In this Parliament, Judgment of High-Treason was given against eighteen several Persons, † and all (save one of them) of eminent Rank; three Privy Counsellors; the Arch-Bishop of *York*, the Duke of *Ireland*, and Earl of *Suffolk*; the Bishop of *Exeter* the King's Confessor; five Knights, some whereof had been Servants to *Edward* the Third, and all save one, Servants to the then King; and some of them of Noble Descent; six Judges, *Lockton* the King's Serjeant at Law, *Blake* of the King's Counsel at Law, and *Uske* the Under-Sheriff of *Middlesex*. Of these eighteen, eight were executed, that is, Sir *Robert Tresilian* the Chief Justice, five Knights, *Blake* of the King's Counsel at Law, and *Uske* the Under-Sheriff. Three, that is, the Arch-Bishop of *York*, Duke of *Ireland*, and Earl of *Suffolk*, fled.

The rest had their Lives pardoned, but were banished; their Lands and Goods forfeited, and little Pensions allowed them during their Lives. It was made Felony for any one to procure their Pardons, and they to be dealt with as Traitors, if they returned from their Banishment: And of those eighteen Persons all save three were impeached by the Commons.

The Offences which procured these exemplary Punishments, altho their Proceedings be long, and comprehended all that was done in this Parliament, I'll briefly open them to your Lordships.

During the Minority of that King, by ill Counsel of some near his Person, there were Miscarriages in Government. In the tenth Year of his Reign, and the twentieth of his Age, a Parliament was holden: in that Parliament, in aid of good Government, and of due Execution of the Laws, a Commission was awarded to 12 several Peers, and others of greatest Wisdom and Fidelity. The Commissioners had Power in all things concerning the Household, Courts of Justice, and the Revenues; in a Word, in all things concerning the Good of the Realm; with full Power finally to determine and put in Execution such Determination for the Honour of the King, the better Governance of the Peace and Laws of the Realm, and Relief of the People.

This Commission was to endure one Year; at the Year's end the King would be of full Age.

My Lords, the endeavouring to overthrow this Commission issued by Authority of Parliament for the Welfare of the Realm, upon pretence that it trenched upon the Royal Power, tended to the Disherison of the King, and Derogation of the Crown, together with the Destruction of the Commissioners who procured it, and put the same in Execution, upon pretence that they and some others had in Parliament forced the Royal Assent:

My Lords, the conspiring to overthrow this Commission, and the Procurers of it, is the Case in brief: for altho there be divers other Articles against many of them, yet this was the Ground-Work of all, and this singly and alone is declared in all the Proceedings in Parliament to be Treason. Of these 18 Persons condemned, 5 of them were Plotters, *viz.* the Arch-Bishop, Duke of *Ireland*, Earl of *Suffolk*, *Tresilian* the Chief Justice, and Sir *Nicholas Bramber*; these insinuated into the King, That this Commission was in diminution of his Kingly Power, that the Procurers of it had extorted his Royal Assent; and that this was Treason. Thereupon *Blake* one of the King's Counsel at Law was advised withal, who declared his Opinion, that it was Treason; he was commanded to prepare an Indictment of Treason against the Commissioners, and some of the Procurers of it, who had been active therein.

The Indictment was drawn by him, which is entered in the Roll, and is to this effect.

That they had traiterously conspired amongst themselves in the Parliament, to make this Commission by Authority of Parliament against the Regality of the King, to his Disherison, and Derogation of the Crown; that they compelled the King's Consent, and that they confederated and bound themselves to maintain one another in so doing.

It was intended that they should be tried upon this Indictment in *Middlesex* or in *London*. *Uske* the Under-Sheriff of *Middlesex* was acquainted with the Business, who was to prepare Things for the effecting of this Design, some of the Parties to be indicted, not being Peers: which he performing accordingly, was therefore executed.

The five Plotters, that the King might the more confide in their Counsels, (for so are the Words of the Record) and that under the Colour of Law they might cover their Malice from the King and the Kingdom, before the Trial was to be had, they advise the King to demand the Opinion of some of the Judges, that is of the two Chief Justices, and Chief Baron, the Judges of the Common Pleas, six in number, and of *Lockton* the

† *Vid.* Trial I. in this Collection.

King's Serjeant. *Blake* of the King's Counsel at Law was commanded to draw up these Questions for the Judges Opinions, who did it accordingly.

For the drawing up of these Questions, and the Indictment, *Blake* was condemned and executed.

The Question being drawn into Writing, the Judges were sent for to *Nottingham* Castle, where, in the King's Presence, they were commanded upon their Allegiance to deliver their Opinions.

1. The first Question was, Whether the Commission was in Derogation of the Crown? They answered, it was.

2. The second Question was, Whether the persuading and urging the King's Consent in Parliament thereto was Treason? They answered, That it was. Tho there were some other Questions asked, all concerning Parliamentary Proceedings, yet these were the main, and those for which they were condemned, as appears by the Replication of the Commons to the Judges Answer, and by the Words of the Judgment, *viz.* That they knew that this Commission was awarded in Parliament, that it was for the publick Good, that they knew of the traitorous Intents to destroy the Procurers of this Commission; that they knew the Law, and that it was not Treason; and had delivered their Opinions thereby under colour of Law, to cover their treasonable Intent: and therefore Judgment of Treason was given against them, and against *Lockton* the King's Serjeant at Law, who had subscribed the Opinions with the Judges.

Sir *Simon Burley*, one of the five Knights that were executed, was condemned only for conspiring the Death of the Procurers of this Commission: and altho there be other Articles against the rest, yet this alone is adjudged Treason in the several Judgments against every one of the eighteen.

1. My Lords, it is observable in all these Judgments, that they are adjudged Traitors, as well against the Person of the King as against the Commonwealth.

2. It is there declared upon great Advice taken, that in Treasons which concern the King and Kingdom, they are not bound to proceed according to the Rules of the Common Law and inferior Courts, but according to the Course of Parliaments, so as may be for the common Good.

3. Judgment was given in Parliament, and Execution awarded, and afterwards a Bill of Confirmation passed, in respect of their Lands, to give them from a Day past; and for Declaration that this should be no Precedent to inferior Courts to adjudge the same Cases Treason, save only in Parliament.

These Judgments were not huddled up in haste, but they were given upon long and mature Deliberation. These Judgments were the whole Work of that Parliament; and the Proceedings against the five Plotters, were begun the fourteenth of *November*, and the Judgments were not given till the thirteenth of *February* following, which was a quarter of a Year. And it is declared in the Roll, that they spent a long time, and took great pains to examine the Evidences, the better thereby to satisfy their own Consciences and the World.

I insist the more upon this, to take away all Blemish from these Proceedings.

It is true, my Lords, these Judgments were afterwards in the Parliament of 21 *Rich. 1.* revoked and made void.

But, my Lords, that Parliament of 21 *Rich. 2.* of Revocation was held by Force, as it is declared in the Parliament Rolls of 1 *Hen. 4. N. 21, 22.* that it was held *viris armatis, & sagittariis immensis.*

The Knights of Parliament were not elected by the Commons, *prout mos exigit, sed per regiam voluntatem*: And so the Lords, *summoniri fecit Rex Dominos sibi adhaerentes.*

My Lords, by these Proceedings it doth appear, that this Parliament of Revocation was no free Parliament, if at all it deserves the Name of a Parliament. But to put all out of doubt, in the Parliament of 1 *Hen. 4. n. 48.* these Judgments of Revocation are declared to be *omnes, iniqua, & omni juri & rationi repugnantia*, erroneous, wicked, and contrary to all Right and Reason. In the Parliament of 1 *Hen. 4.* in Print, these Attainders are confirmed: So that these Judgments of Attainder have the Authority of two Acts of Parliament, both of them of Force at this Day.

Your Lordships will give me leave to observe the Differences and Agreements, between the Offences of those and of the present Judges, and as well in the Way and Manner of Procurement, as in the Matter of them. For the Manner of Procurement, those Judges in *Rich. II's* time were in the King's Presence; and as it is in the Parliament Roll of 1 *Hen. 4. n. 18.* they were *violenter attracti*, violently drawn to deliver their Opinions, and that *metu mortis & cruciatu corporis*, for the fear of Death and Tortures of their Bodies: and at their Trials severally they say, That in part Violence had been offered to their Persons; because they had differed in the delivery of their Opinions. My Lords, this was such a Miscarriage in the Judges, these Circumstances considered, as might *cadere in virum fortem & constantem*. But, my Lords, Fear or Cowardice is no Plea for delivering up of the Forts and Bulwarks of the Kingdom.

But in the present Business, there is none of all this, it came from within; there is no outward Force. In those of *Rich. II.* it was *Actus unicus*, once done at *Nottingham* Castle; if the Judges had been put to it the Second time, perhaps the rest, as well as some of them, had repented, and would not have done it over again: for *Belknappe*, the Chief Justice of the *Common-Pleas*, the same Day declared his Sorrow, and said, That now there remained nothing but a Horse, a Hurdle, and a Halter; and *Fulstorp*, another of them, the next Day declared his Grief for what he had done. But here, after the Opinion in *November* 1635, a Year after, *viz.* 1636, they proceed *a pessimo ad pejus pessimo*; for that was with Additions: Most of them declared their Opinions in their Circuits, and a Year after confirmed it again by the Judgment in the *Exchequer*. Here it was done Year after Year in cold Blood: One murderous Blow, whereupon Death follows, is Felony; but to multiply Wounds upon the dead Body, and to come again in cool Blood to do it, it shews the Height of Malice. In these two things they agree:

1. That which the Judges did in *Rich. II's* time, they did against their own Knowledge; they knew the Commission was done by Act of Parliament: so here these knew the Petition of *Right* damned the Commissions of *Loans*, a stronger Case than that; they subscribed many of them, knew that the Commission of *Excise* was damn'd in Parliament; they knew the other Proceedings in Parliament, and if they had forgotten them, they were afterwards

afterwards put in mind of them; they needed not to have consulted with Books and Journals of Parliaments, saving only with their own Memories.

2. They agree in this, That their Opinions tended to the Subversion of the Laws and Statutes of the Kingdom: for in that of *Rich. II.* the Pre-
tence was, the endeavouring to overthrow Parliaments, and Parliamentary Proceedings; the Conspiracy of the Death of the Procurers, was only an Aggravation. It was not Treason to conspire the Death of a Privy-Counsellor, or to kill a Judge, unless he be upon the Bench; and in that Case it is Treason, because of the Malice, not of the Person, but to the Law: so that there the Treason lay in this, not that they conspired barely against their Persons, but with reference to their Proceedings in Parliament, and thereby to overthrow the Acts of Parliament, wherein these Persons had been principal Actors. But in this again they disagree; for in that Case there was only a Conspiracy, no Death followed to the Procurers of the Commission, nor was the Commission overthrown; all that was done, was only this, That a Warrant was directed to the Lord Mayor of London, for apprehending their Persons to bring them to Trial, which yet was not done. But here (after the Opinions delivered) Judgment was afterwards given by them in the *Exchequer*, and Execution awarded thereupon, for so much as concerns our Property.

And likewise in the *King's-Bench*, where the Judges after the Judgments in the *Exchequer* refused to hear any more Debate of the Matter; and so for the Liberty of our Persons, by keeping divers of the Subjects in Prison, Term after Term, for not paying Ship-Money, and other things depending upon those Opinions, when they had been brought before them upon their *Habeas Corpus*.

In that of *Rich. II.* it was for overthrowing but one Act of Parliament, which was likewise introductive of a new Law; for the Commission had no Rise from the Common Law; for in truth it was derogatory to the Crown: It had only the Strength of the Parliament to support it, which was sufficient, it was for the common Good.

But here the Endeavour was at once, not to blow up one Act of Parliament, but all; and these not introductive, but declaratory of the Common Law, as was the Petition of *Right*, the Statutes there mentioned, and the Resolutions.

That of *Rich. II.* was but the blowing up of the upper Deck; this of the Common Law, and the Statutes too, and the old Foundations, and the Structures built upon them, all together.

In that of *Rich. II.* it was only to overthrow a temporary Act of Parliament, that was to continue no longer than one Year; but this to make an eternal Devastation; (for *toties quoties*) to the World's End as his Majesty or his Successors shall say, That the Kingdom is in Danger, may these Opinions be put in Execution, and likewise they are enrolled in all the Courts of *Westminster-Hall*, in perpetuam rei memoriam.

The Sin against the Holy Ghost is therefore unpardonable, because it takes from the Party Repentance, the Means of Pardon. To put us therefore into a Case of Desperation, some of them have publickly, and upon the Bench, de-

clared, That this Prerogative is so inherent in the Crown, as that it cannot be taken away by Act of Parliament.

As they have put an Impossibility upon themselves, so would they put an Impossibility upon his Majesty, your Lordships, and the whole Parliament, for ever righting us again.

My Lords, *Contraria juxta se posita magis elucescunt.* I have presented your Lordships with the Obliquity of the ill Judges in *Rich. II.*'s Time, give me leave to present your Lordships with one Example of a contrary Nature; and that was in Queen *Elizabeth's* time, in the 29th Year of her Majesty's Reign: She erects a new Office in the *Common-Pleas*, for the making of *Superfedeas* in *Exigents* that issued there; she grants it to *Richard Cavendish*, her Servant, sends to have him admitted; but the Judges delay the doing of it, for this Reason, because the *Protbonotaries* and *Philazers* claimed the making of those Writs. The Queen sends a sharp Letter, and commands them forthwith to admit him, yet the Judges forbear. The Queen sends a sharper Letter, commanding them to shew the Reasons of their Contempt and Disobedience to the then Lord Keeper, and the Earl of *Leicester*, no mean Men in those Days: the Judges deliver their Reasons why they had refused, that it was because others claimed the making of those Writs.

The Queen sends a fourth peremptory Message for their admitting him, with this Reason, That if the others were put out, they were rich and able Men; and that her Courts of Justice were open, where they might demand their Rights.

This was not to take away the Right, but to put them to their Action.

The Judges humbly returned this Answer, That the Queen had taken her Oath for the Execution of Justice, according to the Law; that they did not doubt, but that when her Majesty was inform'd that it was against Law, she would do what befitted her: for their parts they had taken an Oath to God, to her, and the Commonwealth; and if they should do it without Process of Law before them, and only upon her Command put the other out of Possession, tho the Right remained to them, it were a Breach of their Oaths; and therefore if the Fear of God were not sufficient, they told her the Punishment that was inflicted upon their Predecessors for Breach of their Oaths, (citing these of *Thorpe* and *Rich. II.*'s time) that they might be sufficient Warning to them. The Queen hearing of these Reasons, was satisfy'd; and the Judges heard no more of the Business.

These Judges have had Examples of both kinds before them; they might have chosen the Good, and refused the Bad.

My Lords, Besides these Judgments and Opinions, the Commons will in due time bring up these Judges with their other Judgments, *Corpora cum causis*; for your Lordships will easily conceive, that they who have done this, have done more: the Principal of them, I mean my Lord Keeper, stands accused before your Lordships of High-Treason: He is not here, Justice goes *pede lento, sed certo*, it will overtake him at the last.

This remains under the Hand of Anderson the Lord Chief Justice in his Reports, Vol. I. pag. 152—158.

The next Step that is making after him, are the Articles of his Impeachment, which, with your Lordships Patience, are now ready to be opened and delivered to your Lordships.

Mr. Hide * *spake afterwards in the following manner.*

My Lords,

THere cannot be a greater Instance of a sick and languishing Commonwealth, than the Buſineſs of this Day. Good God! how have the Guilty theſe late Years been puniſhed, when the Judges themſelves have been ſuch Delinquents! 'Tis no marvel that an irregular, extravagant Arbitrary Power, like a Torrent, hath broke in upon us, when our Banks, and our Bulwarks, the Laws, were in the Cuſtody of ſuch Perſons. Men who had loſt their Innocence, could not preſerve their Courage; nor could we look that they who had ſo viſibly undone us themſelves, ſhould have the Virtue or Credit to reſcue us from the Oppreſſion of other Men. It was ſaid by one who always ſpoke excellently, That the twelve Judges were like the twelve Lions under the Throne of Solomon; *Under the Throne in Obedience, but yet Lions:* Your Lordships ſhall this day hear of ſix, who (be they what they will be elſe) were no Lions, who upon vulgar fears delivered up the precious Forts they were truſted with, almoſt without aſſault; and in a tame eaſy Trance of Flattery and Servitude, loſt and forfeited (ſhamefully forfeited) that Reputation, Awe, and Reverence, which the Wiſdom, Courage, and Gravity of their venerable Predeceſſors had contracted and faſtned to the Places they now hold; and even rendred that Study and Profeſſion, which in all Ages hath been, and I hope now ſhall be of an honourable Eſtimation, ſo contemptible and vile, that had not this bleſſed Day come, all Men would have had that quarrel to the Law itſelf, which *Marcus* had to the *Greek Tongue*, who thought it a Mockery to learn that Language, the Maſters whereof lived in Bondage under others. And I appeal to theſe unhappy Gentlemen themſelves, with what a ſtrange Negligence, Scorn, and Indignation, the Faces of all Men, even of the meaneſt, have been directed towards them, ſince (to call it no worſe) that fatal Declenſion of their Underſtandings, in thoſe Judgments of which they ſtand here charged before your Lordships.

But, my Lords, the Work of this Day is the greateſt Instance of a growing, and thriving Commonwealth too; and is as the Dawning of a fair and laſting Day of Happineſs to this Kingdom.

It is in your Lordships Power (and I am ſure it is in your Lordships Will) to reſtore the dejected broken People of this Iſland to their former Joy and Security, the Succeſſors of theſe Men to their own Privilege and Veneration: *Et ſepultas prope leges revocare.*

So theſe Judges enter themſelves, and harden their Hearts by more particular Treſpaſſes upon the Law; by Impoſitions and Taxes upon the Merchants in Trade; by Burdens and Preſſures upon the Gentry in Knighthood; before they could arrive at that univerſal Deſtruction of the Kingdom by Ship-Money, which promiſed Reward and Security for all their former Services, by doing the Work of a Parliament to his Maſteſty in Supplies, and ſeemed to delude Juſtice, in leaving none to

judge them, by making the whole Kingdom Party - to their Oppreſſion.

My Lords, the Commons aſſembled in Parliament hope that your Lordships will call theſe Judges ſpeedily before you to answer theſe Articles laid to their charge, that the Nation may be ſatisfied in your Lordships Juſtice upon them, as their Crimes demerit.

Then Mr. *Pierpoint* delivered in the following Articles againſt Sir *Robert Berkley*, one of the Juſtices of the *King's Bench*.

Articles of Impeachment of Sir Robert Berkley Kt. one of the Juſtices of the Court of King's-Bench, by the Commons in this preſent Parliament aſſembled, in their own Name, and in the Name of all the Commons of England, in maintenance of their Accuſation, whereby he ſtandeth charged with High-Treaſon, and other great Miſdemeanours.

Imprimis, **T**hat the ſaid Sir *Robert Berkley*, then being one of the Juſtices of the ſaid Court of *King's-Bench*, hath traiterouſly and wickedly endeavoured to ſubvert the fundamental Laws, and eſta bliſhed Government of the Realm of *England*; and inſtead thereof, to introduce an Arbitrary and Tyrannical Government againſt Law, which he hath declared by traiterous and wicked Words, Opinions, Judgments, Practices, and Actions appearing in the ſeveral Articles enſuing.

2. Whereas by the Statute made in the 25th year of the Reign of *K. Henry VIII.* Prices of Victuals are appointed to be rated in ſuch manner, as in the ſaid Statute is declared; but it is manifeſt by the ſaid Statute, Corn is none of the Victuals thereby intended: Nevertheleſs ſome ill-affected Perſons endeavouring to bring a Charge upon the Subjects contrary to Law, did furniſh, that the Prices of Corn might be rated, and ſet according to the direction of that Statute; and thereupon great gain might be raiſed to his Maſteſty by Licenſes and Diſpenſations for ſelling Corn at other Prices: And a Command from his Maſteſty being procured to the Judges, and ſent to them by *William Noy* Eſq; his Maſteſty's then Attorney-General, to deliver their Opinions touching the Queſtion, whether Corn was ſuch Victuals as was intended to have the Price rated within the ſaid Statute: In answer to which, the ſaid Sir *Robert Berkley* then being one of his Maſteſty's Juſtices of the Court of *King's-Bench*, in furtherance of the ſaid unlawful Charge, endeavoured to be impoſed as aforeſaid, the thirtieth day of *November*, in the eighth year of his now Maſteſty's Reign, did deliver his Opinion, That Corn was ſuch Victual as was intended to have the Price rated within the ſaid Statute; which ſaid Opinion was contrary to Law, and to the plain ſenſe and meaning of the ſaid Statute, and contrary to his own Knowledge, and was given and delivered by him, with a purpoſe and intention, that the ſaid unlawful Charge might be impoſed upon the Subject.

3. That an Information being preferred in the Court of *Star-Chamber* by the ſaid *William Noy*, his Maſteſty's then Attorney-General, againſt *John Overman*,

* Afterwards Lord Chancellor of England.

man, and fifteen other Soap-makers, Defendants, charging them with several pretended Offences, contrary to divers Letters Patents, and Proclamations, touching the making and uttering Soap, and using the Trade of Soap-makers, and other Offences in the said Information mentioned; whereunto the Defendants did plead, and demur as to part, and answer to other parts of the said Information: And the said Plea and Demurrer being over-ruled, for that the Particulars therein insisted upon, would appear more fully after Answer and Proof; therefore the Defendants were ordered to answer without prejudice, and were to be admitted to such Exceptions to the said Informations, and Advantages of the matter of the Plea and Demurrer upon the Hearing, as shall be material; and accordingly the Defendants did put in their Answers, and set forth several Acts of Parliament, Letters Patents, Charters, Customs, and Acts of Common-Council of the City of London, and other matters materially conducing to their Defence; and, in conclusion, pleaded not guilty. The said Sir Robert Berkley then being one of the Justices of the Court of King's-Bench, upon the 30th day of March, in the eighth Year of his Majesty's Reign, upon an Order of Reference to him and others, by the said Court of Star-Chamber, to consider of the Impertinency of the said Answers, did certify the said Court of Star-Chamber, That the whole Answers, excepting the four words and ten last lines, should be expunged; leaving thereby no more substance of the said Answers, than the Plea of Not guilty. And after, upon a Reference to him and others, by Order of the said Court, of the Impertinency of the Interrogatories, and Depositions of Witnesses taken on the Defendants part in the same Case, Sir Robert Berkley, upon the second day of May, in the eighth year of his now Majesty's Reign, certified, That nine and thirty of the said Interrogatories, and the Depositions upon them taken, should be suppressed, with the Answers, (except as aforesaid) and Depositions, altho the same did contain the said Defendants most material Defence, yet were they expunged and suppressed according to the said Certificates; both which said Certificates were contrary to Law and Justice and contrary to his the said Sir Robert Berkley's own Knowledge, and contrary to the said former Order, whereby the Advantages were saved to the Defendants, as aforesaid: And by reason thereof the said John Overman, and the said other fifteen Defendants, were sentenced in the said Court of Star-Chamber to be committed Prisoners to the Fleet, and disabled from using their Trade of Soap-makers; and one of them fined in 1500*l.* two of them in 1000*l.* a-piece, four of them in 1000 Marks a-piece; which Fines were estreated into the Exchequer without any mitigation: And the said Defendants, according to the said Sentence, were imprison'd, and deprived of their Trade and Livelihood, tending to the utter Ruin of the said Defendants, and to the Overthrow of free Trade, and contrary to the Liberty of the Subject.

4. That he the said Sir Robert Berkley, then being one of the Justices of the King's-Bench, and having taken an Oath for the due Administration of Justice, according to the Laws and Statutes of this Realm, to his Majesty's Liege People, on or about the last of December subscribed an Opinion in *hæc verba*: 'I am of opinion, that as where the Benefit doth more particularly redound to the good of the Ports or Maritime Parts, (as in

' Case of Piracy or Depredations upon the Seas) there the Charge hath been, and may be lawfully imposed upon them, according to Precedents of former Times; so where the Safety and Good of the Kingdom in general is concerned, and the whole Kingdom in danger, (of which his Majesty is the only Judge) there the Charge of the Defence ought to be borne by all the Realm in general: This I hold agreeable both to Law and Reason'.

5. That he the said Sir Robert Berkley, then being one of the Justices of the Court of King's-Bench, and duly sworn as aforesaid, in Feb. 1636. subscribed an extra-judicial Opinion, in answer to Questions in a Letter from his Majesty, in *hæc verba*.

Charles Rex.

WHEN the Good and Safety of the Kingdom in general is concerned, and the whole Kingdom in danger; whether may not the King, by Writ under the Great Seal of England, command all the Subjects of this Kingdom at their charge to provide and furnish such number of Ships with Men, Victuals and Munition, and for such time as he shall think fit, for the defence and safeguard of the Kingdom, from such Danger and Peril? and by Law compel the doing thereof in case of refusal, or refractoriness? and whether in such case, is not the King sole Judge, both of the Danger, and when and how the same is to be prevented and avoided? C. R. 'May it please your most excellent Majesty, we have, according to your Majesty's Command, severally every Man by himself, and all of us together, taken into serious consideration the Case and Question signed by your Majesty, and inclosed in your Royal Letter: And we are of opinion, that when the Good and Safety of the Kingdom in general is concerned, and the whole Kingdom in danger, your Majesty may, by Writ under the Great Seal of England, command all your Subjects of this your Kingdom, at their charge to provide and furnish such number of Ships, with Men, Victuals, and Munition, and for such time as your Majesty shall think fit, for the defence and safeguard of the Kingdom from such Danger and Peril; and that by Law your Majesty may compel the doing thereof in case of refusal, and refractoriness: And we are also of opinion, that in such case your Majesty is the sole Judge, both of the Danger, and when and how the same is to be prevented and avoided. John Brampton, John Finch, Humphry Davenport, John Denham, Richard Hutton, William Jones, George Crooke, Thomas Trevor, George Vernon, Robert Berkley, Francis Crawley, Richard Weston.'

6. That he the said Sir Robert Berkley, then being one of the Justices of the Court of King's-Bench, and duly sworn as aforesaid, did on the deliver his Opinion in the Exchequer-Chamber against John Hampden Esq; in the Case of Ship-Money, That he the said John Hampden, upon the matter and substance of the Case, was chargeable with the Money then in question; a Copy of which Proceeding and Judgment the Commons of this present Parliament have deliver'd to your Lordships.

7. That he the said Sir Robert Berkley, then being one of the Justices of the Court of King's-Bench, and one of the Justices of Assize for the County of York, did at the Assizes held at York,

in *Lent* 1636, deliver his Charge to the Grand Jury, *That it was a lawful and inseparable Flower of the Crown for the King to command, not only the Maritime Counties, but also those that were Inland, to find Ships for the defence of the Kingdom.* And then likewise falsely and maliciously affirmed, *That it was not his single Judgment, but the Judgment of all his Brethren, witnessed by their Subscriptions.* And then also said, *That there was a Rumor, that some of his Brethren that had subscribed, were of a contrary Judgment; but it was a base and unworthy thing, for any to give his Hand contrary to his Heart: and then wished for his own part, that his Hand might rot from his Arm, that was guilty of any such Crime; when as he knew that Mr. Justice Hutton, and Mr. Justice Crooke, who had subscribed, were of a contrary opinion, and was present when they were persuaded to subscribe; and did subscribe for Conformity, only because the major number of the Judges had subscribed.* And he the said Sir Robert Berkley then also said, *That in some Cases the Judges were above an Act of Parliament; which said false malicious Words were uttered, as aforesaid, with intent and purpose to countenance and maintain the said unjust Opinions, and to terrify his Majesty's Subjects that should refuse to pay Ship-Money, or seek any remedy by Law against the said unjust and illegal Taxation.*

8. That whereas *Richard Chambers* Merchant, having commenced a Suit for Trespass, and false Imprisonment, against *Sir Edward Bromfeild* Kt. for imprisoning him the said *Chambers* for refusing to pay Ship-Money, in the time that the said *Sir Edward Bromfeild* was Lord Mayor of the City of *London*; in which Suit the said *Sir Edward Bromfeild* did make a special Justification: *The said Sir Robert Berkley, then being one of the Justices of the Court of King's-Bench, in Trinity Term last, then sitting on the Bench in the said Court, upon debate of the said Case between the said Chambers and Sir Edward Bromfeild, said openly in the Court, That there was a Rule of Law, and a Rule of Government; and that many things which might not be done by the Rule of Law, might be done by the Rule of Government: And would not suffer the point of Legality of Ship-Money to be argued by Chambers's Counsel.* All which Opinions, Declarations, Words, and Speeches, contained in the third, fourth, fifth, sixth, seventh and eighth Articles, are destructive to the fundamental Laws of this Realm, the Subjects Right of Property, and contrary to former Resolutions in Parliament, and to the Petition of Right; which Resolution in Parliament, and Petition of Right, were well known to him, and resolved and enacted when he was the King's Serjeant at Law, and attendant in the Lords House of Parliament.

9. That the said *Sir Robert Berkley*, then being one of the Judges of the Court of *King's-Bench*, and being in Commission of the Peace, and duly sworn to execute the Office of a Justice of the Peace in the County of *Hertford*, on or about the 7th of *January* 1638. at which time the general Sessions of the Peace for the said County were there holden; the said *Sir Robert Berkley*, then and there sitting on the Bench, did revile and threaten the Grand-Jury returned to serve at the said Sessions, for presenting the Removal of the Communion-Table in *All-Saints Church* in *Hertford* aforesaid, out of the place where it antiently and usually stood, and setting it Altar-ways, against the Laws

of this Realm in that Case made and provided, as an Innovation in matters concerning the Church; the said Grand-Jury having delivered to them in charge at the said Sessions, by *Mr. Serjeant Atkins*, a Justice of the Peace for the said County of *Hertford*, that by the Oath they had taken, they were bound to present all Innovations concerning Church-Matters. And he the said *Sir Robert Berkley* compelled the Foreman of the Jury to tell him who gave him any such Information; and thereby knowing it to be one *Henry Brown*, one of the said Grand-Jury, he asked the said *Brown*, how he durst meddle with Church-Matters, who affirming, that in the said Charge from *Mr. Serjeant Atkins*, the said Jury was charged so to do, he the said *Sir Robert Berkley* told the said *Brown*, He should therefore find Sureties for his good Behaviour; and that he the said *Sir Robert Berkley* would set a great Fine on his Head, to make him an example to others: and thereupon the said *Brown* offered sufficient Bail; but he the said *Sir Robert Berkley*, being incensed against him, refused the said Bail, and committed the said *Brown* to Prison, where he lay in Irons till the next Morning; and used to the said *Brown*, and the rest of the Jurors, many other reviling and terrifying Speeches; and said, he knew no Law for the said Presentment; and told the said *Brown* That he had sinned in the said Presentment: And he compelled the said Grand-Jurors to say, *they were sorry for what they had done in that Presentment*, and did bid them to trample the said Presentment under their Feet; and caused *Brown* to tear the said Presentment in his sight. And he the said *Sir Robert Berkley*, when as *John Houland*, and *Ralph Pemberton*, late Mayors of *St. Albans*, came to desire his Opinion on several Indictments against *John Brown*, Parson of *St. Albans*, and *Anthony Smith*, Vicar of *St. Peter's* in *St. Albans*, at the Quarter Sessions held at the said Town of *St. Albans*, on the 24th of *June* 1369. for the Removal of the Communion-Table out of the usual Place, and not administering the Sacrament according to Law in that case provided; he the said *Sir Robert Berkley* then told them, that such an Indictment was before him at *Hertford*, and that he quashed the same, and imprisoned the Promoters: by which threatening and reviling Speeches, unjust Actions and Declarations, he so terrified the Jurors in those parts, that they durst not present any Innovations in Church-matters, to their great Grief, and Trouble of their Consciences.

And whereas several Indictments were preferred against *Matthew Brook*, Parson of *Yarmouth*, by *John Ingram* and *John Carter*, for refusing several times to administer the Sacrament of the Lord's Supper to them without any lawful Cause, at the Assizes held at *Norwich* in the Year 1633, he the said *Sir Robert Berkley*, then being one of the Judges of the Assize, proceeded then to the Trial on the said Indictments; where the Matter in issue being, *That the said Brooks refused to administer the said Sacrament, because the said Ingram and Carter would not receive Tickets with their Surnames before their Christian-names; which was a Course never used amongst them, but by the said Brook:* And the said *Sir Robert Berkley* did then much discourage the said *Ingram's* Counsel, and over-rule the Cause for Matter of Law, so as the Jury never went from the Bar, but there found for the said *Brook*: And the said *Sir Robert Berkley* bound the said *Ingram* to the good Behaviour for the prosecuting the said Indictments, and ordered him to pay Costs to the said *Brook* for wrongfully

wrongfully indicting him. And whereas the said Carter, not expecting the Trial at the same Assizes he preferred his Indictment, was then absent; whereupon the said Sir Robert Berkley did cause to be entered upon the said Indictment a *Vacat, quia non sufficiens in lege*, and order'd an Attachment against the said Carter. Which said Proceedings against the said Ingram and Carter, by the said Sir Robert Berkley, were contrary to Law and Justice, and to his own Knowledge.

10. That the said Sir Robert Berkley, being one of the Justices of the Court of King's-Bench, and duly sworn as aforesaid, in Trinity Term 1637, deferred to discharge or bail Alexander Jennings Prisoner in the Fleet, (brought by Habeas Corpus to the Bar of the said Court; the Return of his Committment being, that he was committed by two several Warrants from the Lords of the Council, dated the 5th of November 1636. the first being only read in Court, expressing no Cause, the other for not paying Messengers Fees,) until he should bring a Certificate that he had paid his Assessment for Ship-Money in the County of Bucks, but remitted him. And in Michaelmas Term after, the said Jennings being brought by another Habeas Corpus before him as aforesaid, and the same returned; yet he the said Sir Robert Berkley refused to discharge or bail him, but remitted him. And in Easter Term, after several Rules were given, for his Majesty's Counsel to shew Cause why the said Jennings should not be bailed, a fourth Rule was made for the said Jennings to let his Majesty's Attorney-General have notice thereof, and notice was given accordingly; and the said Jennings by another Habeas Corpus, being brought to the Bar in Trinity Term after, and the same Return made, with this Addition, of a new Committment of the 4th of May, suggesting the said Jennings had used divers scandalous words in derogation and disparagement of his Majesty's Government: He the said Jennings after several Rules, in the end of the said Trinity Term, was again remitted to Prison. And he the said Sir Robert Berkley did on the 5th of June last, defer to grant his Majesty's Writs of Habeas Corpus for William Pargiter and Samuel Danvers Esquires, Prisoners in the Gate-house, and in the Fleet; and afterwards having granted the said Writ of Habeas Corpus, the said Pargiter and Danvers were on the 18th of June last brought to the Bar of the said Court, where the Returns of their Committments were several Warrants from the Lords of the Council not expressing any Cause: yet he the said Sir Robert Berkley, then sitting in the said Court, deferred to bail the said Pargiter and Danvers, and the 18th of June last, made a Rule for a new Return to be received, which was returned the 25th of June last, in *hec verba*.

Whereas his Majesty finding that his Subjects of Scotland have in rebellious and hostile manner assembled themselves together, and intend not only to shake off their Obedience unto his Majesty, but also as Enemies to invade and infest this his Kingdom of England, to the danger of his Royal Person, &c.

For prevention whereof his Majesty hath by the advice of his Council-board, given special Commandment to all the Lord Lieutenants of the Counties of this Realm, to assemble the Militia at the Places appointed for their Rendezvous in their several and respective Counties, there to be conducted and drawn to-

gether into a Body for this Service. And whereas his Majesty, according to the Laws and Statutes of this Realm, and the constant Custom of his Predecessors Kings and Queens of this Realm, hath Power for the defence of this Kingdom, and resisting the Force of the Enemies thereof, to grant forth Commissions under his Great Seal to such fit Persons as he shall make choice of, to array and arm the Subjects of this Kingdom, and to compel those who are of able Bodies and able Estates, to arm themselves; and such as should not be of able Bodies, but of Ability in Estate, to assess them according to their Estates, to contribute towards the Charge of arraying others, being able of Body, and not able in Estate, to arm themselves; and such Persons as should be contrariant to commit to Prison, there to remain until the King should take further order therein. And whereas the Earl of Exeter, by virtue of his Majesty's Commission to him directed, for the arraying and arming of a certain number of Persons in the County of Northampton, hath assessed William Pargiter, being a Man unfit of Body for that Service, but being of Estate and Ability, to contribute amongst others, to pay the Sum of five Shillings towards the arraying and arming of others of able Bodies, and wanting Ability to array and arm themselves.

And whereas we have received Information from the said Earl, that the said William Pargiter hath not only in a wilful disobedient manner refused to pay the said Money assessed upon him towards so important a Service, to the disturbance and hindrance of the necessary defence of this Kingdom; but also by his ill example hath misled many others; and, as we have just cause to believe, hath practised to seduce others from that ready Obedience which they owe, and would otherwise have yielded to his Majesty's just Command, for the publick defence of his Person and Kingdom, which we purpose with all convenient speed to enquire further of and examine. These are therefore to will and require you to take into your Custody the Persons of the said William Pargiter and Samuel Danvers, and them safely to keep Prisoners till further Order from this Board, or until by due Course of Law they shall be delivered.

Yet he the said Sir Robert Berkley being desired to bail the said Pargiter and Danvers, remitted them, where they remained Prisoners till the ninth of November last, or thereabouts; altho the said Jennings, Pargiter and Danvers, on all and every the said Returns, were clearly bailable by Law; and the Counsel of the said Jennings, Pargiter and Danvers, offered in Court very sufficient Bail. And he the said Sir Robert Berkley, being one of the Justices of the Court of King's Bench, denied to grant his Majesty's Writs of Habeas Corpus to very many others his Majesty's Subjects; and when he had granted the said Writs of Habeas Corpus to very many others his Majesty's Subjects, and on the Return no Cause appeared, or such only as was clearly bailed by Law; yet he remanded them, where they remained Prisoners very long: which said deferring to grant the said Writs of Habeas Corpus, and Refusals and Delays to discharge Prisoners, or to suffer them to be bailed, contained in this Article, are destructive to the fundamental Laws of this Realm, and contrary to former Resolutions in Parliament, and to the Petition of Right; which said Resolutions and Petition of Right were well known to

him the said Sir *Robert Berkley*, and were resolved on and enacted when he was the King's Serjeant at Law, and Attendant in the Lords House of Parliament.

11. That whereas there was a Cause depending in the Court-Christian at *Norwich*, between *Samuel Booty* Clerk and *Collard* for two Shillings in the Pound, for Tithes for Rents and Houses in *Norwich*, and the said *Collard* moved by his Counsel in the Court of *King's-Bench* for a Prohibition to stay Proceedings in the Court-Christian at *Norwich*, and delivered into the said Court of *King's-Bench* his Suggestions, that the said Cause in the said Court-Christian was only for Tithes for Rents of Houses in *Norwich*, which was determinable by the Common-Law only; yet he the said Sir *Robert Berkley*, being one of the Justices of the said Court of *King's-Bench*, and sitting in the said Court, deferred to grant a Prohibition to the said Court-Christian in the said Cause, altho the Counsel did move in the said Court many several times, and several Terms, for a Prohibition. And he the said Sir *Robert Berkley* deferred to grant his Majesty's Writ of Prohibition to several other Courts, on the Motions of divers others of his Majesty's Subjects, where the same by the Laws of this Realm ought to have been granted, contrary to the Laws of this Realm and his own Knowledge.

All which Words, Opinions, and Actions, were so spoken and done by him the said Sir *Robert Berkley* traiterously and wickedly, to alienate the hearts of his Majesty's Liege People from his Majesty, and to set a Division betwixt them, and to subvert the fundamental Laws and established Government of his Majesty's Realm of *England*: For which they do impeach him the said Sir *Robert Berkley*, one of the Justices of the Court of *King's-Bench*, of High-Treason against our Sovereign Lord the King, his Crown and Dignity, and of the Misdemeanors abovementioned.

And the said Commons by Protestation, saving to themselves only the liberty of exhibiting at any time hereafter any other Accusation or Impeachment against the said Sir *Robert Berkley*, and also of replying to the Answer that he the said Sir *Robert Berkley*, shall make to the said Articles, or any of them, or of offering Proof of the Premises, or any other Impeachments or Accusations that shall be exhibited by them, as the Case shall, according to the course of Parliaments require, do pray that the said Sir *Robert Berkley*, one of the Justices of the Court of *King's-Bench*, may be put to answer to all and every the Premises; and that such Proceedings, Examinations, Trials, Judgments and Executions may be upon every of them had and used, as is agreeable to Law and Justice.

At the presenting these Articles, Mr. *Pierpoint* deliver'd himself as follows.

My Lords,

I AM commanded to present your Lordships these Articles, with which the Knights, Citizens, and Burgeesses of the Commons House of Parliament, in their own name and in the name of all the Commons of *England*, impeach Sir *Robert Berkley*, Kt. one of the Justices of his Majesty's Court of *King's-Bench*, in maintenance of their Accusation of High-Treason, and other great Misdemeanors; the Articles they desire may be read. Whereupon the Articles were read by Mr. *Francis Newport*, a Member of the House of

Commons. Then Mr. *Pierpoint* proceeded and said.

The High-Treason is in the first Article, in his Endeavours to subvert the fundamental Laws of this Realm, and to introduce an arbitrary and tyrannical Government, which hath been lately adjudged Treason in the Cause of the Earl of *Strafford*.

The other Articles prove the first by his Opinions, Certificates, Judgments, by his Denials of the Benefit of our Laws, which have been read by your Lordships. No fundamental Law to the Subject is left; our Goods, our Lands, our Bodies, the Peace of a good Conscience, are by him given up to arbitrary tyrannical Government.

Nothing hath been omitted to make a Judge know the Laws, to make him just, or fright him from being evil: We have Inns of Court peculiar to that Study, Judges from thence only chosen; seldom any but what have been twenty years there; Honours and Revenues are given to Judges, encouragement to do well; this Judge had these: Judges are sworn according to Law to serve the King, and his People; according to Law to counsel the King; and for not so doing, to be at his Will for Body, Lands, and Goods. This Judge took that Oath; the Laws (the Judges Study) impose the greatest Punishment upon unjust Judges; they shew that these Punishments have been inflicted, and more could not be done to persuade or fright a Judge.

His Offences shew in him great Ambition, yet he was most timorous of displeasing the great in Power; he did not only forbear doing what he was sworn to do, but was most active against our Laws, and in opposing and punishing any that did maintain them.

To have only received Bribes, (tho they blind the Eyes, and tho the desire to get Money increaseth with Age) that heinous Crime in a Judge had been, in comparison with his Offences, a tolerable Vice; for from such a Judge Justice is also to be had for Money. Ambition is violent, and ruins whilst Covetousness is making a bargain.

The Words of his Opinion and Judgment are for the King's Power. It is pleasing to the nature of Man, that others should obey his Will; and well-framed Dispositions of Princes may easily be persuaded, their Power is unlimited, when they are also put in mind, that therefore they have more cause to do well, and for doing well are more renowned: for in the most oppressive Designs, (which we have suffered under) the Pretences of his Majesty have ever been the Good of his Subjects; his is the Sin, that is to judge by the Laws, and knows the Laws are to the contrary, yet puts and confirms such thoughts in his Prince.

He that incites another to arbitrary Government, when his Self-ends are thereby compassed, hates him for taking that Power he persuaded him unto.

The Writs, those *Monsters of Necessity*, to provide Ships to avoid imminent Danger, that could not stay 40 Days for the Calling of a Parliament, were therefore to go out in *September*, to have Ships ready in *March*. This hath been adjudged by your Lordships to be destructive to the fundamental Laws of this Realm, and to the Subjects Right of Property and Liberty, &c. that I shall say but this concerning them; that this Judge published them to be inseparable Flowers of the

Crown;

Crown; and that we have lived to see for five Years together imminent Danger, and thus to be prevented.

This Judge did advise to such a Government, as future Kings here might exercise the highest Tyranny, and the Subjects want the Benefit of Restraints, known to the most slavish Eastern Nations; where, if their Prince do unjustly, he hath Hatred for it, and the Dangers that follow that. This Judge will have that Hatred to go to our good Laws: *No such Bondage, as when the Laws of Freedom are mis-interpreted by Judges to make Men Slaves.*

What can be considered of in a Judge of Law, to give his Opinion and Advice to his Prince, how the Laws (the mutual Covenants of Kings and Subjects) are to be broken, but that his intentions are to have his Prince do ill, by making his evil Servants to study, and to be pleased with their wicked Designs; because they see means to put them in execution, by making them to persuade their Prince, because in imminent Danger his Subjects Goods are at his Will, *that there is such Danger when there is not*, and that they have only some by-ends of their own?

This Judge will have the Law to be what to him seems Reason; the Reason limited to him to judge of, is what the Common Law faith is so, what a Statute hath so enacted. For him to judge this or that is Law, else a Mischief shall follow, because the Law in such a thing is imperfect, therefore he will make a Law to supply it; or because that the Law written in such Particulars is against his Reason, therefore his Reason's to be Law; then must follow, as often as a Judge's Reason changes, or Judges change, our Laws change also.

Our Liberties are in our Laws, which a Subject may read, or hear read; this is his, this he may do and be safe: and that thus the Judge ought to give Judgment, and then he is free. The excessive growth of Courts of Reason and Conscience came from great and cunning Persons; and tho not the most sudden, yet the most dangerous, and sure ways to eat out our Laws, our Liberties.

Unlimited Power must be in some to make and repeal Laws, to fit the dispositions of Times and Persons: Nature placeth this in common Consent only; and where all cannot conveniently meet, instructeth them to give their Consents to some they know or believe so well of, as to be bound to what they agree on. His Majesty, your Lordships, and the Commons, are thus met in Parliament; and so long as we are often reduced to this main Foundation, our King and we shall prosper.

This Judge will not allow us our Knowledge, or any Reason; he will have our Minds, our Souls Slaves. A Grand Jury Man gave his Fellows true Information; they present an Innovation in Church, are threatened and reviled for it; he that told this truth is charged (I shall use this Judge's own words) to sin in that, and that he made others forswear themselves; this Judge sent him to the common Goal, where he is laid in Irons; and all this, because he and they durst meddle with Church-Matters. He is forced to tear the Presentment in Pieces in open Court. Our Laws provide for the Peace of our Consciences, many Acts of Parliament are for it, and the Trust by those Acts set to Juries: this Judge well knew all this; your Lordships have heard what he did to the Jury at Hertford;

VOL. V.

he would have us know no more Divinity than to obey what the chief of the Clergy directed, no more Law than what he said was so.

Judges in former Times (except only such as were examples of Punishment, as of Injustice) in Cases of great and publick Concernment, forbear Proceedings till the next Parliament. This necessitated the Calling of Parliaments. This Judge had as many such Causes before him, as ever any had; yet he never desired the Resolution of Parliament in any one; for the ways he went, the Necessity was never to have a Parliament; he would pull up that Root of our Safeties and Liberties, which whilst we enjoy, the Malice or Injustice of all other Courts and Persons can never ruin; and when near to Ruin, (as most near of late) this only sure Remedy will help us; nothing can ruin a Parliament, but itself.

The Evils which we have suffered under, they were committed by the Judges; or by them ought to have been, and might have been prevented.

This Judge assisted in causing the Miseries we suffered in the *Star-Chamber*, and at the Council-Table: he denied the known Rights, which he ought to have granted us, to stop our Grievances in the Ecclesiastical Courts; he was the Causer of our Sufferings in other Courts.

The best Lovers of their Laws and Liberties, the most honest, suffer most by an unjust Judge, they most oppose his Vices; dishonest Persons find such a Judge to fit their purposes, the Judge finds them for his, the Bond of Iniquity confederates them.

He that will do no wrong, will suffer none which he can help: The Man that knows himself born free, will do his utmost to live so, and to leave Freedom to his Posterity; were he in Slavery, when by outward gesture thought to be most delighted, were his Mind then known, there would be found vexation, and his busy thoughts employed to redeem himself and his Posterity from Thralldom. But to say, could this Judge intend to make himself and his own Posterity Slaves? what he did was thro' Error of Judgment only. No, my Lords, what his Aims and Endeavours were, is apparent. To consider Man in the general, we shall find in every Age he will be a Slave to some few, that many may be Slaves to him, he looks to himself only; this he would do, or forbear doing, to be great, to be rich, had he Children or Kindred, or had he none. This highly unjust Judge, by continuing Sins, maintained his actions to preserve himself; he knows, to be found guilty in one of his Offences, the Penalty of the Law for it, therefore covers the Offences committed with inventing and acting other.

For a Judge to be unjust, more hurts the Publick than any other; he is not suspected. What a Judge doth, is looked on as a thing that ought to be done. The most pernicious great Man, that by Cunning hath got to himself the Heart and Tongue of his Prince, his ill Acts have died with him, if not taken up by others, and then they walk in Darknes; no Man will justify what he doth, by saying such a Favourite did it: But the unjust Judgments of this Judge, were given in Noon-day, were done in the face of the whole Kingdom, in the hearing of such as might carry the news to all parts of the Realm, and was therefore done; his unjust Judgments were our Records. We have seen wicked great Men most craftily politick; they had our Laws, yet not meeting

with active Judges moulded to their purposes, they and their Acts have died, the Realm flourished: but of late, others less politick meeting with most unjust Judges, every way as ill as they could wish them to be, then did the Kingdom faint, under the load of its Misery did long struggle: Now it's rising, I assure myself, your Lordships will assist to take off the Burden.

If the Designs of some would not have such a Man to be at liberty, a Warrant from some Lords of the Council would soon have laid him in Prison, and given no Cause; had he moved this Judge to be discharged or bailed, he could have obtained neither. If their Ways would not have endured that Man to live, a Judge reviling the Prisoner, and the Counsel that moved for his Discharge or Bail, joined with the hate of some great Man, might soon have moved a Goaler for unwholesom Rooms and Lodging, and ill Diet for his Prisoner, and they may soon take Life away. Offenders in Prisons are looked after to be safe only; such as are brought in by Power against Law, are abused.

Had a great Man desired the Estates of others, the breach of a Proclamation might readily have been charged against them in *Star-Chamber*; but they, it may be, could have answered and cleared themselves, and proved their Answer by Testimonies: had they been referred to this Judge, he would have expunged the one, suppressed the other. Then followed Fines to the value of their Estates or more; then Imprisonment of course, till they paid such Fines: your Lordships have heard what this Judge did to the *Soap-boilers*.

The Country-man followed the Plough, and to his thinking he was assured of his Right, Property, and Liberty, which gave him ability to do it. He believed his Neighbour, his Landlord, his King, could not take his Goods from him without his consent. He knew the usual Payments by Law; and in extraordinary Causes thought to have that care to chuse such for the Knights of his Shire, or for his Burgessees, as might be mindful of the Cause of Payment, and of his Estate.

This Country-man hath heard the Opinions and Judgment of this Judge, hath seen his Goods taken from him, without his, or his Knights of the Shire, or Burgessees Consent or Advice. These have made him, his Wife and Children, to join in tears to wish they had never been born; they have made them think on many ways to keep safe that Estate which was yet left them, have made them desire to sell all their Goods, and hide the Money: but then he remembers this Judge, how that he shall be carried to Prison, and remain there, if he pay not what it pleases others to assess him. Then they think idle persons (the Drones and Moths of the Commonwealth) to be a wise People, whilst the Country-men expect, and can think of nothing, but being Beggars.

Where publick and enormous Offences have been committed, eminent and notorious Punishments must be: such will make your Lordships Proceedings highly esteemed, else there will be so many Offenders, and none without danger can be punished.

This Judge subverting our Laws, took away the Hearts of many; he subscribed for the King's Power, but so as he put him on taking his Subjects Goods; and of all other, such ways be most dangerous: for we know his Majesty is not the

last that suffers, and is not the King worth many thousands?

The place of this Judge was to have given and preserved to the King the Hearts of his Subjects, the due Execution of the Laws had done this; and when such notice is taken of a Prince, none will conspire against him, who cannot feign to themselves Safety before or after any Fact committed, foreign Enemies will not invade his Kingdoms.

Thus hath his Majesty now got our Hearts, and will for ever have them. This Judge is to answer for what his Majesty, and for what we have suffered.

I am commanded by the House of Commons to desire of your Lordships, that the Proceedings against Sir *Robert Berkley* Kt. one of the Justices of his Majesty's Court of *King's-Bench*, may be put in as speedy a way of Trial, as the Course of Parliament will allow.

At the same time Mr. *Hollis* made a Speech in behalf of Sir *Randolph Crew*, formerly Lord Chief Justice of the *King's-Bench*, but remov'd for giving his Opinion against Loan-Money.

My Lords,

These Gentlemen have presented unto your Lordships the sad Object of Justice perverted, Liberty oppressed, of Judgment turned into Wormwood, the Laws, which should be the Bars of our Gates to protect us, keep us, and all that is ours in safety, made weak and impotent, to betray us unto the hands of Violence; instead of Props to support us, become broken Reeds to deceive us, and run into our sides when we lean upon them; even so many Snares to entrap and entangle us.

And all this by the Perfidiousness of those who are intrusted with our Laws, who call themselves the Guardians, and the Interpreters of the Law; but by their accursed Glosses have confounded the Text, and made it speak another Language, and another Sense, than ever our Ancestors, the Law-makers intended.

Our Ancestors made Laws to keep themselves, and their Posterity after them, in the possession of their Estates: these Judges could make the Law itself rob us, and despoil us of our Estates. Were we invaded or persecuted at any time for pretended Crimes, or rather because we were free from Crimes? And did we put ourselves upon a Legal Defence, and shelter ourselves under the Buckler of the Law, use those lawful Weapons which Justice, and Truth, and the common Right of the Subject did put into our Hands, would this avail us? No: These Judges would make the Law wrest our Weapons from us, disarm us, take away all our Defence, expunge our Answers, even bind us hand and foot, and so expose us naked and bound to the Mercilessness of our Oppressors. Were our Persons forced, and imprisoned by an Act of Power, would the Law relieve us when we appealed unto it? No: It would join hands with Violence, and add Bitterness to our Sorrow. These Judges would not hear us when we did cry; no Importunity could get a *Habeas Corpus*: Nay, our Cries would displease them, and they would beat us for crying; and over-do the unjust Judge in the Gospel, with whom yet importunity could prevail.

My

My Lords, the Commons of *England* finding themselves in this lamentable Condition, by the Wickedness of these Judges, it is no wonder that we complain of them. It is no wonder if the Knights, Citizens, and Burgeesses assembled in Parliament, have sent up some of their Members to stand upon Mount *Ebal* to curse these Judges; to denounce a Curse upon them who have removed our Land-Marks, have taken away the Bound-Stones of the Propriety of the Subject, have left us no *Meum & Tuum*; but he that had most Might had most Right, and the Law was sure to be of his side.

It hath been the part of these Gentlemen who have spoken before me, to pray for Justice upon those Men, who would not do Justice to others. My Lords, I come upon another Errand, and yet for Justice too; for there is Justice upon Mount *Gerizim*, as well as upon Mount *Ebal*. It is as great a point of Justice to give a Blessing, a Reward where it is due, as Punishment were Punishment is due: for Reward and Punishment, *præmium & pœna* be the two Legs that Justice walks on, and Reward is her right Leg, the more noble and the most glorious Supporture of that Sacred and Divine Body, that which God himself, the Foundation of Justice doth more delight in.

Tardior ad pœnas Deus est, ad præmia velox;

Punishment is good as Physick in the Consequence, Reward as wholesom and nourishing Food in the Essence; the one we do, because we must do it as necessary; the other, because we love to do it, as being pleasing and delightful.

Your Lordships then, I doubt not, will as willingly join with the Commons in doing good to a good Judge, as in publishing of the bad.

My Lords, We honour them, and reckon them Martyrs for the Commonwealth, who suffer any thing by defending the common Right of the Subject, when they will not part with their own Goods contrary to Law; when indeed their private Interest goes along with it, or rather before it; and the publick Concernment seems to come but in a second place. Such were those many whom these Judges have oppressed; yet these Men we magnify, and judge worthy of Praise and Reward.

But what Honour then is he worthy of, who merely for the Publick, hath suffered himself to be divested and deprived of his particular; such a Judge as would lose his Place, rather than to do that which his Conscience told him was prejudicial to the Commonwealth? is not he worthy of double Honour?

And this did that worthy reverend Judge, the Chief Judge of *England* at that time, Sir *Randal Crew*, because he would not, by subscribing, countenance the Loan in the first Year of the King, contrary to his Oath and Conscience, he drew upon himself the Displeasure of some great Persons about his Majesty, who put on that Project, which was afterwards condemned by the Petition of Right, in the Parliament of *Tertio*, as unjust and unlawful; and by that means he lost his Place of Chief Justice of the *King's-Bench*; and hath these 14 Years, by keeping his Innocency, lost the Profit of that Office, which upon a just Calculation, in so long a Revolution of time, amounts to 26000*l.* or thereabout. He kept his Innocency when others let theirs go; when himself and the Commonwealth were alike deserted: which raises

his Merit to a higher pitch. For to be honest when every body else is honest, when Honesty is in Fashion, and is Trump, as I may say, is nothing so meritorious; but to stand alone in the Breach, to own Honesty when others dare not do it, cannot be sufficiently applauded, nor sufficiently rewarded. And that did this good old Man do in a time of general Desertion, he preserved himself pure and untainted.

Temporibusque malis ausus is esse bonus.

My Lords, The House of Commons are therefore Suitors unto your Lordships, to join with them in the Representation of this good Man's Case unto his Majesty, and humbly to beseech his Majesty to be so good and gracious unto him, as to give him such Honour (the quality of this Case considered) as may be a noble Mark of Sovereign Grace and Favour, to remain to him and his Posterity; and may be in some measure, a proportionable Compensation for the great Loss he hath with so much Patience and Resolution sustained.

After the Conference, the Lords came to the following Resolutions.

Die Mercur. 20 die Jan. 1640.

It was Resolved by the Lords upon the Question,
Nemine contradicente;

I. **T**Hat the Ship-Writs, the extra-judicial Opinions of the Judges therein, both first and last, and the Judgment given in Mr. *Hampden's* Case, and the Proceedings thereupon in the Exchequer-Chamber, are all illegal, and contrary to the Laws and Statutes of this Realm, contrary to the Rights and Proprieties of the Subjects of this Realm, contrary to former Judgments in Parliaments, and contrary to the Petition of Right.

Likewise resolved upon the Question, *Nemine contradicente;*

II. **T**Hat the extra-judicial Opinions enrolled in the Exchequer-Chamber, and in other Courts concerning Ship-Money, and all the Proceedings thereupon, are illegal in part and in whole, and contrary to the Laws and Statutes of this Realm, and contrary to the Rights and Proprieties of the Subjects of this Realm, and contrary to former Judgments in Parliaments, and contrary to the Petition of Right.

Die Veneris, 26 die Februarii, 1640.

UPon the Report of the Right Honourable the Lords Committees appointed to consider of the way of Vacating of the Judgment in the Exchequer concerning Ship-Money, it was Ordered by the Lords Spiritual and Temporal in the High Court of Parliament assembled, That the Lord Keeper, or the Master of the Rolls, the two Lord Chief Justices, and the Lord Chief Baron, and likewise the Chief Clerk of the Star-chamber, shall bring into the Upper House of Parliament the Record in the Exchequer of the Judgment in Mr. *Hampden's* Case concerning Ship-Money; and also the several Rolls in each several Court of *King's-Bench*, Common-Pleas, Exchequer, Star-Chamber, and Chancery, wherein the Judges extra-

extra-judicial Opinions in the Cases made touching Ship-Money be entred; and that a *Vacat* shall be made in the Upper House of Parliament of the said several Records: And likewise the Judgment of Parliament touching the Illegality of the said Judgments in the Exchequer, and the Proceedings thereupon, and touching the Illegality of the extra-judicial Opinions of the Judges in the said several Courts concerning Ship-Money be annexed and apostiled unto the same. And that a Copy of the Judgment of the Parliament concerning the Illegality of the said Judgment in the Exchequer, and the said extra-judicial Opinions of the said Judges concerning Ship-Money, be delivered to the several Judges of Assize; and that they be required to publish the same at the Assizes in each several County within their Circuits, and to take care that the same be entered and enrolled by the several Clerks of Assizes: And if any Entry be made by any *Custos Rotulorum*, or Clerk of Assize, of the said Judgment in the Exchequer, or of the said extra-judicial Opinions of the Judges, that several *Vacats* be made thereof, *per judicium in Parlamento*: And that an Act of Parliament be prepared against the said Judgment and extra-judicial Opinions, and against the Proceedings touching Ship-Money.

Memorandum quod vicesimo septimo die Febr. 1640. Annoque regni Regis Domini nostri Caroli Angliæ decimo sexto;

VAcatur istud Recordum & Judicium inde habitum per considerationem & judicium Dominorum Spiritual. & Temporal. in Curia Parliam. & Irrotulamentum ejusdem cancellatur.

Memorand^o quod vicesimo septimo die Febr. præd.

IStud Irrotul. & omnia & singula in eodem contenta & expressa vacantur per Judicium Dominorum Spiritualium & Temporalium in Curia Parliament.

And that all the Rolls be rased cross with a Pen, and subscribed with the Clerk of the Parliament's Hand. All which was accordingly done in open Court.

After this it was Resolved upon the Question,
Nemine contradicente;

THat the Resolutions of the Judges touching the Shipping-Money, and the Judgment given against Mr. *Hampden* in the Exchequer, and all the Proceedings thereupon, are against the Great Charter, and therefore void in Law.

Resolved upon the Question, *Nemine contradicente;*

THat *Vacats* and Cancellations shall be made of the Resolutions of the Judges touching the Shipping-Money; and of the Enrollments thereof in the several Courts, and of the Warrants for Ship-Writs, and Proceedings therein; and the Judgment given against Mr. *Hampden*, and Proceedings thereupon; and that Entries be made of those *Vacats* upon the several Rolls, according to the Form read in the House.

The same Session an Act of Parliament passed for that purpose, *viz.*

THat the Charge imposed upon the Subject for providing and furnishing of Ships, commonly called Ship-Money, and the extra-judicial Opinions of the Justices and Barons, and the Writs,

and every of them, and the Agreement or Opinion of the greater part of the Justices and Barons, and the Judgment given against *John Hampden* Esq; for the Payment of Ship-Money, were, and are contrary to, and against the Laws and Statutes of the Realm, the Right of Property, the Liberty of the Subjects, former Resolutions of Parliament, and the Petition of Right made in the third year of his Majesty that now is.

That all and every the Particulars prayed and desired in the Petition of Right, shall from henceforth be put in execution, and shall be firmly and strictly holden and observed; as in the same Petition they are prayed and expressed; and that all and every the Records and Remembrances of all and every the said Judgments against the said *John Hampden*, and all and every the Proceedings whatsoever upon or by colour of any of the said Writs, called *Ship-Writs*, and all and every the Defendants on every of them, shall be adjudged to all Intents, Constructions and Purposes, to be utterly void, and that all and every the said Judgment, Inrolment, Entries, Proceedings, and Dependents of what kind soever, shall be vacated and cancelled, in such manner and form as Records use to be that are vacated.

Afterwards Articles were exhibited against the other Judges. Those against Mr. Justice *Crawley* were delivered by Mr. *Waller*, July 6, 1641. who spoke, as follows,

My Lords,

I Am commanded by the House of Commons, to present you with these Articles against Mr. Justice *Crawley*, which when your Lordships shall have been pleased to hear read, I shall take leave (according to Custom) to say something of what I have collected from the Sense of that House, concerning the Crimes therein contained.

Then the Charge was read, containing his extra-judicial Opinions subscribed, and Judgment given for Ship-Money; and after a Declaration in his Charge at an Assize, That Ship-Money was so inherent a Right in the Crown, that it would not be in the Power of a Parliament to take it away.

My Lords,

Not only my Wants, but my Affections, render me less fit for this Employment; for tho it has not been my Happiness to have the Law a part of my Breeding, there is no Man honours that Profession more, or has a greater Reverence towards the grave Judges, the Oracles thereof. Out of Parliament all our Courts of Justice are govern'd or directed by them; and when a Parliament is called, if your Lordships were not assisted by them, and the House of Commons by other Gentlemen of that Robe, Experience tells us, it might run a hazard of being styl'd *Parliamentum indoctorum*. But as all Professions are obnoxious to the Malice of the Professors, and by them most easily betray'd; so my Lords, these Articles have told you, how these Brothers of the Coif are become *fratres in Malo*; how these Sons of the Law have torn out the Bowels of their Mother: But the Judge (whose Charge you last heard) in one Expression of his, excells no less his Fellows, than they have done the worst of their Predecessors, in this Conspiracy against the Commonwealth. Of the Judgment for *Ship-Money*, and those extra-judicial Opinions preceding the same, (wherein they

are

are jointly concern'd) you have already: How unjust and pernicious a Proceeding that was, in so publick a Cause, has been sufficiently expressed to your Lordships: But this Man adding Despair to our Misery, tells us from the Bench, That *Ship-Money* was a Right so inherent in the Crown, that it would not be in the Power of any Act of Parliament to take it away. Herein, my Lords, he did not only give as deep a Wound to the Commonwealth as any of the rest, but dipped his Dart in such a Poison, that, so far as in him lay, it might never receive a Cure. As by those abortive Opinions, subscribing to the Subversion of our Property, before he heard what could be said for it, he prevented his own; so by this Declaration of his, he endeavours to prevent the Judgment of your Lordships too, and to confine the Power of a Parliament, the only Place where this Mischief might be redress'd. Sure he is more wise and learned, than to believe himself in this Opinion, or not to know how ridiculous it would appear to a Parliament, and how dangerous to himself: And therefore, no doubt, but by saying no Parliament could abolish this Judgment, his Meaning was, That this Judgment had abolish'd Parliaments.

This Imposition of *Ship-Money* springing from a pretended Necessity, was it not enough that it was now grown annual, but he must entail it upon the State for ever; making Necessity inherent to the Crown, and Slavery to the Subject? Necessity, which dissolving all Law is so much more prejudicial to his Majesty, than to any of us, by how much the Law has invested his Royal State with a greater Power and ample Fortune: For so undoubted a Truth it has ever been, that Kings as well as Subjects are involved in the Confusion which Necessity produces, that the Heathen thought their Gods also obliged by the same, *Pareamus necessitati, quam nec homines nec Dii superant*. This Judge then having in his Charge at the Assize declared the Dissolution of the Law, by this supposed Necessity; with what Conscience could he at the same Assize proceed to condemn and punish Men, unless perhaps he meant the Law was still in force for our Destruction, and not for our Preservation? that it should have Power to kill, and none to protect us? A thing no less horrid, than if the Sun should burn without lighting us, or the Earth serve only to bury, and not to feed and nourish us. But, my Lords, to demonstrate that it was a supposititious, imposed Necessity, and such as they could remove when they pleased; at the last Convention in Parliament, a Price was set upon it, *for twelve Subsidies you may reverse this Sentence*. It may be said, that so much Money would have removed the present Necessity; *for twelve Subsidies you shall never suffer Necessity again, you shall for ever abolish that Judgment*. Here this Mystery is revealed, this Vizard of Necessity is pull'd off; and now it appears, that this Parliament of Judges hath very frankly and bountifully presented his Majesty with twelve Subsidies, to be levy'd on your Lordships and the Commons. Certainly there is no Privilege, which more properly belongs to us, than to open the Purse of a Subject; and yet these Judges, who are neither capable of sitting among us in the House of Commons, nor with your Lordships otherwise than your Assistants, have not only assumed to themselves the Privilege of Parliament, but presumed at once to make a Present to the Crown of all that either your

Lordships, or the Commons of *England* do, or shall hereafter possess.

And because this Man has had the Boldness to put the Power of Parliament in Ballance with the Opinion of the Judges, I shall intreat your Lordships to observe by way of Comparison, the solemn and safe Proceeding of the one, with the precipitate Dispatch of the other. In Parliament (as your Lordships know well) no new Law can pass, or old be abrogated, till it has been thrice read with your Lordships, thrice in the Commons House, then it receives the Royal Assent; so that 'tis like Gold seven times purify'd: Whereas these Judges, by this one Resolution of theirs, would persuade his Majesty, that by naming *Necessity*, he might at once dissolve (at least suspend) the great Charter, thirty two times confirmed by his Royal Progenitors, the Petition of *Right*, and all other Laws provided for the Maintenance of the Right and Property of the Subject. A strange Force, *my Lords*, in the Sound of this Word *Necessity*, that like a Charm it should silence the Laws, while we are despoil'd of all we have; for that but a Part of our Goods was taken, was owing to the Grace and Goodness of the King: for so much as concerns these Judges, we have no more left than they perhaps may deserve to have, when your Lordships shall have passed Judgment upon them for this Neglect of their Oaths, and betraying that publick Trust, which for the Conservation of our Laws was repos'd in them.

Now for the Cruelty and Unmercifulness of this Judgment, you may please to remember, that in the old Law they are forbid to feed a Kid in his Mother's Milk; of which the received Interpretation is, That we should not use that to the Destruction of any Creature, which was intended for its Preservation. Now, *my Lords*, God and Nature have given us the Sea, as our best Guard against our Enemies; and our Ships, as our greatest Glory above other Nations: And how barbarously would these Men have let in the Sea upon us at once, to wash away our Liberties; and to overwhelm, if not our Land, all the Property we have therein, making the Supply of our Navy a Pretence for the Ruin of our Nation? For observe, I beseech you, the Fruit and Consequence of this Judgment, how this Money has prosper'd, how contrary an Effect it has had to the End for which they pretended to take it. On every County a Ship is annually imposed; and who would not expect, but our Seas by this time should be cover'd by the Number of our Ships? Alas! *my Lords*, the daily Complaints of the Decay of our Navy tell us, how ill *Ship-Money* has maintain'd the Sovereignty of the Sea; and by the many Petitions which we receive from the Wives of those miserable Captives at *Algiers* (being between four and five thousand of our Country-men) it does too evidently appear, that to make us Slaves at Home, is not the Way to keep us from being made Slaves Abroad. So far has this Judgment been from relieving the present, or preventing the future Necessity, that as it changed our real Property into a Shadow of a Property, so of a feigned it is made a real Necessity.

A little before the Approach of the *Gauls* to *Rome*, while the *Romans* had yet no apprehension of that Danger, there was heard a Voice in the Air, louder than ordinary, *The Gauls are come*; which Cry, after they had sack'd the City, and besieged the Capitol, was held so ominous, that

Livy relates it as a Prodigy. This Anticipation of Necessity seems to have been no less ominous to us: These Judges, like ill-boding Birds, have call'd Necessity upon the State, in a time, which I dare say, they thought themselves in greatest Security. But if it seem superstitious to take this as an Omen, sure I am we may look on it as a Cause of the unfeigned Necessity we now suffer: For what Regret and Discontent had this Judgment bred among us? And as when the Noise and Tumult in a private House grows so loud, as to be heard in the Streets, it calls in the next Dwellers, either kindly to appease, or to make their own use of domestick Strife; so in all likelihood, our known Discontentments at home have been a concurrent Cause to invite our Neighbours to visit us, so much to the Expence and Trouble of both these Kingdoms.

And here, my Lords, I cannot but take notice of the most sad Effect of this Oppression, the ill Influence it has had upon the antient Reputation and Valour of the *English* Nation: And no wonder; for if it be true, that Oppression makes a wise Man mad, it may well suspend the Courage of the Valiant. The same happened to the *Romans*, when for Renown in Arms they most excelled the rest of the World; the Story is but short. 'Twas in the time of the *Decemviri*, (and I think the chief Troublers of our State may make up that number.) The *Decemviri*, my Lords, had subverted the Laws, suspended the Courts of Justice, and (which was the greatest Grievance both to the Nobility and People) had for some time omitted to assemble the Senate, which was their Parliament: This, says the Historian, did not only deject the *Romans*, and make them despair of their Liberty, but caused them to be less valued by their Neighbours. The *Sabines* take the advantage, and invade them; and now the *Decemviri* are forced to call a long desired Senate, whereof the People were so glad, that *Hostibus belloque gratiam habuerunt*: This Assembly breaks up in Discontent, nevertheless the War proceeds; Forces are raised, led by some of the *Decemviri*; and with the *Sabines*, they meet in the Field. I know your Lordships expect the Event: My Author's Words of his Country-men are these, *Ne quid ductu aut auspicio Decemvirorum prospere gereretur, vinci se patiebantur*; they chose rather to suffer a present Diminution of their Honour, than by Victory to confirm the Tyranny of their new Masters. At their Return from their unfortunate Expedition, after some Distempers and Expostulations of the People, another Senate, that is, a second Parliament is call'd; and there the *Decemviri* are questioned, depriv'd of their Authority, imprisoned, banish'd, and some lose their Lives: and soon after this Vindication of their Liberties, the *Romans* by their better Success, made it appear to the World, that Liberty and Courage dwell always in the same Breast, and are never to be divorced. No doubt, my Lords, but your Justice shall have the like Effect upon this dispirited People. 'Tis not the Restitution of our antient Laws alone, but the Restoration of our antient Courage, which is expected from your Lordships. I need not say any thing to move your just Indignation, that this Man should so cheaply give away that

which your noble Ancestors, with so much Courage and Industry, had so long maintain'd. You have often been told how careful they were, tho' with the hazard of their Lives and Fortunes, to derive those Rights and Liberties as entire to Posterity, as they received them from their Fathers; what they did with Labour, you may do with Ease; what they did with Danger, you may do securely. The Foundation of our Laws is not shaken with the Engine of War; they are only blasted with the Breath of these Men, and by your Breath they may be restored.

What Judgment your Predecessors have given, and what Punishments their Predecessors have suffered for Offences of this Nature, your Lordships have already been so well informed, I shall not trouble you with a Repetition of those Precedents. Only, my Lords, something I shall take leave to observe of the Person with whose Charge I have presented you, that you may the less doubt of the Wilfulness of this Offence.

His Education in the Inns of Court, his constant Practice as a Counsellor, and his Experience as a Judge, considered with the Mischief he has done, makes it appear that this Progress of his thro' the Law has been like that of a diligent Spy thro' a Country, into which he meant to conduct an Enemy.

To let you see he did not offend for Company, there is one Crime so peculiar to himself, and of such Malignity, that it makes him at once incapable of your Lordships Favour, and his own Subsistence incompatible with the Right and Property of the Subject. For if you leave him in a Capacity of interpreting the Laws; has he not declared his Opinion, That your Votes and Resolutions against Ship-money are void, and that it is not in the Power of Parliament to abolish that Judgment? To him, my Lords, that has thus played with the Power of Parliament, we may well apply what was once said to a Goat browsing on a Vine:

Rode, Caper, vitem, tamen hinc cum stabis ad aras,

In tua quod fundi Cornua possit, erit.

He has cropt and infring'd the Privileges of a banish'd Parliament; but now it is returned, he may find it has Power enough to make a Sacrifice of him, to the better Establishment of our Laws: and in truth, what other Satisfaction can he make his injured Country, than to confirm, by his Example, those Rights and Liberties which he had ruined by his Opinion?

For the Proofs, my Lords, they are so manifest, that they will give you little trouble in the Disquisition: his Crimes are already upon Record, the Delinquent and the Witness is the same; having from several Seats of *Judicature* proclaimed himself an Enemy to our Laws and Nation, *ex ore suo judicabitur*. To which purpose I am commanded by the Knights, Citizens, and Burgeesses of the House of Commons, to desire your Lordships, that a speedy Proceeding may be had against Mr. Justice *Crawley*, as the Course of Parliament will permit.

CONTENTS

OF THE

Proceedings in the Case of *Ship-Money*.

T H E First Speech of Thomas Lord Coventry, Lord-Keeper of the Great-Seal of England, to all the Judges of Assize, in the Star-Chamber, June 17, 1635. Page 90	<i>The Argument of Sir William Jones, one of the Justices of the King's-Bench, for the King.</i> 248
<i>The second Speech of Thomas Lord Coventry, Lord-Keeper of the Great-Seal of England, to all the Judges of Assize, in the Star-Chamber, Feb. 14, 1636.</i> 92	<i>The Argument of Sir Richard Hutton, one of the Justices of the Common-Pleas, for Mr. Hampden.</i> 252
<i>The King's Letter, touching Ship-Money.</i> 94	<i>The Opinion of Sir John Denham, one of the Barons of the Exchequer, presented in Writing, for Mr. Hampden.</i> 257
<i>The Case inclosed.</i> <i>ibid.</i>	<i>Sir John Denham's Second Certificate, directed to the Lord Chief-Justice Brampton, for Mr. Hampden.</i> <i>ibid.</i>
<i>The Judges Opinions thereupon.</i> <i>ibid.</i>	<i>The Argument of Sir Humphry Davenport, Lord Chief-Baron of the Exchequer, for the King.</i> <i>ibid.</i>
<i>The Proceedings in the Case, as entred upon Record in the Exchequer.</i> 95	<i>The Argument of Sir John Finch, Lord Chief-Justice of the Common-Pleas, for the King.</i> 264
<i>The First Day's Argument of Mr. St. John, on the behalf of Mr. Hampden, before all the Judges in the Exchequer-Chamber, in the great Case of Ship-Money.</i> 100	<i>The Argument of Sir John Brampton, Lord Chief-Justice of the King's-Bench, for the King.</i> 276
<i>The second Day's Argument of Mr. St. John.</i> 122	<i>The Motion of the Attorney-General after the Arguments, and the Lord Chief-Baron's Answer thereunto.</i> 280
<i>The First Day's Argument of Sir Edward Littleton Solicitor-General, on the behalf of his Majesty.</i> 129	<i>The Copy of the Order, as drawn up upon the Motion of the Attorney-General, and now remains entred in the Exchequer.</i> <i>ibid.</i>
<i>The Second Day's Argument of Sir Edward Littleton.</i> 135	<i>The Copy of the Judgment as it is entred upon Record, in pursuance of the said Motion, and according to the Major Votes.</i> <i>ibid.</i>
<i>The Third Day's Argument of Sir Edward Littleton.</i> 143	<i>Mr. Waller's Speech in the House of Commons, April 22, 1640.</i> 281
<i>The First Day's Argument of Mr. Holborne, on the behalf of Mr. Hampden.</i> 147	<i>Lord Falkland's Speech in the House of Commons, against those Judges who had given their Opinion for Ship-Money.</i> 283
<i>The Second Day's Argument of Mr. Holborne.</i> 153	<i>Votes of the House of Commons thereupon.</i> 284
<i>Mr. Holborne's Third Day's Argument.</i> 159	<i>Mr. St. John's Speech to the Lords on carrying up the said Votes.</i> <i>ibid.</i>
<i>Mr. Holborne's Fourth Day's Argument.</i> 165	<i>Mr. Edward Hyde's Speech at the same time.</i> 294
<i>The First Day's Argument of Sir John Banks, Attorney-General, on behalf of his Majesty.</i> 171	<i>Articles of Impeachment against Sir Robert Berkley, one of the aforesaid Judges.</i> <i>ibid.</i>
<i>The Second Day's Argument of Sir John Banks.</i> 179	<i>Mr. Pierpoint's Speech on presenting the Articles against Sir Robert Berkley.</i> 298
<i>The Third Day's Argument of Sir John Banks.</i> 188	<i>Mr. Hollis's Speech on behalf of Sir Randolph Crew.</i> 300
<i>The Argument of Sir Francis Weston, one of the Barons of the Exchequer, for the King.</i> 194	<i>Resolutions of the Lords touching Ship-Money.</i> 301
<i>The Argument of Sir Francis Crawley, one of the Justices of the Common-Pleas, for the King.</i> 200	<i>Act of Parliament for vacating the Proceedings in relation to Ship-Money.</i> 302
<i>The Argument of Sir Robert Berkley, one of the Justices of the King's-Bench, for the King.</i> 204	<i>Mr. Waller's Speech, July 6, 1641. on the exhibiting of Articles against Mr. Justice Crawley.</i> <i>ibid.</i>
<i>The Opinion of Sir George Vernon, one of the Justices of the Common-Pleas, for the King.</i> 222	
<i>Notes taken out of the Argument of Sir Thomas Trevor, one of the Barons of the Exchequer, for the King.</i> <i>ibid.</i>	
<i>The Argument of Sir George Crooke, one of the Justices of the King's-Bench, for Mr. Hampden.</i> 223	
<i>His Argument, as it was presented to His Majesty, for Mr. Hampden.</i> 229	

*The Trial of THOMAS HARRISON, Clerk, at the King's Bench, for a Misdemeanour, in speaking reflecting Words of Judge Hutton. 1638. Trin. 14 Car. I.**

Middx' ff.

BEfore this time, that is to say, upon Thursday next after the Octaves of the Holy Trinity in the said Term, before our Sovereign Lord the King at Westminster, upon the Oath of twelve Jurors, it is presented, That whereas the Court of our Lord the King of *Common Pleas* is, and from the time to the contrary of which there is no Memory of Man, hath been an antient Court of Record of our said now Lord the King and his Progenitors and Ancestors, Kings and Queens of *England*, for the Administration of Justice to the Subjects of this Kingdom of *England*, and others in *Common Pleas*, moved and arising thro' all the Kingdom of *England*: And whereas it is against the Crown and Dignity of the King's Majesty, and against the Law and Custom of this Kingdom of *England*, for any Person or Persons to disturb the Court aforesaid, or any Justices of the said Court, the said Court being open, and the Judges of the said Court being present, and Judicially sitting: And whereas *Richard Hutton* Knight is, and for divers Years now last past, hath been, and yet is one of the Justices of our said now Lord the King of this Court: Nevertheless one *Thomas Harrison* of *Creeke* in the County of *Northampton*, Clerk, not having God before his Eyes, but by the Instigation of the Devil moved and seduced, maliciously with himself imagining, and in his Mind compassing by what Means he might, the aforesaid *Richard Hutton* Knight, there and then, and yet being one of the Justices of our said now Lord the King of the *Common Pleas* aforesaid, many ways to defame and scandalize, and contriving and maliciously intending, as much as was in his power, to bring the said *Richard Hutton* into Scandal, Ignominy, Contempt, and vile Character, and the said *Richard Hutton*, of his Life and Goods and Chattels, Lands and Tenements, wickedly and maliciously to deprive; as also the Displeasure and Indignation of our said now Lord the King against the said *Richard Hutton* to stir up and provoke, and using his utmost Endeavour to make the said *Richard Hutton* be held and esteemed a Traitor as well by our said Lord the King and the Peers of this Kingdom of *England*, as by all the loyal Subjects of our said Lord the King: And the aforesaid Court of our said now Lord the King of *Common Pleas*, and the Justices of our said Lord the King of the said Court in the said Court being present, and Judicially sitting, to disturb, and the Ad-

ministration of Justice in the said Court to hinder, the fourth Day of *May*, in the fourteenth Year of the Reign of our Lord *Charles* by the Grace of God, of *England*, *Scotland*, *France* and *Ireland*, King, Defender of the Faith, &c. at the City of *Westminster* in the County of *Middx'*, viz. in the great Hall of Pleas there, the Court of our said Lord the King, that is to say, the Court of our said Lord the King before him the King, the Court of *Chancery*, and the Court of our said Lord the King of *Common Pleas*, in the aforesaid great Hall of Pleas aforesaid open, and the Justices of our said Lord the King in the Court aforesaid then there present, and Judicially sitting, in assiduously attending and hearing the Matters and Causes of our said Lord the King, his People and Kingdom of *England*, and in ministring the Laws of the Kingdom aforesaid to the Subjects of our said Lord the King; the aforesaid *Thomas Harrison* to the Bar of the aforesaid Court of our said Lord the King of the *Common Pleas*, then and there violently and by Force and Arms, &c. came, the said Court of *Common Pleas* then and there in the aforesaid great Hall being open as aforesaid, and the aforesaid *Richard Hutton* Knight, and the other Justices of our said Lord the King of the Court of *Common Pleas* aforesaid in that Court, then there as aforesaid being present, and Judicially sitting; and the aforesaid *Thomas Harrison*, then and there out of his mere Malice, evil Mind, and wicked Intention, in the Presence and Hearing of the aforesaid Justices of the aforesaid Court of *Common Pleas*, and divers Serjeants at Law, and many venerable Men, and other faithful Subjects of our said now Lord the King, falsely, wickedly and maliciously accused the aforesaid *Richard Hutton* Knight of High-Treason, and then and there falsely, wickedly, and maliciously, these scandalous, venomous, defamatory *English* Words, openly, publickly and with a loud Voice said, published and spoke, viz. *I* (him the said *Thomas Harrison* meaning) do accuse *Mr. Justice Hutton* (the aforesaid *Richard Hutton* Knight, one of the Justices of our said Lord the King of the *Common Pleas*, meaning) of *High-Treason*: To the great hurt and derogation of the Crown and Dignity of our said Lord the King, and of his Royal Power, and the manifest Contempt and Scandal of his Courts aforesaid, and of the Justice and Laws of our said Lord the King, his Kingdom aforesaid, and the Court of *Common Pleas* aforesaid, and the Justices of our said Lord the King, and

* Cr. Car. 503.

' Administration of Justice in the said Court, to the most evil Example of all other Offenders hereafter in the like Case, and to the more grievous Scandal, Infamy, Disgrace, and final Destruction of the aforesaid *Richard Hutton* Knight, and against the Peace of our said now Lord the King, his Crown and Dignity, &c.'

To this the said *Thomas Harrison* hath pleaded Not Guilty, and hath put himself upon the County, and the King's Attorney of this Court likewise. You are now to enquire whether the said *Thomas Harrison* be guilty of this Crime, Yea or No.

Mr. Serjeant *Heath*. May it please your Lordship, and you Gentlemen of the Jury do hear, that by reading of the Record, that there is an Indictment preferred on the behalf of the King against *Thomas Harrison* who is now at the Bar, and that it is for a notable and insolent Contempt in this Hall against Justice *Hutton* and the Laws of this Kingdom. The Indictment sets it out thus: That the Court of *Common Pleas* is an ancient Court, and that it is against the Crown and Dignity of the King, and the Courts of Justice, that when the said Courts were sitting, they, or any of the Ministers of the said Court shall be disturbed. It is further said, that Mr. Justice *Hutton* is, and for many Years last past hath been one of the Judges of the Court of *Common Pleas*; and that the Defendant who is now at the Bar (Mr. *Harrison* a Clerk) being moved with Malice against the Person of Mr. Justice *Hutton*, and intending to bring Mr. Justice *Hutton* into the King's high Displeasure, and to hazard the losing of his Life and his Estate, and the Forfeiture of his Goods, and to disturb the Peace of the King, and the Court of Justice sitting, did falsely and maliciously the 4th of May last in *Westminster-Hall* in the City of *Westminster*, the Court being sitting, this Court and the Court of *Chancery*, and the Court of *Common Pleas*, this Defendant, boldly, audaciously, and maliciously did rush to the Bar of the said Court of *Common Pleas*, Mr. Justice *Hutton* and Mr. Justice *Crawley* then and there sitting, there attending to the Service of the said Court, there with a loud Voice spake to Mr. Justice *Hutton* sitting as a Judge: *I do accuse Mr. Justice Hutton of High-Treason*. This Offence being committed in this Manner and in this Place, and with such a Boldness, is laid to be of a high Nature, and to the Contempt of the Crown, and Dignity of all the Courts of Justice, where the King is wholly interested. Whether this Offence may be punished, that is the Force and Intent of this Indictment. My Lords, to this the Defendant hath pleaded not guilty: we that be of the King's Counsel shall make it appear, that this Defendant did do this, and in this Manner as it is set forth.

* Sir John Banks.

Mr. Attorney*. I desire that this Examination may be read; but let him see it, whether it be his Hand

yea, or no.

Harrison. It is my Hand.

The Examination of *Thomas Harrison* of *Creeke* in the County of *Northampton*, Clerk; being examined before my Lord Chief Justice *Brampston*, saith, that it is true, that whereas Mr. Justice *Hutton*, and Mr. Justice *Crawley* sitting in the Court of *Common Pleas*, he came to the Bar, and there did publickly charge Mr. Justice *Hutton* with High-

Treason. He charged him first with denying the King's Supremacy, next with moving the People to Sedition, and these be the Points on which he charged him with High-Treason, as aforesaid. Further, he was asked why he charged him with the first, and how he doth deny the King's Supremacy: he answers, for that by common Fame upon *Saturday* last in the *Exchequer-Chamber* he did deliver his Opinion, that the King had no lawful Power to levy the Ship-Money. Being asked whether he heard the Argument, he answered, he heard it not, but received it from the common Report of others. Being further asked why he charged him with stirring up the People to Sedition; he answered, that was because by the Report of divers near to the Place where this Examinant dwells, the People go on more and more in their Stubbornness, refusing the paying of Ship-Money; the which is contrary to the Opinion of all the Orthodox Divines of this Kingdom; and in that Mr. Justice *Hutton* riding that Circuit, hath given the People such an Encouragement to their Disobedience. Being further asked, whether any other Person did know of this his Intent; he answered, that there were two other Persons with him, but they did not know any thing of his Intentions, till they heard it spoken at the Bar. Being asked why he made choice of this publick Way; the Reason he saith was, because he delivered his Opinion publickly, therefore he thought that to be the best Way; and if it had been done in a private Way, he thought it fit to acquaint him with it in a private Way.

THOMAS HARRISON.

Mr. Attorney. May it please your Lordship, and you of the Jury, the Prisoner at the Bar, Mr. *Harrison*, stands indicted of a very foul and horrible Offence, of a forged Accusation framed and contrived out of his own Brain. It should seem it was out of some rotten and inveterate Malice, a thing for which there is no Colour nor Appearance of Truth, and he confesseth it was upon the ground of common Fame. Now you know what common Fame is, a *Mendax*, he charged this Reverend Judge, as you have heard, that he did deny the King's Supremacy, and the Reason was, because he heard by common Fame, that the Judge had delivered his Opinion, that the King had no Power to levy Ship-Money. Secondly, because he stirreth up the King's Subjects to Sedition; and he giveth that for a Reason, in that the People of *Northampton* do go on in the denial of the Payment of Ship-Money.

My Lord, it is a heavy thing to accuse any Man of Treason, whereby he shall forfeit his Lands and Goods, and lose his Life: and surely by the old Law, this false Accuser should undergo the same Punishment as he should, that is accused, if found guilty.

My Lord, the Place of a Judge is a Place of great Honour and Trust. Of Honour, for they be reckoned in the old Statutes among the *Magnates Regni*, 2 Ric. 2. &c. And these People that be the Authors and Publishers of these base Scandals, they are reckoned to be the Sowers of Discord, and are Subverters of the Peace of the Commonwealth. And surely if Mr. *Harrison* had looked upon these Statutes, he would have been better advised: Of Trust, for he is trusted with the Administration

of equal Justice between the King and his Subjects, and the Lives, Fortunes, and Estates of Men. Therefore being a place of so great Honour and Trust the Scandal is the greater; and Offences and Crimes against them have been punished not with ordinary Punishment.

25 *Edw. III.* 1. *pr.* It is declared to be Treason to kill a Judge in execution of his Office.

Our Books say, That if one draw a Weapon upon a Judge sitting in Judicature, tho he strike him not, he shall be Imprisoned during Life, and forfeit his Goods and Lands, and lose his Right Hand.

Tho the Offence be not done to the Judge, yet being in the Judges presence (the Courts sitting) as if one strike a Juror, or any other Person in *Westminster-Hall*, sitting in the Courts, it hath been punished with the loss of Hand, Goods, and Lands during Life; this appeareth, 19 *E. 3.* Judgment, 174. 22 *Ed. 3.* 13. *Mich. 6 Ed. 3.* *Coram Rege*, *Rot. 55.* *Stamford's Pleas* of the Crown, 38.

The Offence of Mr. *Harrifon* is not for accusing Judge *Hutton*, or any other of Treason, for God forbid but that should be lawful where there is just Cause; But to do it without any colour of Ground, and to forge a false Accusation out of his own brain, and to act in such an insolent and mad way against a reverend Judge, sitting in the Seat of Judgment, this is the Offence.

37 *Hen. 6. 3.* If one call another Traitor, an Appeal lieth before the Constable and Marshal, and if the Appellant be killed in Battel, it is Justifiable.

30 *lib. Ass.* one called Justice *Seaton* Traitor, and answered well in Damages, as appeareth more at large in the Record than in the Printed Book.

Mich. 5 Car. in Banco Regis, *Nich. Jeoffes* was indicted and fined in the King's-Bench, for writing a Petition, wherein he said the Lord Chief-Justice *Coke* was a Traitor.

Treasons are declared by the Statute 25 *Ed. 3.* and this Gentleman may expound a Text, he cannot expound Statutes, for this is proper for the Judges of the Realm.

He is not to judge what is Treason, and what not: *Trahent fabrilis fabri*, let him keep himself within the compass of his own profession.

This offence is *contra Coronam & Dignitatem*, and the Scandals against the King's Judges and Ministers trench upon the King himself, and therefore his Royal Majesty, detesting this odious and foul Fact in the Prisoner at the Bar, hath commanded us his Counsel to give Evidence.

The Person of the Party accused is best known to your Lordships to be a most grave, honest, learned, and reverend Judge, and, I presume, free from any thought of Treason.

Mich. 33. 34 Ed. 1. In this Court, *Rot. 75.* there was *Roger de Heigham* gave Judgment against one *De Bruce* in the *Exchequer-Chamber*. This *De Bruce* was of a noble Family: He asked this *Roger*, whether he would avow the Judgment, and he told him yes. Now, says *De Bruce*, thou hast thy will, which of long time thou hast sought: The Judge asked him what was that, he said, My Shame and Loss, and this I will think on. For this Offence in a Kind of implicate Way, taxing the Judge of Injustice, he was indicted, and confessed the Indictment, as Mr. *Harrifon* doth: The Judgment was, That he should be committed, and there to remain during the King's Pleasure, besides a great Fine.

The Record saith, *Et quia sicut honor, & reverentia qui Ministris Domini Regis ratione officii sui faciuntur, ipsi Regi attribuuntur, sic dedecus & contemptus ministris suis fact. eidem Domino Regi inferuntur, consideratum est quod prædictus Willhelmus de Bruce districtus in corpore, capite nudo, toga deposita eat à Banco Domini Regis ubi placita tenentur in Aula Westmonasterii per medium Aulæ prædictæ cum curia plena fuerit, usque ad Scac. ubi deliquit & ibidem veniam petat à præfato Rogero, &c. Et postea committatur Turri London. ibidem moretur ad voluntatem Regis.*

My Lords,

This Offence, which was offered to the Person of a most Reverend, Learned, and Honest Judge, by the Rules of our Books, is a Scandal done to the King himself, if there be no Colour nor Ground why he should take upon him to make this bold and impudent Assertion.

I doubt not but you will maintain the Honour of a Judge, and punish this Delinquent according to his Demerits. His Offence contained in the Indictment is confessed in his Examination, and by himself *ore tenus*, therefore you of the Jury need not depart from the Bar.

Whereupon the Jury immediately gave in a Verdict, that he was guilty of the Indictment.

Mr. *Attorney General*. Now, my Lord I desire Judgment.

Upon which the Court pronounc'd the following Sentence *.

That he should pay a Fine to the King of 50000 l. and be imprisoned during the King's Pleasure, and should have a Paper upon his Head, shewing his Offence, and go therewith to all the Courts of Westminster, and make his Submission in every Court in Westminster-Hall, and in the Exchequer: For it is an Offence to every Court.

* Vide *Croke's Reports*, pag. 362. *Thomas Harrifon's Case.*

The Trial of Colonel Nathanael Fiennes, before a Council of War at St. Albans, for cowardly surrendring the City and Castle of Bristol, the 14th of December 1643. 19 Car. I. Taken out of the Account given thereof by Mr. Prynn and Mr. Walker.*

COLONEL Fiennes having been taxed with a cowardly Surrender of *Bristol*, thought proper to justify himself by a set Speech in the House of Commons, and also by a printed Relation of the Fact, in both which he desired that the Affair might be examined in a Council of War, for which purpose he obtained an Order of the House.

To this Relation Mr. *Walker* published an Answer, and Mr. *Prynn*, in a Book intituled *Rome's Masterpiece*, stiles this Action, *the most cowardly and unworthy Surrender of Bristol*.

Hereupon Mr. *Prynn* and Mr. *Walker* were summoned to the Council of War, to make good what they had alledged against Colonel *Fiennes*. Mr. *Prynn* and Mr. *Walker* being thus made Parties, petition'd his Excellency the Lord General† to appoint a proper Time and Place within *London* or *Westminster* for the Trial and Examination of this Affair: They also drew up Articles of Impeachment against Col. *Fiennes*, and presented them, together with a Petition, to the House of Commons, who upon reading the Petition came to the following Resolutions.

Die Mercurii 15 Novembris 1643.

THE humble Petition of Clement Walker and William Prynn Esquires, concerning Mr. Nathanael Fiennes, and the Surrender of Bristol, was this day read in the House of Commons; and Articles of Accusation of the said Mr. Fiennes touching the Surrender of the said City of Bristol, and Castle, were this day likewise presented to the said House. A Letter from Mr. Prynn to Mr. Nathanael Fiennes was likewise read.

Order'd by the House of Commons, that as they shall be careful that there shall be a fair and equal Trial of Mr. Nathanael Fiennes, so they will take the Petition of the Petitioners, and the Articles, after the Trial, into Consideration, inasmuch as it shall concern my Lord General and the Council of War, and as it shall concern the Privilege of Parliament.

Resolved, &c.

That the Articles, intituled, *Articles of Accusation and Impeachment against Colonel Nathanael Fiennes, late Governor of the City and Castle of Bristol, touching the dishonourable Surrender thereof to the Enemy, contrary to his Trust and Duty, by Clement Walker, and William Prynn Esquires, shall be now read. The said Articles and Impeachment were accordingly read.*

The Petition and Articles were signed Clement Walker, and William Prynn; and they were both called in, and at the Bar being demanded, whether the Names subscribed were of their own hand-writing, did avow the Names to be of their own hand-writing, and did avow the said Petition and Articles.

Order'd that a Copy of these Articles, attested under the Clerk's hand, be forthwith sent to my Lord General.

H. Elsyng, Cler. Parl. D. Com.

Soon after these Resolutions, viz. on Thursday December 14, came on the Trial before the Council of War at *St. Albans*.

The Council being assembled in a Room adjoining to the Town-Hall, Mr. *Prynn* and Mr. *Walker* appeared there, when Dr. *Dorilaus*, Judg-Advocate of the Army, there demanded of them, whether they had any Articles of Impeachment drawn against Colonel *Fiennes*? To which Mr. *Prynn* replied, that he being a Member of the House of Commons, they had exhibited their Articles to that House, who by order had sent a Copy of them to his Excellency, upon which they were to proceed. Which the Advocate thereupon acknowledging, my Lord *Roberts*, President of the Council of War, commanded him to read the said Order, and Articles sent together with it. As soon as the Order was read, Mr. *Prynn* tendered a Copy of the Articles of Impeachment under Mr. *Walker's* and his own Hands, agreeing with those deliver'd to the House, which he averred they were there ready to make good in each Particular; desiring the Council to proceed upon them, because the other was but a Copy which they had not subscribed, but this they now tender'd an Original; which was assented to.

Upon this Dr. *Dorilaus* the Judg-Advocate was commanded to read the Articles; but Mr. *Prynn* then perceiving the Doors kept close, contrary to expectation, and all Persons, Auditors, but themselves alone, excluded; and fearing that by this means a Door would be opened to misreport the Proceedings of this Trial, before the reading of the Articles made this request to the Council, that this Hearing might be as publick as the Cause itself, and as that Place could afford, the Door set open, and none excluded; the rather, because himself and Mr. *Walker* (being no Challengers, but challenged) were engaged in this Prosecution, not in their own particular Interests but the Republick's, and that by special Order of Parliament (the

* Rush. Col. Vol. 3. p. 153, 284. Clar. Hist. Vol. 2. p. 315.

† The Earl of Essex.

representative Body of the Kingdom) which had ordered a *fair and equal Trial*, which they humbly conceived to be a free and open one, agreeable to the Proceedings of Parliament, and all other Courts of Justice in the Realm; which stand open to all, and from whence no Auditors are, or ought to be excluded.

Colonel *Fiennes* opposing this Motion, alledged, That we suspected the Integrity of that Court, as appeared by this Request for an open Trial, and our Endeavours to appeal therefrom by several Petitions to the Parliament, for a Trial before the House in *London* or *Westminster*; whereas he had cast himself freely and clearly upon their Justice, (which he no ways suspected) to whom the Cognizance of such Causes properly belonged; and therefore desired the Hearing might be private, according to the Proceedings used in such Courts. Upon which Dr. *Dorilaus*, Judge-Advocate, intervening, told the Prosecutors and Council that it was against the *Stile and Course of a Court Martial* to be publick and open: therefore it might not be admitted upon any Terms.

To which Mr. *Prynn* replied, That he no ways distrusted the Justice or Integrity of this Honourable Council, for then he would not have appeared before them at this Place and Time to crave Justice from them: That he was a Common Lawyer, and by his Profession, his late Protestation, and solemn Covenant, bound to maintain the fundamental Laws of the Kingdom and Liberty of the Subject: That the Members of this Honourable Council, as well as himself, had not only taken the like solemn Protestation and Covenant, but also put themselves in Arms, to maintain and defend the said Laws and Liberties of the Subject to the uttermost: That by the Laws and Statutes of the Realm, all Courts of Justice ever have been, are, and ought to be held openly and publickly, not close like a Cabinet-Council; witness all Courts of Justice at *Westminster*, and elsewhere, yea, all our Assizes and Sessions, wherein Men, tho indicted but for a private Felony, Murder, or Trespass, (which nothing near concerns the Republick so highly as this dishonourable Surrender of *Bristol*) have always open Trials: And if such petty Causes, then much more this of most general Concernment to the whole Realm, recommended to a *fair Trial* by the Parliament itself, ought to be as open and publick as possible, to satisfy both the Parliament and People: That not only in Courts of Common Law, but in the Admiralty itself, and all other Courts, proceeding by the Rules either of the Civil or Canon Law, the Proceedings have ever been publick, the Courts open. And even in late Proceedings by martial Law before a Council of War, the Trials of Delinquents in *England* have been publick, as appears by the Trials of *Yeomans* and *Butcher* at *Bristol*, before Colonel *Fiennes* himself, which were publick; and by the Trial of Mr. *Tomkins*, *Challoner*, and others since, before a Council of War at the *Guild-Hall* of *London*, in presence of both Houses of Parliament and the whole City, no Comers being thence excluded. Wherefore this Cause being of the same publick Nature, and as much or more concerning the Kingdom as theirs, ought to receive as publick a Trial as theirs did.

To which *Dorilaus* answered, That himself protested against the open Trial of *Tomkins* and *Challoner*, as a breach upon the Council of War's Privileges; but was over-ruled therein, to give the

Parliament and City Content: adding, that all Councils of War in foreign Parts were ever private, and ours now used not to be guided by Common or Statute Laws, or the Course of other Courts, but by their own Orders; and this being a Council, it was against the Nature and Constitution of it to be publick.

To which Mr. *Prynn* rejoined: First, That there was as great cause to give the Parliament, City, and Kingdom Satisfaction in this, as in the other fore-named Cause, it being of as publick Concernment. Next, That we of *England* are not to be guided by foreign Laws or Precedents, but by our own domestick: That the Common Law, the Statutes of the Realm, and constant Practice of all our other Courts of Justice, ought to regulate the Proceedings of the Council of War, not the Council of War's to repeal and controul them; especially in an Army which hath taken up Arms, which are waged by the Parliament of purpose to defend the fundamental Laws and Subjects Liberties, not to thwart them: That it was both against the Laws and Subjects Liberty (as he humbly conceived) to deny any Prosecutor or Subject an open Trial, and thus to chamber up or restrain Justice *intra privatos parietes*, in any, much more in this publick Cause. That the Judge-Advocate could produce no one Precedent for such a close Trial within our Realm in any former Age; and therefore he should make no such new Precedent now.—That all Cases of this nature, touching the cowardly surrendring of Towns and Castles, were, in former Times, tried only in full Parliament, as appears by the Cases of *Gomines*, *Weston*, the Bishop of *Norwich*, and others, and that upon very good reason; since Cases, which concern all, are fittest to be determined in that highest Court which represents all the Realm. That this Council of War had a double Capacity and Consideration; First, as a Council of War only, to deliberate of things necessary for the regulating and managing of military Affairs; and in this Regard it ought to be secret in all such Debates, and not communicate their Councils: But in this Capacity we were not now before it. Secondly, as a Court of Justice, to proceed criminally against Malefactors; and in this Respect it ought (as he believed) to be publick and open to all Comers. To put this out of doubt, he would instance only in one Example: The High Court of Parliament is both the *supremest great general Council* for Peace and War, and the *highest Court of Justice* in the Realm: as it is a Council to consult, debate, or deliberate of the military or civil Affairs of the Kingdom, so it is always private, none but the Members and Officers of either House being admitted to their Consultations or Debates. But as it is a Court of Justice to punish Malefactors, so the Proceedings of both or either House are always open and publick; as appears by the late Trial of the Earl of *Strafford* in *Westminster-Hall*, and infinite other Precedents of antient and present Times. If then this *supremest Council* of all others, as it is a Court of Justice, stands ever open unto all, and the Proceedings of it be always publick, without any Infringement of its Privileges as a supreme Council of War and Peace; then certainly this honourable Council of War (inferior to it both in Power and Jurisdiction) as it is now a Court of Justice, may and ought to hold their Proceedings and Sessions publickly in this common Cause, without any violation of its Privileges.

as a Council. What therefore the Peers in Parliament once answered the Prelates in a Case of *Bustardy*, he hoped this honourable Council would now answer the Advocate in this Case of our Impeachment, * *Nolumus leges Angliæ mutare, quæ bucuque usitate sunt & approbatæ*; and so allow us a publick Trial, to satisfy both the Parliament and People, whose Eyes are fixed on it; else if it should be private, they would be apt to report, it was *buddled up in a Corner*: For which innocent Expression, as we intended it, (St. Albans and this Council, in respect of London and the Parliament, being but a *Corner*) so much exception was taken in the House against our Petition. In fine, he alledged, that Colonel *Fiennes* himself, who had made such publick Professions of his Innocency, both before the House of Commons, his Excellency, and the World, in printed Speeches, Relations, and Letters, had most cause to desire, and least reason to decline an open Trial, *since Truth and Innocency seek no Corners*: And his Honour, his Honesty now openly charged, could not otherwise than openly be discharged; no Trial being publick enough for him who presumes his Innocency able to endure, and professeth a Desire to bring it to the touch, that it may be cleared. And if he should now decline an open Trial, after so many publick Bravadoes in London and elsewhere, it would draw upon him a just Suspicion of Guilt in most Mens Opinions, since no Man *fleeth the Light, but he whose Works are evil*.

Upon this, the Lord *Roberts* demanded of Mr. *Prynn*, what he meant by a publick Trial? whether only the reading of the Articles, Answers, producing of Witnesses, and managing the Evidence to make good the Articles? or else, the Council's private Debates of the Cause among themselves, after the Hearing? To which Mr. *Prynn* replied, That he meant only the former of these, the Judges Debates many times in Cases of difficulty being private after Hearings, till they come to deliver their Resolutions in publick. Hereupon all were commanded to withdraw; and then one of the Council, after a short Debate, was sent to his Excellency to know his Pleasure, whether the Trial should be publick, as the Prosecutors desired, or private? Who returned answer, that it should be private; with which Resolution the Prosecutors (being called in) were acquainted.

Mr. *Prynn* upon this Answer desired, that he might put in writing the Reasons he had suddenly offered to the Council for an open Trial, that so they might be presented to his Excellency; for that (as he conceived) he had not been made acquainted with them, who upon consideration of them, might happily alter his Resolution. Upon which Motion, the Council ordered the Judge-Advocate and Prosecutors to repair to his Excellency, to acquaint him with the former Reasons by word of mouth, which they did very briefly: But the Advocate informing his Excellency, that it was against the Privileges of the Council that the Trial should be open; he answered, that he would not infringe the Privileges of the Council, whom he thought the Prosecutors seemed to distrust by demanding a publick Trial.

The manner of the Trial being thus settled, the Articles of Impeachment were first read, and then his Answer delivered in writing unto them.

Articles of Accusation and Impeachment against Colonel Nathanael Fiennes, late Governor of the City and Castle of Bristol, touching his dishonourable Surrender thereof to the Enemy, contrary to his Trust and Duty; exhibited by Clement Walker and William Prynn Esquires, in the behalf of the Commonwealth of England.

1. *I*mprimis, That he, the said Colonel *Nathanael Fiennes*, did suddenly apprehend, imprison, and remove Colonel *Thomas Essex*, late Governor of the said City and Castle, from his Government there, upon pretence that he intended to deliver up the same (not then fully fortified, or sufficiently provided to withstand any long Siege) into the Hands of the common Enemies of the Kingdom and Parliament, contrary to the Trust reposed in him; and that hereupon, he, the said Colonel *Fiennes*, obtained the Government of the said City and Castle for himself, and undertook to defend and keep the same, to the uttermost Extremity, against the said Enemy, for the use of the King and Parliament, and not to surrender the said City and Castle, or either of them to the said Enemies, or to any other Person whatsoever, without the previous Consent, and Order of the Parliament.

2. *Item*, That the said Colonel, soon after he became Governor of the said City and Castle, did, by martial Law, apprehend, condemn, and execute some chief Citizens thereof; namely, Mr. *Yeomans*, Mr. *Butcher*, and others, only for intending to deliver up the same to Prince *Rupert*, when he came first before *Bristol*, (not then fully fortified and stored) tho they did not actually surrender the same.

3. *Item*, That he, the said Colonel, did put the Parliament, Kingdom, Country, and City to a vast Expence, in fortifying and furnishing it, and the Castle thereof, with Forts, Sconces, Cannons, Ammunition, Arms, Victuals, Provisions of all sorts, and with Garisons sufficiently able to defend and maintain the same for three Months space or more, against all the Power of the Enemies, that might or did come against the same; and did likewise promise and undertake to divers Gentlemen and Inhabitants thereof, to defend the same for so long space or more, in case they should be besieged.

4. *Item*, That he, the said Colonel, notwithstanding the Premises, when the Enemy came before the said City and Castle, with no extraordinary Forces or Ammunition able to force the same, and besieged them not above three Days at the most, did, before ever the Enemy had taken any of the Out-Forts, or Sconces about the same, or had made so much as the least Battery or Assault upon the Walls of the said City or Castle, or any Mine or Breach into any of the Forts thereof, contrary to his former Trust, Promises, Duty, and the Honour of a Soldier, most dishonourably, cowardly, and traiterously delivered up the said City and Castle, with all the Prisoners, Cannons, Ammunition, Artillery, Arms, military Provisions,

sions, Magazines, Victuals therein, and the very Colours too, without and against the Consent of the Parliament, or his Excellency their General, into the Hands and Power of Prince *Rupert*, and other common Enemies of the Kingdom and Parliament, to the extraordinary great Danger, Dishonour, Loss and Prejudice of the whole Kingdom and Parliament, the evil Example of other Governors and Towns, the Loss of most of the Western Parts of *England*, and great encouraging, enriching, and strengthening of the said Enemies, both by Land and Sea; and that upon very dishonourable Articles, to which he was no ways necessitated, and had no care to see them punctually performed by the Enemy, when Complaint thereof was made to him for Relief; to the great prejudice and impoverishing of the Inhabitants and Garrison-Soldiers there.

5. *Item*, That the said Colonel, without the Privy or Consent of any general Council of War, did, of his own Head, send out for a Parley with the Enemy, when divers Officers and Soldiers advised and persuaded the contrary, and would have repulsed the Enemies, and defended the said City and Castle to the utmost. That the surrendering up of the same was principally occasioned by the earnest Persuasion, Advice, and Cowardice of the said Governor, contrary to his Trust and Duty to keep the same. And that the said Governor, when as the Council of War unanimously voted upon the Parley, that it was neither safe nor honourable for them to depart the Town, unless they might march thence with half their Arms at least, and with their Colours; thereupon, after some private Conference with Colonel *Gerrard*, one of the Enemies Commissioners, in the Garden, without the Privy, and contrary to the Vote, of the said Council, did make and insert the last Article, That they should leave all their Cannon and Ammunition, with their Arms and Colours, behind them; and returning to them out of the Garden, told them plainly, that they must now deliver up all to the Enemy, but what was expressed in the Articles he then produced, and leave their Arms and Colours behind them, to the said Council's and Soldiers great Discontent. And whereas by those very Articles, the said Town and Castle were not to be delivered up till nine of the Clock the next Morning, nor the Enemies to enter them till the Soldiers, and other Gentlemen were marched out; the said Governor was so over-hasty to surrender up the same, that he delivered them up to the Enemy above one Hour or more before the Hour agreed on; and suffered the Enemies to enter and possess them before the Soldiers were marched out: whereby many of the Soldiers were pillaged in the Castle and Town, and divers of the Inhabitants best affected to the Parliament, were plundered before the Hour of Surrender came, to their great loss and undoing.

6. *Item*, That he the said Colonel, during the three Days Siege of the said City and Castle, did not give any such Encouragement to the Soldiers and Officers (who bravely defended the same, and slew near one thousand of the Enemies best Men, by his own printed Relation, with the loss only of eight Persons) as his Duty and Place required, and they expected, which much discouraged them: And that when a small Number of the Enemies, not two Hundred (who gave themselves for lost)

had entred the Line of Communication at the weakest Place, which was worst guarded, on Wednesday-Morning the 26th of *July* last, (being bravely repulsed by the Soldiers with great Loss in all Places else;) he the said Colonel, for two Hours space or more (during which time no more Enemies entred or approached the said Breach) both neglected and refused to command or encourage the Officers and Soldiers, who offered to beat them out in due time, as he was advised and pressed to do by Captain *Bagnall*, Lieutenant Colonel *Davison*, and divers others, who would have undertaken that Service; and instead of encountering the said Enemies (against whom the very Women offered to go on with their Children to dead the Canon, if the Soldiers were afraid, rather than the City and Castle should be yielded) called off the Soldiers and Officers from the Line and Out-works (that the Enemies might the better enter them without resistance) upon pain of Death, much against their Wills, who should and would have hindered and repulsed the Enemies; and discouraged and hindered such as were forwards to have cut them off, founding a Parley when the Enemies were so beaten, that they threw down their Arms and cried for quarter: insomuch that divers of the Soldiers and Inhabitants cried out they were betrayed, and some of the Soldiers brake their Arms in discontent, swearing they would serve the Parliament no more.

7. *Item*, That the said Governor, notwithstanding his Promises to defend the said City and Castle, and dispute it to the last, had yet a real Intention to deliver up the same to the Enemies before ever they were besieged by them, and no thought at all to defend them to the uttermost; or till they might be relieved by his Excellency; as appears by the premised Articles, by the said Governor's refusal to send the Prisoners, formerly taken, out of the said Castle, before the Enemy approached, when moved to it by Sir *William Waller*; saying to him and others, that he would detain those Prisoners still there, to make his own Conditions and Composition the better with the Enemies, if they came before it; by his commanding Mr. *Haffard*, the Master-Gunner there, to lay aside a Reserve of thirty Barrels of Powder, with Match and Bullet answerable, to which when he was reduced he would then treat with the Enemy; (which he did long before he was reduced to this large Reserve) by other Speeches to the like effect; and by his moving Sir *William Waller* to depart from *Bristol* before it was besieged, who otherwise would have adventured his Life in its Defence.

8. *Item*, That he the said Governor, when he surrendered the said Castle to the Enemy, had at least sixty Barrels of Powder therein, (besides what was in the City and Forts) being above twenty more than were in *Glocester* when it was first besieged, five hundred Cannon-shot, fifty great Granaadoes, fourteen hundred-weight of Match or more, great Store of Musket-Bullets, and Tin to make more; a Match-maker, a Bullet-maker, with Materials to make Match and Bullets; and all manner of Provisions and Victuals, sufficient to maintain one thousand Men for three or four Months space at least; eleven Cannons therein mounted; (besides forty-four Cannons mounted in the City and Forts) all which were surrendered to the Enemy before any Battery or Assault made against

against the said Castle (tho he had Men more than enough by his own Relation to defend it) contrary to his Promise made to divers Inhabitants of the said City, best affected to the Parliament, to defend the same to the uttermost, and to dispute every Foot thereof with the Enemy, and to keep it, or to lay his Bones therein; who thereupon sent their Estates with Provisions for them and their Families, for three Months space or more, into the said Castle, where the said Colonel promised to secure and defend the same, most of which their Estates were there seized on by the Enemy to their undoing; by reason the said Colonel admitted the Enemies into the said Castle, and deliver'd up the Keys thereof unto them, before the Hour agreed on in the Articles, such was his extraordinary haste to quit the same.

9. *Item*, That the said Colonel, to aggravate this his dishonourable Action, hath presumed to justify the same, not only before the honourable House of Commons, by word of mouth, but likewise before the whole Kingdom and World, in printed Relations and Letters, wherein he hath laid an extraordinary great Blemish both upon the honourable Houses of Parliament, and his Excellency the Earl of *Essex*, their Lieut. General, by publishing in print, that had he manfully held out the said City and Castle to the last, yet he could not have expected any Relief from them in six or eight Weeks space at the least; when as *Glocester*, since besieged with far greater Force than *Bristol*, was yet relieved by them in less than half the time (as *Bristol* doubtless might and would have been) and held out a full Month's Siege or more, as *Bristol* might have done: tho he the said Colonel, to add to his former Offence, and hinder or anticipate the Relief of *Glocester*, that it might be lost as *Bristol* was, gave out in Speeches to some Members of the House of Commons and others, and namely to Master *Samuel Browne*, and Master *John Sedgwick*, that he would lose his Head, or be hanged, if *Glocester* could or would hold out three days Siege, if the Enemy once came before it, or Words to the like effect.

10. *Item*, That the said City and Castle were so cowardly and unworthily deliver'd up to the Enemies, that they have since published in Print, and given out in Speeches, *That the said Colonel Fiennes did bestow the same upon his Majesty*; that they were deliver'd up to them beyond their expectation, and that they could not have taken the same had it been defended by the Governor; who eventually at least, if not intentionally, did but strongly fortify, and plentifully store the same with all manner of Provisions to make it tenable, at the Kingdom's and the Country's extraordinary expence, to render up the same to the Enemies with greater Advantage to them, and far more Prejudice and Damage to the Commonwealth, as soon as it was made defensible.

Clement Walker.

William Prynn.

The Answer of Col. *Nathanael Fiennes*, to the Articles exhibited by *Clement Walker*, and *William Prynn*.

1. **T**O the first Article, Colonel *Fiennes* denieth, that he did suddenly apprehend, imprison, and remove from the Government of the City and Castle of *Bristol*, Col. *Thomas Essex*,
Vol. V.

the Governor thereof, upon pretence that he intended to deliver up the same into the Hands of the common Enemies of the Kingdom and Parliament; or upon any pretended Cause whatsoever, or that Col. *Thomas Essex* was ever Governor of the said City or Castle; but doth acknowledge that soon after his coming to *Bristol*, by an express Order from his Excellency, written all with his own Hand, he did send unto him Col. *Thomas Essex*, who at that Time commanded a Regiment in that City: and as he is well assured that his Excellency had very good Cause to send that Order to him, altho he knew nothing before it came unto him; so he did not put it in Execution, but upon mature deliberation and advice with most of the wisest and best affected Gentlemen to the Parliament, and of the best Quality in the Town and Country, and upon good cause appearing unto him; and that for the Security and Preservation of that City, which in all probability could not otherwise at that time have been secured. And he doth further deny, that thereupon or at any Time after, he did seek or desire the Government of that City for himself: But on the contrary, that he did seek and endeavour to be freed from that Employment, and that not in compliment, but really, earnestly, and frequently, as he is ready to make good by Proof. And lastly, he doth deny, *That ever he undertook to the Parliament, or my Lord General, to make good that City or Castle; or that ever he had any Charge of the Castle as a Fort, or otherwise than he had of any Church or House in the City*: But on the contrary, *That he did from time to time declare, that he could not keep the City in the Condition it was, and that it would certainly fall into the Hands of the Enemy, unless better provision were made for it; and that he would not be answerable for it, unless certain propositions which he sent to the Parliament, or something equivalent thereunto might be granted unto him, which he could never obtain*. And further he affirmeth, *That he never did undertake not to surrender the said City or Castle, both or either of them, without the previous Consent and Order of the Parliament, or that the Parliament ever did, or in reason and justice could require any such Undertaking of him, or that he ever did or would have undertaken it*. All which he is ready to make good by proof.

2. To the second Article, Col. *Fiennes* doth acknowledge, that not many days after his sending away Col. *Essex*, by the Blessing of God upon his Care and Vigilance, he discovered and defeated a wicked Conspiracy, plotted between divers Inhabitants of the City of *Bristol* and some of the Officers of Col. *Essex* his Regiment, for the delivering up of the City into the Hands of Prince *Rupert*, and other common Enemies of the Kingdom and Parliament; and thereupon apprehending and imprisoning divers of the Conspirators, and thereby disappointing the design of the Enemy, he was a means, under God, at that Time of preserving that City, for which he received publick thanks by a Letter from both Houses of Parliament, which he hath to shew: and after, by virtue of a Commission from his Excellency, by Order of both Houses of Parliament, he called a Council of War, whereof himself was appointed President by the said Commission, and by that Council of War divers of the Conspirators, after due Trial were condemned, and the Sentence of Death passed upon them, which Sentence Col. *Fiennes* did forbear to put in Execution till such time as he had acquainted

acquainted the House of Parliament, and his Excellency therewith, and the grounds thereof; and then by his Excellency's Command, according to a Vote of the House of Commons, he did execute two of the principal Conspirators, (*viz.* M. *Yeomans* and M. *Butcher*) notwithstanding the Importunity and most earnest Intercession of the Mayor and Aldermen, and divers of the City to the contrary, and the *Threats and desperate Speeches* given out by the Malignants, altho it so happened at that Time, that a considerable strength was drawn forth of that Town to the Assistance of Sir William Waller; insomuch that some ill-affected Persons in the Town conceiving us so weak that the Malignants were able to master us, had procured his Majesty to send a Trumpeter with a Letter from himself to the City, to stir them up, and command them to rise and rescue the said Conspirators, and to kill and slay all those that should oppose them therein: yet for all this Col. *Fiennes*, in Obedience to the Parliament and his Excellency, did put the Sentence in Execution, and that at mid-day and in the middle of the Town; in all which he conceiveth that he discharged his duty faithfully, temperately, and resolutely.

3. To the third Article, he answereth, that notwithstanding, that without any or very little Help at all, by his own proper Industry and unceasing Travel and Pains, he endeavoured to fortify and furnish that Place in such sort that it might be in posture of Defence, and that without troubling the Parliament at all; he had well nigh brought a Line or Rampart of Earth round about the Town; whereupon there were some small Works or Redoubts, which in this Charge are called Forts and Sconces; and that he had procured some proportion of Powder, Artillery, Guns, Granadoes and other Provisions, whereof he found the Town very much destitute: yet he denies that there ever was, or that he ever did, or could raise a sufficient Garison to defend and maintain that City against all the Power of the Enemy, that might or did come against it, for the space of three Months or more, or for three Days; or that he did undertake or promise to any Gentlemen or Inhabitants of the same, to keep it for so long Space, in Case that they should be Besieged.

4. To the fourth, He denieth, that he did deliver up the City or Castle of Bristol, with all the Arms therein; or that he did deliver the same up, with all the Prisoners, Cannons, Ammunition, &c. against the Consent of the Parliament, or his Excellency their General; or that he did deliver them up Traitorously, Cowardly, or Dishonourably, or contrary to any former Promise of his, or contrary to his Trust or Duty, to the extraordinary great Danger, Dishonour, Loss, or Prejudice of the whole Kingdom and Parliament; and the evil Example of other Governors, and Towns, upon dishonourable Articles, to which he was no ways necessitated; or, that he had no Care to see the Articles agreed upon, punctually performed by the Enemy, when Complaint was made to him for Relief, to the great Prejudice and Impoverishment of the Inhabitants and Garrison Soldiers there: But on the contrary, is ready to justify, that over and above his former good Services, in sending away Col. *Essex* without Disorder or Blood-shed, in discovering and preventing that wicked Conspiracy, and preserving the City thereby, notwithstanding a Proclamation set forth of Purpose by

the King, wherein he offered Pardon to all, both Soldiers, Citizens, and others (except himself) within the City of Bristol, at that Time, in Case they would peaceably yield up the said City: And over and above, his great Pains and Care to put the City in as good a Posture of Defence as possibly he could; and notwithstanding, he never undertook to make good the City or Castle, or either of them, declaring that he could not, nor would not undertake it; and that also he could never obtain a sufficient Garison for the Defence of that Place for any considerable Time, or Moneys to maintain it, or Means to raise it; Yet he did defend that Town and Castle to the utmost Point, not only of Duty, but also of Honour, that any Soldier could, or ought to have maintained the same: And that he surrendered them upon good and honourable Conditions, in respect to the State he was in: And that he did take all the Care that any Governor could or ought to do, that they might be punctually performed; and that the breaking of them was not any Fault of his, but principally by the failing and unfaithfulness of the Enemy, and partly by the disobedience and disorder of some of his Soldiers; all which he is ready to justify in every Particular. Notwithstanding that after the Line or principal Rampart of the Town was entered, and the Enemy lodged within it, he did surrender the Town and Castle, with all the Prisoners, Cannons, Ammunition, Artillery, Military Provisions, Magazines, Victuals, and part of the Arms therein, before the Enemy had taken any of the Out-Forts about the same, or had made the least Assault or Battery upon the Walls of the City, (which had none at all on that Part against which the Enemy then lay, nor at all defensible in any Part on that Side the Town) or upon the Walls of the Castle, or any Mine or Breach into any the Forts thereof: All which (nor the Castle) could not prevent the Enemy being lodged in the Suburbs by Froome-Gate, from immediately entering the Town by force. And neither could, nor ought to have been kept in the Condition that things then stood, to the prejudice of the City and Garison, and the Surrender thereof upon terms of Composition, but ought to have been surrendered together with it, as they were by the constant Practice and Policy of War in all Places, the Principles of Justice and Honesty, and the Rules of Wisdom and Discretion, for the Honour, Profit, and best Advantage of the Kingdom and Parliament.

5. To the fifth Article, he answereth, that he did not of his own Head, without the privy of any Council of War, send out for a Parley with the Enemy, when the Officers and Soldiers advised and dissuaded the contrary, and would have repulsed the Enemy, and defended the City to the uttermost: And that the surrendring of the Town was not principally, or not at all could possibly be, by his earnest Persuasion or Advice, nor that it was by his Advice or Cowardice, contrary to his Trust and Duty to keep the same: But on the contrary, he was advised to the Treaty by the far major part, if not by the unanimous Consent of his whole Council of War, and of the Gentlemen there present, unless it were Mr. *Strode* (who also, to the remembrance of many present, was not heard to give any Dissent when the Question was put; and all that he said, tended only to a deferring rather than a denial of the Treaty, without any good Reason, that he either then did or yet can give for his Opinion;) and that by many Expressions and other

other clear Evidences, it did at the time of the first Proposition of the Treaty appear, that Col. Fiennes had for his principal aim therein, the Honour and Advantage of those by whom he was intrusted. And he doth deny that when the Council of War unanimously voted upon the Parley, that it was neither safe nor honourable for them to depart the Town, unless they might march thence with half their Arms at least, and their Colours, he did thereupon offer some private Conference with Col. Gerrard one of the Enemies Commissioners in the Garden; at which, without the Privy, and contrary to the Vote of the said Council, he did make and insert the said Article, that they should leave all their Cannons, and Ammunition, with their Arms and Colours behind them, and returning to them out of the Garden, told them plainly, that they should now deliver up all to the Enemy, or that it was expressed in the Articles he then produced, that they should leave their Arms and Colours behind them, to the said Council's and Soldiers great Discontent: But on the contrary, he doth affirm, and will justify, that he bid the Soldiers make Conditions for themselves, the Gentlemen of the Country for themselves, and the Citizens for themselves, which was done accordingly: And after, when upon the Treaty the Gentlemen of the Country, and Citizens were satisfied with their Demands; Colonel *Fiennes* was the first and the chief, if not the only Man that took exception at the Condition for the Soldiers; the Commissioners of the Enemy standing upon it, that they would allow only the Officers their Horses and Arms; and he on the other Side standing as peremptorily for all their Horses and Arms, and Colours: whereupon he was about to break off the Parley, and the Commissioners of the Enemy ready to return to the Army, but by the earnest Persuasion of the Mayor and Citizens, the Commissioners of the Enemy were persuaded to walk into the Garden, and to leave us at the Council of War to debate amongst ourselves concerning that point of the Arms and Colours: Whereupon Col. *Fiennes* stood very stiffly, till at length he was persuaded by the Council of War to rest satisfied with half Arms, and our Colours, if we could obtain them; whereunto Col. *Fiennes* expressed a great deal of Resolution to adhere, and he had done it to the End, had the Soldiers upon their Guards done their Parts as well as he did; but returning into the Garden with this Resolution, many of his Officers following him, and it being free for any to enter, openly and before the Mayor and divers of his Officers, he began to insist upon his former Propositions for all his Arms and Colours; whereupon they yielded that our Troopers should have their Horses and Swords; and then Col. *Fiennes* descended to the Propositions of half Arms and our Colours, but being not able to obtain it, he yielded so far to the Intreaty of the Mayor and Citizens, that he would not break upon that point of his own Head without the Advice of his Officers; and thereupon withdrawing into a Room, with all his Officers that there were present, he debated the Matter a good while with them, and could not be brought to yield thereunto, till six or seven of his Officers came out of the Town, and told him, that they could not get six Men a-piece of their Companies together, they ran so fast over the Key to the Enemy: Whereupon, altho with much reluctance, he was content to yield to that Condition, for fear of putting ourselves

into a far worse Condition; and after calling in the Commissioners of the Enemy, we fell to set down all the Articles in Writing, there being Liberty to any Man to take his Exception upon the Penning of them: At which Time Captain *Birch* coming in, and desiring a more clear Expression for the Citizens and Inhabitants to have Liberty to carry away their Estates, which Col. *Gerrard* boggling at, Col. *Fiennes* rose up, and with great earnestness protested, *That he would rather die than not provide for his Friends and their Estates, as well Citizens as Soldiers*; whereupon Col. *Gerrard* consented to it: and it was further expressed, that they should have three Days Liberty, to resolve whether they would stay or depart with their Goods; and the last Article was no new Article inserted at the latter End, but only a clear Expression of what was before agreed upon, and fully contained in the first Article, as by the Article itself doth appear. And lastly, Col. *Fiennes* doth deny, that he was so over-hasty to surrender up the Town and Castle, that he delivered them up to the Enemy one Hour or more before the Time agreed, or that he suffered the Enemy to enter and possess them before the Soldiers were marched out. But on the contrary, that he gave Order to all his Officers that came to him for Orders, to keep their Soldiers upon their Guards, until one Hour before we were to march out of the Town: at which Time having given Order to his Captain Lieutenant *Stokes* with his Company to stay in the Castle, and to keep it till Prince *Rupert* sent to demand it, and then to deliver it up unto him according to the Articles, he gave Order to the rest of his Officers to draw their Men into the Marsh, whither he did repair unto them, and about nine of the Clock marched out with the greatest Part of them to the Gate which leadeth to *Warminster*, where he stayed within the Town for an Hour or two after: *But the Enemy did enter the Town, contrary to their Faith, and the Articles agreed upon, an Hour or more before nine of the Clock, about the Time that we were drawing off to a Rendezvous, and fell upon our Men, disarming, dismounting and pillaging them, by means whereof, and by no Fault of Col. Fiennes, many both Soldiers and Citizens, were Pillaged and Plundered.*

6. To the sixth, he acknowledgeth and owneth the Clause mentioned to be in his printed Relation, and that the Enemy having entred in one Place on Wednesday Morning the 26th of July, were valiantly repulsed in all Places else with great Loss; but doth deny, that to his Knowledge any Women made any such Offers as in the Articles is expressed, or that he should have thought it a fit means to dead the Cannon-bullets, or that any such Speeches were given out, or any such Actions done by any Inhabitants or Soldiers to his Knowledge, as that they brake their Arms, and said they were betrayed; or that he would have suffer'd them unpunished, if he had heard or known any such thing: and for the rest of the Article he denieth it in the whole, and in every part thereof; and on the contrary affirmeth, and is ready to prove, that during the whole Siege, he did both by his Words and Actions encourage the Soldiers and Officers to do their Duty, thanking some, praising others, stirring up others, sending them Bread, Wine, Victuals, and giving them Monies, and promising them further Rewards, but especially by his own Example, going constantly the

round at all hours of the Night, sometimes in the beginning of the Night, and sometimes in the latter end thereof, and repairing upon all occasions to the places of most Danger, and standing most usually with his Troop, in the Place of greatest danger, and by all other ways and means that could be expected from any Governor. And he further affirmeth, that the place where the Enemy entred, was not a likely place for the Enemy to enter by, was weakliest assaulted; could not have been better guarded without drawing Forces from other places, which were in more apparent danger and more strongly assaulted, was more strongly guarded than some other places that were more strongly assaulted, and yet the Enemy repulsed, and that the Enemy might have been in all probability repulsed there also, had the Guards of Foot or Horse that were to second them done their duty, as well as they did elsewhere, or had Colonel *Stephens* or his Major sent down some Foot together with the Governor's Troop when they went to charge the Enemy, out of the Men that were under their Command upon the next adjoining Guards, which they might and ought to have done, and could only well do it. And he further affirms, that when the Enemy first enter'd they were at the least two hundred; that soon after they dug down the Rampart of Earth all flat for their Horse and Foot to enter, and that then immediately they possessed themselves of Walls, Houses, *Essex-Fort*, and other places of advantage; that within one hour's space at the farthest, after the entry of the first, there entred at least 300 Foot more, and a Regiment of Horse with Ordnance, and after both Horse and Foot entred as fast as they could; that Col. *Fiennes*, so soon as he had notice of the entry of the Enemy at that place, made all the haste he could to repair thither, but that before he got thither, his Men were come off the Lines for half a Mile together, and his own Troop (unto which he was going up) beaten off also: that afterwards both by his Commands and his own Person, he used the best, the safest, the speediest, and the most effectual means that any then could, or yet can shew for the securing of the City, the safeguard of his Soldiers, and for the repulsing of the Enemy, but divers of his Soldiers did disobey, and other of his Soldiers and Commanders did refuse to yield ready Obedience to his Commands, especially Major *Lewes*, to whom he was constrained to send an Order upon pain of death to yield obedience before he would do it; and by his and others Disobedience, the Service was hindred and retarded, that a Sally could not be made so seasonably as otherwise it might have been, and with better Success than it was, altho when it was made, it was performed with such Resolution that it gave a stop to the Enemy, who otherwise had, in all probability, entred the rest of the Town by force, being already possessed of two of the greatest Works thereof; and Col. *Fiennes* did not cause any Parley to be sounded till such time as his Men were beaten back again with fresh Regiments of Foot and Horse brought down upon them, but was still ready to have seconded them with his own Company, had there been any hopes to have beaten them off, and till such time as going round the Town with his Lieutenant Colonel, he spake with great earnestness to all his Officers that he could meet to get their Men to their Colours again; commanding them to repair to the Marsh, and that there should be Victuals, and Twelvepence a Man given them, which accordingly was

given to as many as came together, but could never get together, or to their Guards, two hundred, of ten or twelve hundred of the Men that were on that side the Town: whereupon by the Advice of his Council of War, he sent forth a Parley; all which he is ready to prove.

To the seventh, he answereth, that notwithstanding he declared that he could not keep the Town with the Force he had in it, yet he denieth that he had a real Intention to deliver up the same to the Enemy before ever it was besieged by them, or that he had no thought at all to defend it to the uttermost, or till it might be relieved by his Excellency, or that he refused to send the Prisoners, formerly taken, out of the Castle before the Enemy approached, or that he commanded Mr. *Hassard* the Master-Gunner, to lay aside a Reserve of thirty Barrels of Powder, with a purpose to treat when he was reduced thereunto; or that he moved Sir *William Waller* to depart from *Bristol*; or that Sir *William Waller* would otherwise have adventured his Life in its Defence; or that it doth appear by any of the premised Articles, or any Speeches of his concerning the Prisoners, or a Reserve of Powder, or Sir *William Waller's* Departure from *Bristol*, or any other Speeches of his, that he had not a real Intention to keep the Town and Castle to the uttermost, that in Honour, Wisdom, and Faithfulness, unto those by whom he was intrusted, he ought to have done: but that the contrary doth appear by very many Deeds and Speeches of his, and by those very Particulars instanced in, so far, and in such a manner as they were spoken and done by him. And he further affirmeth, that he did often move Sir *William Waller* to free him from the care and danger of so many Prisoners, but could never obtain it; but when he thought neither Town nor Castle safe enough to keep them, he spake to him to send them away to a Place of more safety, but neither shewed him the means how to do it, nor offer'd to take any of the most considerable with him, altho he had an absolute Command over them at all times, whensoever he pleased to signify his Pleasure concerning the Discharge or Disposal of them, as he did discharge Major-General *Bret*, and divers others (whereof some led on those that assaulted us at *Bristol*.) That Colonel *Fiennes* spoke to Sir *Arthur Haslerigge*, when he took leave of him, to take some of the Prisoners away with him in the Ship, but he refused it: that he spake to Captain *Birch* (who seemed forward to undertake such a matter) to see if he could find means to send them away speedily and safely by Sea, and that he would contribute his best Assistance thereunto, but he also gave it over: That he commanded *Hassard* the Master-Gunner, when the Enemy was approaching the Town, to lay apart a Reserve of thirty Barrels of Powder, and to keep it private, that every Man might be careful to husband that which appeared, and to make no waste thereof; and that in case he was forced to retreat into the Castle before he came to Treaty, he might have wherewith to defend himself: but Mr. *Hassard* did so over-do his Command, that tho afterward at several times he commanded him to give a perfect Account of all his Ammunition to his Brother Colonel *John Fiennes*, who was to have the chief care thereof over him, yet he did conceal from him this Reserve; insomuch that when Col. *John Fiennes*, was required to declare at the Council of War, what store of Ammunition was left, he informed us that he had taken a particular

cular Account thereof, and that there was not above three or four hundred weight of Match, and between twenty and thirty Barrels of Powder (as indeed he knew of no more;) and that they were spending of that too: whereby (as by like Speeches of the Master-Gunner to the like purpose) Col. Fiennes did believe he had broken up his Reserve, and that he was spending of that also, and that there was not above twenty Barrels of Powder left; and did not certainly know the contrary, till such time as he was come to London, and had particularly informed himself by Mr. Hassard of the truth: and that the Enemy knew not of more Powder in the Castle than twenty Barrels, for divers Weeks after the surrender of the Town, he is able to prove. And lastly, he doth affirm, that Sir William Waller was so far from needing to be stirred up to depart the Town, that on Friday, the Day after he came to Bristol, commanding some of his Officers to draw forth some of their Men into the Marsh, and they conceiving that it would not be possible to do it till the next Morning, he replied, that then it might be too late: and the next day drawing them out upon Durdam Down, where Col. Fiennes there asked, in case the Enemy should advance towards Bristol, how he would dispose of himself and his Horse, he answer'd, that he must retreat. And it is evident in many respects, that it was necessary for him to draw out of the Town; for it is most likely, that had he not done it, the Town would have been left sooner than it was, and the Dishonour and Loss of the State been greater; and that if he had, when he first came to Bristol, followed the Advice given him by Col. Fiennes and his Officers, or done according as he promised Col. Fiennes, when he took his leave of him, he would have done better Service, both for the preservation of that City, and the rest of England, than by the course he took: all which he is ready to prove and justify.

8. To the eighth Article, he doth deny that there were sixty Barrels of Powder in the Castle when it was surrendred, or that he did promise to any Inhabitant of the City to defend the same, but in case he was forced to retreat into it; nor any longer than he thought fit, for the honour and best advantage of them by whom he was intrusted; or that there was in it all manner of Provision and Victuals sufficient to maintain one thousand Men for three Months space; or that he deliver'd up the Keys of the Castle before the hour agreed on in the Articles; or that by reason thereof many Inhabitants of the City, or any other Person whatsoever, had their Estates which they brought into the Castle seized upon: But on the contrary he affirmeth, That there were but fifty Barrels in the Castle when it was surrendred, and that was thirty more than either he or his Council of War knew of before they came to London; and that therewith he was less able to defend the Town four days, or the Castle fourteen days, then Gloucester might with the like proportion be defended twenty four days: That there were about eleven Cannons mounted in and about the Castle, and that there was need of more, to supply the many defects and universal weakness thereof; but that there was never an one amongst them all, or in the Town, fit for Battery, or to hinder the approach of the Enemy in any effectual way; but he had sent to London for three to that purpose, and that they were at hand, but not yet come to him: that altho he had no charge of the Castle, more than of any House in the Town, nor was obliged to hold it further than he judged it for the good of the Publick, yet he did resolve to

make use of it for the advantage of the State, and of their Friends and Soldiers; as also he did, by making the terms of Composition the better by the Countenance thereof, which was the best use he could make of it in that Condition he was in, and would have been as ready to have done it by the Defence thereof, if he had been forced thereunto, or that it had been fit in Wisdom and Justice to have taken this Course, as if Succours had been at hand, and in some other Cases, it might have been. And for this, and divers other Reasons, he did take some pains, and was at some cost, for the strengthening of it, and furnishing of it with great and small Shot, and Granadoes, and Provision of Victuals, and other Necessaries, whereof what was the quantity of each Sort he is uncertain; but is certain, that none was employed but where there was occasion, nor should have been spared if there had been occasion to use them: but doth affirm, that he never gave order to the Commissary of Victuals, to make provision of Victuals for more than one thousand Men for a Month, wherein he aimed at a double Proportion to what he thought he should have need of; or that he ever hoped to keep the Castle for more than a Fortnight, or three Weeks at the farthest: That he was content, for divers good Reasons, to suffer the best affected Persons to carry into the Castle some of their principal Goods, but was very angry when he saw them offer to carry in their Lumber, and straitly forbid it. That a special Article was made for them that carried in their Goods, that they might have free Liberty to carry them out at leisure: That the Citizens themselves, being divers of them upon the Guard in the Castle, that had their Goods there, made such haste to get them out on Thursday-morning, that leaving their Guards, and Major Wood and others, that had charge of the Soldiers in the Castle, suffering their Soldiers to go from their Guards without and against order, the Passage into the Castle was so thronged, that none could pass in nor out, and by that means some of the Prisoners got loose in the Castle, and grew disorderly, and some of the Enemies got in before the time; but Colonel Fiennes coming thither, and seeing this Disorder, with his Sword in his Hand beat back the People that thronged the Draw-Bridge, drew up the Bridge, and got some of his Soldiers to their Guards again, put their Arms into their Hands, and had drawn all his Soldiers into it, had he not received News while he was doing this, that the Enemy was broken into the Town, contrary to the Articles, and were dismounting, disarming, and pillaging our Men: Whereupon he gave order unto his Captain-Lieutenant Stokes, to keep the Castle with his Company, and to deliver it up to Prince Rupert when he sent to demand it; and was forced himself to go into the Marsh with Captain Teringham, one of the Enemies Hostages, with him, for the Safeguard of his Soldiers, both Horse and Foot, and of his Friends in the Town, as is expressed in answer to the fifth Article. And lastly, he doth affirm, and will justify, That the Castle was in no sort tenable, neither in respect of the Strength thereof, or of the Provision wherewith it was furnished, for one quarter of the space, wherein possibly he could have had Succours; nor for half the quarter of the time, where, in possibility, he could have expected them: And that if it had been tenable, yet neither by the constant Practice or Maxims of War in all Places, nor by the Rules of Honesty or Christianity, that he ought to have held the same; or that it had been for the Honour and Advantage of those by whom he was intrusted so to have

have done; and therefore ought to surrender it together with the Town, without disputing it at all, as he did.

9. To the ninth, he denieth that he hath done any dishonourable Action, or that he hath said or done any thing amiss, or unduly, or untruly, in the Justification which he made of the Surrender of the City and Castle of *Bristol* in the honourable House of Commons, or any other ways. And the rest of the Article he denieth in the whole, and in every part thereof; and doth affirm, and doubteth not but to make appear to any that are vers'd in military Affairs, that without detracting any thing from the worthy Governor, who did as much as the Enemy put him to, and as honourably as any Man could do, that he had a harder Task to hold *Bristol* in the condition it was in, and in the manner that it was assaulted four Days, than Colonel *Maffy* had to defend *Gloucester* four Weeks: and that he was so far from declaring that *Gloucester* could not hold out three Days, that he often declared, that if they had Ammunition enough, they might do well enough, and hold out till relief came to them; but oft he feared they might be strained therein, as having good cause to know it: for had he not supplied them with ten Barrels of Powder; and had they not had two or three more out of *Barkley* Castle, which he sent thither but a Week or two before, the Town had been lost for want of Powder. And in this respect he desired those whom it concerned to relieve them, not to be too confident of their holding out, and to hasten relief unto them; so far was he from desiring to hinder relief to be sent unto them, that it might be lost as *Bristol* was.

10. To the tenth he answereth, that it is an Article without a Charge, an Argument without a Proof; for that the Testimony of the Enemy can make nothing against him, it being their parts to dishonour and disgrace their Enemies as much as they can; but the Testimony of an Enemy, tho it be of no validity against him, yet it is strong for him: and as he doth deny, that those that are Soldiers on the Enemies side have any such sense of the Action, so he doth affirm that they had, and have expressed the contrary.

The first Day's Hearing upon the three first Articles.

THE Articles and this Answer to them being read, the Prosecutors proceeded presently to the Proof of their Articles: And whereas they conceived the Defendant would have granted the three first Articles, being but introductive to the Impeachment, yet he put the Prosecutors to their Proofs;

First, *That Colonel Essex was ever Governor of Bristol.*

Secondly, *That he ever removed or sent Colonel Essex thence.*

Thirdly, *That himself was ever Governor of Bristol.*

And then bid Mr. *Prynn* prove these Particulars ere he proceeded farther,

Mr. *Prynn* thereupon replied, that he much admired how a Man of his Birth and Breeding should so much forget himself, as to deny that in private before the Council, which himself had not only confessed, but professed before the House of Com-

mons, (the representative Body of the Realm) the City of *Bristol*, and published in print to all the World in publick: But since he denied these Particulars, he would easily make them good against him.

(1.) For the first it is clear, that Colonel *Essex* was both acknowledged and styled Governor of *Bristol*, by the Parliament, his Excellency, the Committees of *Somersetshire*, *Gloucestershire*, *Wiltshire*, the Citizens and Garison of *Bristol*, and all the Gentlemen of those Parts, and by Colonel *Fiennes* himself at his first coming to *Bristol*, who gave him the Title of Governor.

(2.) That he made out his Warrants, Commands, and ordered all things for the City's Defence and Fortification, as Governor, having the Command in chief of the City, Castle, and Forces there, as absolutely as any Governor whatsoever.

(3.) That in the Book, intituled, *A full Declaration of Colonel Fiennes's March to, and Proceedings at Bristol*, compiled and published by himself, or his Major *Langrish* with his Approbation, pag. 3, 4, 10, 12 to 16. Colonel *Essex* is both acknowledged and styled Governor of *Bristol*, and that by himself, in his own printed Letter to his Father to justify his Removal; and the Depositions which he took and published against him, attest him to be the Governor. Therefore he must even blush to deny all these pregnant Evidences, and to put us thus to prove that only now, which he ever confessed before.

Whereupon Colonel *Fiennes* said, *I confess he was a Governor de facto, but not de jure.*

To which Mr. *Prynn* replied; First, that he was sent thither, and placed there, by his Excellency's special Command, and the Parliament's Approbation; therefore he was as much Governor *de jure* as himself or any other. Secondly, that he was obeyed as a rightful Governor till he sent him thence, and so esteemed by the Parliament, his Excellency, the Garison, City, and Committee. Thirdly, if he was not Governor *de jure*, then all his Commands and Acts there done, during his Government, were injurious, unwarrantable, which he presumed the Defendant durst not affirm.

Then he replied, that Colonel *Essex* had no Commission, and therefore was no rightful Governor.

To which Mr. *Prynn* rejoined, First, that for ought he knew he had a Commission. Secondly, that his Excellency's sending of him thither, to take in command the City, and his confirming him there as Governor, with the Parliament's Consent, was a Commission sufficient to make him Governor *de jure*. Thirdly, that if his Excellency commanded an Officer by Word of Mouth alone, without a Commission under Seal, to lead any Brigade out upon Service, or to take in any Town or Castle, (as he had lately commanded Major *Skippon* to take in and fortify *Newport-Pannel*) this was warrant enough to make him Governor both of the Brigade, Town and Fort; and if he should betray, or basely deliver up that Brigade, Town or Fort, when taken in, he should be condemned for it by martial Law as a Traitor, and the want of a Commission would be no excuse to acquit him from being a Governor, and betraying his Trust.

Secondly, *That he removed and sent away Colonel Essex from Bristol.*

(1.) Mr. Prynn proved it, first by his own printed Letter, and the Depositions published by his Direction, in a full Relation, &c. pag. 4, 6, 10, 11, 12. where he useth these Expressions: Colonel Fiennes (writes his Major Langrish) who communicated unto me an Order that he had received from his Excellency, whereby he was enjoined to send Colonel Essex to Windsor, or the Parliament, in case he saw cause for it; and having given me Reasons to see and know that there was cause so to do, he asked me, whether I would assist him in the execution of it or no? The which, seeing cause for, I promised to do. But it will be necessary here to annex the Reasons which caused Colonel Fiennes to put in execution the Order given him by my Lord General, to send up Colonel Essex from Bristol; not as an Accusation against Colonel Essex in this Place, (let that be followed by those to whom it appertains) but by way of vindication of Colonel Fiennes, that he had done nothing herein, but what the Trust reposed in him, and the Safety of that important Place did require him; and that the rather, because it begins so far to reflect upon Colonel Fiennes, as if he had done him injury, and there had been no Plot at all, but a Plot to put himself in the Governor's Place. The Malignants in the Town taking up this, and spreading it, and adding strength to it by Colonel Essex's own Speeches and Carriages, it will be a great Injustice to him, who hath done his Duty, and therein no inconsiderable Services, to be requited with Calumny, &c. Besides, Colonel Fiennes writes thus in a printed Letter to his Father: My Lord, &c. I have sent a Letter long enough, and full enough of Particulars, concerning Colonel Essex, and which I think were sufficient to satisfy any Man, that it was necessary he should be removed from hence, before the Town could be put in any possibility of Security, altho he had not been touched in the Point of his Fidelity: His being here, I found inconsistent with the good and safety of this City; and tho there were no apparent Proof of his Falseness, which I never affirmed, yet there were shew'd Grounds of Jealousy, as may appear by the Depositions, whereof I have sent your Lordship a Copy, together with this Letter. For my part, so my Lord General and the World be satisfied, that I had good reason to send him away from hence, according to his Direction, I would not have things prosecuted too hard against him, altho I am very much deceived, if many a Governor of a Town hath not been called to an account, in point of his Fidelity, upon weaker Grounds than those which I have sent.

(2.) By his own express Confession, in the latter end of his Answer to the second Article, tho he denies it in the beginning, that he did it not upon any pretended Cause.

To the third, That himself was never Governor of Bristol, Mr. Prynn answered, That it seemed he had carried himself so dishonourably in that Government, that he was now ashamed or afraid to confess himself Governor, for fear he should suffer for it, else he could not have the Impudence to deny it. But since he thus denied himself Governor, he would quickly prove him so;

First, by his own Warrants, during his Government, wherein he styled himself Governor of Bristol. Secondly, by his acceptance of that Title from his Officers, Soldiers, the Committee, and all others. Thirdly, by the Parliament's, his Excellency's, and own Father's intitling of him Governor of Bristol, in their Letters and Directions to him. Fourthly, by his exercising all the Authority, and receiving the Pay of a Governor.

Fifthly, by the full Declaration concerning his March to Bristol, set forth by his Major Langrish; who, in his Letter from Bristol, March 6, 1643. pag. 3, 4, 6. styles Colonel Fiennes our Governor, and now Governor of Bristol, three several Times, long before he had a Commission to be Governor there. Sixthly, by his own Draught of an Ordinance presented to the House of Commons by the Lord Say, for the settling of a sufficient Garison at Bristol; printed by himself, in his Relation made to the House of Commons concerning the Surrender of the City of Bristol, pag. 17 to 22. in which we find this Gentleman no less than eight several times expressly styled; Colonel Fiennes Governor of Bristol. And are you not ashamed so confidently to deny that here in the Presence of this honourable Council, which yourself have so lately published to all the World? Oportet mendacem esse memorem. Seventhly, in the very Articles of the Surrender of the City and Castle of Bristol to the Enemy he intitled himself Governor, witness the Title of them: Articles agreed on at the City of Bristol, between Colonel Nathanael Fiennes Governor of the said City on the one Party, and Colonel Charles Gerard and Captain William Teringham, for and on the behalf of Prince Rupert, on the other Party; July 26, 1643. And Article 1. That the Governor Colonel Nathanael Fiennes, &c. Certainly if he were not Governor before to keep, yet these very Articles prove he was then Governor to surrender it. And now, Sir, take your Choice; If you were not Governor, then you had no Power to treat or surrender the City or Castle, and so must be condemned (by your own Confession) as a Betrayer of them: If you were Governor of them, then you shew yourself most unworthy your Birth and Breeding in denying it now; especially since you have given an Account in a printed Relation, of your Proceedings and Surrender of Bristol; which is in Law a Confession of this Trust. To conclude: His Excellency's own Proclamation, posted up at Westminster by the Defendant's Procurement; and summoning us to give Information against him, doth no less than three several times together style him, Colonel Nathanael Fiennes, late Governor of Bristol; and therefore eternally concludes him to deny it.

The Colonel confessed at last, that he was Governor of Bristol; but he next denied, in the fourth place, That he was ever Governor of the Castle of Bristol, tho he was of the Town.

And, Fifthly, That he had ever any Commission to be Governor of Bristol.

To the first whereof Mr. Prynn replied, First, That he had the chief Command of the Castle, and none else. Secondly, That he placed his own Brother, Colonel John Fiennes, as Commander in chief, and all other Officers under him, in the Castle. Thirdly, That he only gave order for the fortifying, victualing, and garisoning of it. Fourthly, That he laid up the Stores and Magazines of the City there, disposed of all the Lodgings in it, intending to make it the place of his last Retreat: therefore certainly he was Governor of it. Fifthly, That tho Bristol Castle and the City were divided heretofore, the Castle lying in Gloucestershire, and being no part of the City, yet since Queen Anne's Entertainment at Bristol, King James at her Request gave and united the Castle to the City, making it part thereof; and so it continueth to this day: Wherefore since he confesseth he was Governor of the City, he must necessarily

be Governor of the Castle too, it being no parcel of the City, and having no other Governor that had charge of it in chief but himself alone, and his Brother under him.

To this the Defendant, in the sixth place, replied, That he had no Charge of it as a Fort, no more than of any one House in the City.

To which Mr. Prynne rejoined, First, That the Castle was never reputed a House, but always a Fort, a Castle, and a very strong one too; therefore he must needs have the Government of it as a Fort, not as a House. Secondly, Himself esteemed it the strongest Fort in and about the City, bestowed much Cost in fortifying it, laid up his Magazines in it, kept a special Garison there, made it the Place of his last Retreat, promised to hold it out till the last, if the City were taken, and to lay his own Bones there rather than yield it up; therefore certainly he took charge of it as a Fort, and must answer for surrendering it as a Fort.

Upon this Colonel Fiennes replied, *That the Castle was not mentioned in his Commission, and so he was not chargeable with it as a Fort.*

Which Mr. Prynne presently laying hold of, rejoined: First, my Lords, We have now a clear Confession that Col. Fiennes had a Commission to be Governor of *Bristol*, the fifth thing he even now denied. Secondly, Tho the Castle be not particularly named as a Fort in his Commission, yet this will not help him, for it is therein included as part of *Bristol*. This I shall undeniably evidence by a Case or two: Colonel Fiennes, by virtue of his Commission, hath built several Forts and Sconces about *Bristol*, without, not within the City-Limits, tho adjoining to it, as we have done the like about *London*; these Forts are properly no part of the City, as the Castle is, nor are they mentioned or included within his Commission, being built for the most part since the Commission was granted; yet no Man will doubt but if Col. Fiennes, or any other Officer, had treacherously or cowardly delivered up any of these Out-Forts to the Enemy, tho no part of the City, it had been Treason in him, and he should have suffered for it: So had he in like manner yielded up or betrayed any one House in the City or Castle, were it fortified or not fortified, to the loss or hazard of the City, it had been Treason by the Laws of War; many Cities and Castles having been lost, by the loss or yielding of one House or Postern; much more then must he suffer for surrendering such a considerable Fort as *Bristol* Castle to the Enemy, without any Battery, Assault, or Necessity, tho he found it not specified in his Commission, which extends to the whole City, and so to every House, Fort, and Parcel of it, tho not particularly mentioned in it.

The Colonel then said, *That he had no Commission to be Governor of Bristol, and by consequence was not Governor of it.*

To which Mr. Prynne replied: First, That since he undertook the Charge of the Town and Castle, as Governor, it mattered not much whether he had a Commission or not; for he writ, and carried himself as Governor, even from the sending away of Colonel *Essex*, till the Surrender of the Town and Castle, which he surrendered as Governor.

Secondly, That himself had formerly unawares confessed, that he had a Commission to be Governor, and that he was styled Governor by *Lan-*

grish, and others, even in Print, before he had his Commission to be Governor.

Thirdly, he should prove hereafter, That himself sent one Captain *Bagnall* twice up to *London* to procure not only a Commission, but an independent Commission, from his Excellency, that so he and his Garison might not be subject to Sir *William Waller's* Commands, (which Captain *Bagnall* afterwards attested upon oath, and that he spent sixteen Pounds in these two Journeys, to obtain this Commission, which the Colonel out of his liberality never yet paid him) and the Colonel himself confessed afterwards to the Council upon *Bagnall's* Testimony, he sent for and received an independent Commission; that so he and his Garison-Soldiers might not be liable to Sir *William Waller's* Commands, as they formerly were.

The Colonel hereupon told the Council, *That he sent for this Commission, not to guard the City against the Enemy, as Governor of it, but only to keep his Soldiers in Order, who, when they were commanded on any Service, grew Mutinous, and would still be calling on him to see his Commission: for which he gave an instance in Col. Popham's Regiment; who disobeyed him when they returned from the taking of Sherborne: And this made him to send for a Commission, only to order his Soldiers, and keep them in Obedience; but he never had nor sent for any Commission to keep the Town or Castle.*

To which Mr. Prynne replied, That this was the most absurd, irrational, if not unsoldierly distinction, that ever was heard of in the World, and that he might be ashamed to propound it before Soldiers, in such an honourable Council of War as this: for what need was there either of a Garison or Governor of *Bristol*, or of such a Commission to keep his Soldiers there in Obedience and Order, but only to preserve the City? This was the only End why he and his Garison were there placed, maintained by the Parliament and his Excellency to keep the City, which else would have as well or better kept itself without them.

Secondly, That he was confident his Excellency never granted any such Commission to any Governor (nor any other Prince or General in the World) only to keep his Garison in Order, but not to defend the Garisoned Place, whereof he was Governor: such an absurd Commission was never yet heard of, nor such a nonsense Distinction made by any Soldier. And thereupon he desired the Commission might be produced, to the End it might appear whether it warranted this Distinction, That it was only to discipline his Soldiers, but not to hold the Town against the Enemy.

Thirdly, That their Lordships now saw the true Reason why Col. Fiennes so soon delivered up *Bristol* to the Enemy: he pleads, he had (or would have) no Commission to keep it, therefore it was he thus Surrendered it up to the Enemies almost as soon as they came before it: who doubtless would keep it better, defend it longer than he, tho they wanted a Commission for it.

Fourthly, that this pretended Disobedience of Col. *Popham's* Regiment was long after his Commission received, and that upon this Occasion: Col. Fiennes, and his Major *Langrish*, would have taken from Col. *Popham's* Regiment, that little Plunder they had gained at *Sherborne*, with the hazard of their Lives, at the Country's Charge, without any direction from Fiennes, who sent them not on that Service; which injurious, avaritious Act of his, they

they justly opposed by standing on their guard, and so kept that Booty he would have carry'd from them into *Bristol* Castle. This occasion then being subsequent to his Commission, could not be the Ground of its procuring, but rather that which himself unawares confessed; his desire of Independence and Exemption from Sir *William Waller's* Commands.

The Colonel then insisted: First, *That he received his Commission only upon this Condition, and with this Intention, to keep his Soldiers in order, but not to make good the Town and Castle: therefore he could be no further chargeable by it than as he received it.*

To which Mr. *Prynn* replied: (1.) That every Governor must receive his Commission at his Peril, as it is granted and intended by him that granted it, (as Tenants do their Leases, and Donees in tail their Lands) and hath no Power to annex any Conditions thereunto: his Commission then being absolute, to keep the Town for the Parliament, that being the sole use and end thereof, his conditional accepting of it being repugnant to it, was void and idle.

(2.) That the * Common and Martial Law of the Realm annex this Condition to every Governor and Officer of Trust, that he ought to discharge his Trust and Government, and keep that safe which is committed to his Custody to his utmost Power, tho it be not expressed in his Commission; and therefore this pretended conditional Acceptance, directly against his Trust and Government, was most ridiculous.

Secondly, he alledged, *That he never sought after the Governorship of Bristol*, but really desired not to accept it, and to be acquitted from it: to which end he produced and read divers Letters of his own to the Lord *Say* his Father, and one or two to his Excellency, which took up near two hours time in reading. In the reading of these Letters, the Colonel casually desired the Council to observe, that many of them were written before he had his Commission for *Bristol*, which was not till the first of May 1643.

This Mr. *Prynn* taking present hold of, desired their Lordships in the first place, to observe his voluntary Confession of that Commission which at first he so obstinately denied.

To these Letters read, Mr. *Prynn* gave these short Answers:

First, That all these Letters were either his own or his Father's, and not above two or three of them proved true Copies, and that by Mr. *Sprig* the Lord *Say's* Secretary; therefore no Evidence at all to justify or excuse him, himself and his own Letters being no competent Witnesses in his own Cause; and his Father but *Testis Domesticus* at the best, if present.

Secondly, That the substance of the chief Letter to his Excellency, was only a modest excuse of his own insufficiency for that Charge; a common Compliment in every ingenuous Man's Mouth, that is preferred to any great Place of trust; who in words at least pretends Insufficiency for that Place which he perchance desires: just like our Bishops usual Answer, *Nolo, nolo, to vis Episcopari?* now used as a Formality, for fashion sake only, even when they come to be consecrated; when in truth they make all the Friends and Means they can to compass that Bishoprick, which (for fashion sake, out of a dissembling Modesty) they pretend, and twice together answer solemnly (when demanded openly

before the Congregation) that they desire by no means to accept of. Therefore this Letter of his can be no proof, that he was unwilling to undertake this Government, since his subsequent Acceptance and Actions disprove this pretended Refusal.

Thirdly, He observ'd, that in one of his Letters dated the 4th of *April*, he writ earnestly to his Father, to procure and send him his Commission: Therefore he was so far from refusing, that he sought the Government, and sent Captain *Bagnall* twice to his Excellency to procure his Commission, as was after attested upon Oath.

Fourthly, That by divers of his Letters then read, it clearly appeared, himself was the chief Informer against Col. *Essex*, and the chief Actor in his Removal, to intrude himself into his Place; for that we had now his own Hand against his Words and Answer.

Fifthly, That the Scope of all his Letters was only to complain and cry out to the Parliament for more Monies from *London*, or to get more Authority to raise Monies in the Country, to pay the Garison, without which Monies, he writ, he could not long hold the Town; but there is not one Clause in all the Letters, that he wanted Arms, Ammunition, Powder, Men, Provision, or that the Town or Castle was not tenable. If then he complained only of Default of Monies, with which if he were furnished, he made no doubt of keeping the Town; and it is clear he lost not the Town for want of Money, (for he hath not hitherto either in his printed Relation, Letters, or Answer, affirmed, that he surrender'd the City or Castle for want of Money) then by his own Confession, he must surrender them either out of Treachery or Cowardice, they being tenable, and furnish'd with all other Necessaries for a Siege but Money.

Sixthly, He observ'd that Col. *Fiennes* did never refuse the Place of Governor, as he should have done had he been unwilling or unable to discharge it: that his Importunity to quit it, in case he could get no Monies, was with no intent to leave the Place, but only to hasten the supply of Monies; it being the Argument and Rhetorick of most other Commanders in their Letters to the Parliament, to cry out for Monies, else all would soon be lost, and they must disband.

Seventhly, That he took on him the Power and Place of a Governor long before he had a Commission; that he drew and sent up Ordinances to pass the House to enlarge his Power and Territories for twenty Miles space round *Bristol*, and to settle himself in an absolute Government there. That he both earnestly writ and sent up twice to his Excellency for a Commission by a special Agent, that so he might be Independent; that he accepted of the Commission when it came; yet never acquainted the City or Committee of Parliament with it, doing all things in a high imperious manner for the most part, of his own Head, without their Privy or Advice; that he held his Commission without surrendering it till he surrender'd the Town and Castle to the Enemy, so unwilling was he to depart with his Governorship. From all which he concluded, it was apparent he was so far from refusing, that he did ambitiously affect, if not injuriously usurp, this Government, for his own private Lucre, to the Prejudice of the former Governor, and irreparable Damage of the whole Realm.

In fine, Col. *Fiennes* desired Mr. *Prynn* to prove. First, *That he ever undertook to his Excellency or the*

T t Parliament

Parliament to make good the City or Castle, and not to surrender the same to the Enemy without their Consents.

To which Mr. Prynne answer'd, That the very Law itself and common Reason informs us, that every Governor of a Town, or Fort is to make them good, and not to surrender them to the Enemy without the consent of those who committed their Custody to them, else every Governor might betray his Trust at pleasure. This therefore being a Condition in Law annexed to all Governors and Officers, and he confessing himself to be Governor, (and that by a Commission which no doubt enjoyned him to make good and keep the Place in manner aforesaid) needs no other Proof at all; the Law resolves it, and therefore none must doubt or contradict it.

With this Debate the Proof of the first Article was concluded.

Article 2. The second Article was proved by his own printed Proceedings mentioned in *A full Declaration, &c.* p. 5, 6, 7, 8, 15. by his Answer to the Article, and Relation to the House of Commons, p. 15. And Mr. Prynne informing the Council, that he did not charge it criminally, being a lawful Action done by direction of Parliament, but only by way of introduction and aggravation of the subsequent Articles, and Crime in surrendring the Town so treacherously and cowardly, after this his Sentence against, and Execution of those Conspirators, it was passed over without further Pressing.

Article 3. The third Article being likewise introductive, to aggravate his Offence in the fourth, fifth, sixth and eighth Articles, was briefly proved by his own printed Relation, p. 4, 5, 6, 23. by his printed Letter to his Excellency, confessed in part in his Answer, and to be further proved in the Proof of the ensuing Articles, was thereupon briefly run over: and so the first day's Hearing ended.

The second Day's Hearing, together with the third, fourth, fifth, sixth and seventh, spent wholly in the Proof and Defence of the fourth Article, to which most of the others in the Reply and Rejoynder were reduced.

THE three first introductive Articles being run over the first Day, the Prosecutors, the next Session, proceeded to the fourth, where the criminal and capital charge of the Impeachment began: The Defendant first demurred to the Depositions taken upon Oath against him, both before the Judge-Advocate himself, and by Sir William Waller and Col. Carre, by Commission from his Excellency; alledging,

First, That no Paper-Deposition ought to be allowed by the Law, in Cases of Life and Death, but the Witnesses ought to be all present to testify *viva Voce*, else the Testimony ought not to be received.

Secondly, That Sir William Waller, was his Enemy, and by Confederacy with the Prosecutors, had been the chiefest Instrument of prosecuting this Impeachment against him; to which end he produced one Major Dowet a Frenchman (whom Sir William Waller had displaced, and so disgusted) to attest, That Master Walker's Reply to Col. Fiennes's Rela-

tion, was shewed to Sir William and his Lady before it was printed, and that Sir William had spoken to his Officers to acquaint Mr. Walker with all such Passages as they knew concerning Col. Fiennes, touching the Siege and Surrender of Bristol: therefore he was neither a fit Commissioner nor Witness in this Cause, nor yet any of his Officers under him.

Thirdly, That he had not joyned with the Prosecutors in Commission, neither had he notice thereof, that so he might cross-examine the Witnesses. Therefore for these Reasons, he desired, that all the Paper-Depositions might be suppressed, and not given in evidence against him.

To the first of these Objections Mr. Prynne returned this Answer: First, that himself had formerly used this kind of Proceeding in the Case of Col. *Essex*, against whom he had not only taken, but printed divers Paper-Testimonies, in things which might have proved Capital if the Proof had been full. That himself in this very Case had sued forth a Commission to examine Witnesses on his behalf, without our Privy, before we took forth any Commission, who did but imitate him therein, and that by the Judge-Advocate's own advice, who directed us to this Course, which he affirmed to be both legal and usual: That in the Civil Law (especially in Courts Martial) Trials were as usual *Testimoniis*, as *Testibus viva voce*: That in the Admiralty, (a Civil Law Court) as likewise in the Chancery, Star-Chamber and *English* Courts, formed after the Civil Law, they proceed usually by way of Deposition: That even at the Common Law in some cases, Depositions taken before the Coroner, and Examinations upon Oath before the Chief Justice, or other Justices, are usually given in evidence even in capital Crimes: That the high Court of Parliament hath upon just occasion allowed of Paper-Depositions in such cases: That in all Courts Martial, both in *England* and elsewhere, they have been constantly allowed, and particularly in the late famous Case of *Tomkins, Challoner*, and other *London* Conspirators, whose Examinations were read, and given in as evidence one against the other, upon which they were condemned and executed. Besides, there was both very great reason and necessity that such Depositions should be admitted in this Case, and in all martial Proceedings of this nature, because divers of our material Witnesses, being Officers or Soldiers now in actual Service, and dispersed upon several occasions into divers Brigades, and parts of the Kingdom remote from *St. Albans*, could not without great danger, disservice to the State, inconvenience to themselves, and excessive Costs, be drawn together personally to attend this Trial, which had been so frequently adjourned, not only from Week to Week, but Place to Place: That we several times petitioned both the Commons House and his Excellency, that the Council appointed for this Trial might be held at a certain Day and Place, within *London* or *Westminster*, before our Witnesses were dispersed, and where we could with less trouble and expence to ourselves and them, have produced all or most of them *viva voce*; but yet we could not (thro' the Defendant's Procurement, as we conceive) obtain this reasonable request: Therefore himself being both the Cause and Precedent of these our Depositions, and of removing the Trial to this Place, for our greater Incommodation and Expence, ought not to take advantage of his own Wrong, against a Maxim of Law, the constant Practice of the Court-

Court-martial, and his own leading Example, which we did but imitate. Which Point the Council did upon solemn Debate among themselves clearly over-rule against the Defendant, upon the premised Reasons.

To the second Exception, concerning Sir William Waller, Mr. Prynn most solemnly protested for himself to the Council, that it was a most false and malicious Slander; that neither Sir William Waller, nor his Lady, nor any other in their behalf, did ever directly or indirectly excite, advise, or encourage him in this Prosecution; that the Delinquent himself was the only Man who unadvisedly put himself upon this Trial, as appears most evidently to all the World by the Close of his printed Relation in the Parliament House, where Page 13. *He desires the House of Commons, that they would be pleased to let the Truth of what he had then affirmed to them (concerning the Surrender of Bristol) be examined at a Council of War, that so he might be cleared or condemned, as they should find the Truth or Falshood of what he had delivered:* by his, and his Officers Petition to his Excellency, and his Excellency's Proclamation upon their Petition, posted up at Westminster and the Exchange, wherein he summoned Mr. Walker and Mr. Prynn by name, in the most publick manner that might be, and after that by private Notes, and sundry other publick Adjournments, to be his Prosecutors: Which thankless Office he was not altogether unwilling to undertake, when thus openly engaged by the Defendant, not out of any private Malice to the Delinquent, whom he formerly honoured, and to whom he never bore any particular Spleen, having never received the least Injury from him; much less out of any degenerate Respects, instrumentally to wreck the private Malice or Revenge of any others upon him, (it being below his Spirit, and most averse to his Genius, his Conscience, to be subservient or instrumental to any Man's Malice or Revenge whatsoever) but merely out of a real desire to do his Country faithful Service, and vindicate the truth of this unworthy State-ruining Action, under which the whole Kingdom now lay languishing, from those false Disguises which the Defendant in sundry printed Papers had obtruded on the World, to save his own irreparable Dishonour. The Prosecution therefore proceeding thus merely from himself, as all the Premises infallibly demonstrate, he had laid a most scandalous Imputation upon Sir William Waller (a noble well-deserving Gentleman then absent,) and on himself, in the fore-mentioned Exception, for which he demanded Justice against him from that honourable Council, unless he could make good this Calumny, for which he was most certain the Defendant had not the least shadow of Proof; the Testimony of Dowet (the ground of this Aspersion) not referring to him, but only to Mr. Walker's Relation, published long before any Impeachment of, or Prosecution against the Defendant: which Charge Mr. Walker himself there present was ready to answer, as to that Particular.

Hereupon Mr. Walker informed the Council, that he acknowledged in the Epistle to his Answer to the Defendant's Relation, that it was but a Collection out of the several Reports of divers Gentlemen and Commanders in that Service, before and when Bristol was besieged: which when he had drawn up, having occasion to go to Southampton, he left in the Hand of a Friend, desiring him to shew it to whomsoever he should think fit, (and especially to those Gentlemen out of whose Mouths he compiled it) to see

if he had hit their Sense aright; and that this Party (as he was since informed) shewed it to Sir William Waller. He said further, that the written Copy was shewed to the Defendant himself, and therefore he doth not wonder if it were shewed to Sir William Waller: and that Sir William's speaking to his Officers, only to declare what they knew touching that Business, with reference simply to his Answer, could not be intended either Malice, or Combination, or Prosecution of this Impeachment, not then so much as thought of, nor any Prejudice to the Truth, since no Man can know a Falshood, because it is a Non-entity, and can be no Object of Man's Knowledge: That therefore this could be no just Exception to Sir William as a Commissioner, the rather because Col. Carre (a Man indifferent) was joined with him; much less any legal Exception to any Officers or Soldiers Testimony then under his Command, who did but testify what they knew for Truth. Besides, Mr. Prynn added, that Col. Fiennes himself had examined divers of Sir William Waller's Officers by Commission, before we examined any of them, and some of those whom we examined; and why we should be deprived of the Benefit of their Examinations for the Kingdom's Advantage, when himself had examined them only for his private Defence, there could be neither Reason nor Equity alledged, it being a mere Artifice, to deprive us of our most material Witnesses, and to suffocate the Truth.

To the third, of his wanting notice to join in Commission, and cross-examine the Witnesses on the other side, Mr. Prynn answered:

First, That himself had begun the Precedent, in taking forth several Commissions to Sir William Waller's, and the Earl of Manchester's Army, to examine Witnesses there, without our Privy or Consent, who neither had any the least notice of the Commissions to join in them, nor of any the Witnesses Names, till the Hearing, nor had not, nor could not cross-examine them, nor ever yet saw their Depositions: And why our Depositions, being Prosecutors, should not be admitted as well as his, being not taken so publickly before the Judge-Advocate as most of ours were, he saw no reason.

Secondly, That we could not enforce Col. Fiennes to cross-examine any Witnesses, or to join with us in their Examination; therefore if he neglected to do it, or went before us in his Commissions, as he did, by virtue of which he might have examined all our Witnesses if he would, before we had taken their Testimonies against him, the Default was his not ours.

That we left all our Depositions, and the Witnesses Names, with the Judge-Advocate, to whom he oft repaired, and from whom he might have received the Catalogue of them, to cross-examine them, if he pleased; which since he neglected to do, after so many Adjournments, and taking no Exceptions till now he came before the Council, of purpose to evade his Trial, and to elude both them, us, the Parliament, and People, whose Eyes are on the Issue of this Business, there was no reason to allow these frivolous Exceptions. All which the Council, upon short Debate, over-ruled against the Defendant, resolving, that the Testimonies ought to be used, unless some particular just Exception could be alledged against any of them.

These Obstacles being removed, Mr. Prynn then proceeded to prove the fourth Article; which he did,

First, By the Defendant's own Answer thereunto, wherein he doth confess the whole Article in substance; yea, more than it chargeth him withal, as namely,

First, *That he never undertook to make good the City or Castle, or either of them, against the Enemy; declaring that he would not, nor could not undertake it:* Which is in plain English as much as to confess, that he had never any Thought or Resolution to hold them out to the utmost Extremity, as he ought to have done in Honour and Duty; but a professed purpose to surrender them to the Enemies, traitorously or cowardly, as soon almost as they came before it.

Secondly, *That soon after the Enemy entred the Line (with a very inconsiderable Number, not above a hundred and fifty at first, and three or four hundred in all at last, as the Witnesses attest) he did surrender the Town and Castle, with all the Prisoners, Cannons, Ammunition, Artillery, Military Provisions, Magazines, Victuals, and part of the Arms, (all but the Horsemen's Swords, most of which were likewise taken from them ere they departed the Town) before the Enemy had taken any of the Out-Forts about the same, or had made the least Assault or Battery upon the Walls of the City, or of the Castle, or any Mine or Breach into the chief Fort thereof, (and that before the Town had been three whole days besieged, which he denieth not, and therefore granteth by his Answer:)* Which whether it were not a most clear Confession and Demonstration of a treacherous and cowardly Surrender, in the superlative degree, he humbly submitted to the honourable Council's Judgment, and the Determination of all Men endued with common Reason; and yet the Defendant hath the Confidence, in the same Branch of his Answer, to deny *that he did deliver them up traitorously, cowardly, or dishonourably, or contrary to his former Promises, (which were to dispute every Inch of the Town, from the Line to the City-Gates, and from thence to the Castle-walls, which he would defend to the utmost, and there lay his Bones if he could not keep it, and make his Flag of Truce his Winding-sheet, as is proved by * divers Witnesses,) or contrary to his Trust and Duty; and the Impudence to affirm, that he did defend the Town and Castle to the utmost Point, not only of Duty, but also of Honour, that any Soldier could or might have maintained the same.* Which whether it were not the greatest Paradox and Contradiction, that any Military Man in his right Senses, durst ever affirm before a Council of experienced, valiant Commanders, he referred to the resolution of all there present.

Thirdly, He confesseth, that *tho neither any of the Out-works were taken, nor the Town Walls once battered or assaulted, when the Enemy entred the Line, yet as things then stood, neither the Forts nor Castle ought to have been kept, to the Prejudice of the City and Garrison, but ought to have been surrendered together with the City, as they were, by the constant Practice and Policy of War in all Places, the Principles of Justice and Honesty, and the Rules of Wisdom and Discretion.* And he further adds in the Clause of his Answer to the eighth Article, *That he doth affirm and will justify, that if the Castle had been tenable, yet neither by the constant Practice and Maxims of War in all Places, nor by the Rules of Honesty and Christianity, he ought to have held the same.* A Riddle which Mr. Prynne professeth transcended the Limits of his Understanding to enucleate, if not

of all Mens else, but the Defendant's; and a Passage which carried *Treachery and Cowardice* engraven with Capitals in its very Front, proclaiming openly to all Men, that had the Out-forts and Castle been never so strong and tenable against the Enemy, yet he was so far from resolving to keep them for the Kingdom's and Parliament's Security, that he professeth, *he ought not to have held the same, neither by the constant Practice and Policy of War, nor Rules of Piety or Christianity, but ought to have surrendered the same with the Town.* Certainly this Gentleman was either resolved to lose his Head when he penned this Answer, or else was intoxicated with the panick Fear that surprized him at Bristol, (which hath made his Pen and Brains to stagger ever since) else he durst not put in such an Answer in Writing to this Impeachment.

Fourthly, He saith, *that this Surrender of the City, Castle, Forts, with all the Ammunition, Cannon, Magazines, Arms, (but Troopers Swords) Prisoners, Ships, and his very Colours, before any Out-fort taken, or Battery made against City or Castle, was upon good and honourable Conditions, in respect to the Estate he was in.* I think he means himself was in an ill Condition, should the King's Forces have forcibly taken him Prisoner, for that the King had excepted him out of the Pardon mentioned in his Answer to the third Article: And therefore out of base Fear and Self-respects he would rather redeem his Head, and buy his Peace with the voluntary Surrender of a Place of such Consequence to his Majesty, than hazard his Life in defending it to the utmost. And withal he adds, *that this Surrender was for the Honour, Profit, and best Advantage of the Kingdom, and Parliament, by whom he was intrusted:* which when he shall be able to demonstrate, or make the Parliament and Kingdom believe, I shall profess this honourable Council may in Justice acquit him; till then (I hope) you cannot but condemn him, even out of these several Passages of his own Answer.

Secondly, From his Answer I shall descend to our Proofs, which extend to all the ensuing Articles as well as this: by which it appears,

First, That the Defendant wanted neither Men nor Ammunition, nor any manner of Provision, to defend the City and Castle against the Enemy: Not Men, for he had near 2000 Foot and 300 Horse beside Volunteers, to defend the Town; and he might have raised at least 6 or 8000 able Men more in the City, if he had wanted Men, which were as many, or more, as besieged it. Proved by the Depositions of Colonel Stevens, Anthony Gale, Arthur Williams, Able Kelly, James Powel, and others.

Secondly, That they wanted not Ammunition, for we proved there were 60 (nay 70 double) Barrels of Powder in the Castle, with Match and Bullet proportionable, besides what was in the City and Forts, and might have been made weekly in the Town, if held out against the Enemy; and that by the Depositions of Mr. Edward Bainton, Arthur Williams, Joan Batten, Major Wood, and others: Besides, himself confesseth in his Relation 50 Barrels in the Castle only, when surrender'd; Mr. Hassard deposeth 50 at least.

Thirdly, That they had all manner of Provision both in the City and Castle, for three Months space or more; the Particulars whereof will appear in the Depositions of Nicholas Cowling, Able Kelly, James Powel, Dorothy Hassard, Mary Smith, and

* Mr. Powel, Col. Strode, Col. Stephens, Mr. Hassard, Cap. Bagnal.

others: That himself and * others deemed the City and Castle strong and tenable; that he promised to hold the same to the utmost; to dispute every Inch of Ground with the Enemy; to retire into the Castle when he could hold the City no longer; to lay his Bones there rather than yield it, and make his Flag of Truce his Winding-sheet. If then the Place were so strong and tenable, and he wanted neither Men, nor Ammunition, nor Victuals, to defend the City and Castle, his Surrender of them, must of Necessity be adjudged *Traitorly*, or *Cowardly* at least, if not both; for what else but *Treachery*, or *Cowardice*, or both conjoined, could move him to this Surrender, in less than three Days Siege, before the utmost extremity, contrary to the Laws and Ordinances of War, whenas he wanted nothing necessary for a brave Defence?

Secondly, We have proved that the Town and Castle were not besieged three whole Days; for the Siege itself began but the Monday Morning, and the Articles of Surrender were agreed on before Wednesday Night, and the Surrender executed before 9 of the Clock the Thursday Morning: as Col. *Stephens*, Col. *Strode*, *Able Kelly*, and others testify.

Thirdly, That the Enemies were generally repulsed on all quarters of the City, with extraordinary great loss of Men, near 700 of them being slain, and as many wounded, with the loss only of six or eight of our Men: and that but 150 of them, or 200 at most, entered the Line the Wednesday Morning before Sun-rising (near three of the Clock) and were so afraid of being cut off, that they gave themselves all for dead Men, and might have easily been cut off, none of their own Party knowing of their entry till two Hours after they entred, nor sending them any Relief. Attested by *Arthur Williams*, *Joseph Proud*, *James Coles*, *Mary Smith*, Serjeant *William Hill*, *Stephen Radford*, *Michael Sparks*, and others.

Fourthly, That Major *Langrish* and his Horse-Troops, which had the Guard of that Place, and two other Captains of Horse under him, never once offered to charge the Enemy, whom they might easily have cut off, but retired into the City without charging them: That *Langrish* (very intimate with the Defendant) had been formerly complained of to him, by Lieutenant *Clifton*, Col. *Stephens*, and others, for his extraordinary Cowardice and Negligence, who desired he might be cashiered to walk the Street, as unfit for any Charge; yet the Defendant continued him in his Place, and set him to guard that very weak Place, where the Enemy was likeliest to enter. Proved by *Joan Battin*, Col. *Popbam*, Col. *Stephens*, and Captain *Nevil*, Lieutenant *Clifton*, Captain *Husbands*, and Captain *Vaughan*, (*Fiennes's* own Witnesses) upon Cross-Examinations before the Council.

Fifthly, That the day before the Enemy entred, one *Thomas Munday*, a Soldier under Captain *Henry Lloyd* (as both their Depositions witness) pointing with his Finger to the very Place where the Enemy entred the next Morning, told Major *Langrish* in the hearing of Colonel *Fiennes*; Captain, *Yonder is a very suspicious Place not fully fortified, and it is very doubtful; unless you set an hundred Musketeers more there, it being weakly manned, the Enemies will there make their first Breach.* Whereupon Co-

lonel *Fiennes* for this his good Advice, in an angry manner asked him, *What, dost be prate?* and called him *Saucy Knave*. And *Langrish* having the Guard thereof, suffered the Enemy the very next Morning to enter that Line at the same Place, from which he retired with his Horse without any Charge or Resistance; whenas he might easily have repulsed and beat them off. Yet the Defendant never questioned nor complained against *Langrish* for this his Cowardice and Treachery, which was the only real Occasion of Surrendring the City, but countenanced and justified him all he could, affirming in Print, that he was acquitted by a Council of War of Cowardice, (which was false;) and endeavoured to lay the Blame of not Charging upon one Lieutenant *Rouswell*, who was so far from being guilty of this Fact, that seeing *Langrish* with his Troop quit the Breach without Charging, he called him Coward, and with three or four Musketeers only marched up to the Enemy, and made good the Breach for a Time, till he received so many Wounds (whereof he after died) as forced him to retreat for want of Seconding; he affirming, that if he had been seconded by the Horse, or with 20 Musketeers more, he could easily have repulsed the Enemy, and made good the Breach. Yet this dead Man must be thus traduced to save *Langrish's* Credit, tho Captain *Husbands* (one of the Defendant's own Witnesses) confessed, that *Langrish's* Cowardice, in not Charging, was the Loss of *Bristol*, and that he told him so openly to his Face, at a meeting in *London*, since the Surrender.

Sixthly, That for two or three Hours space at least, the few Enemies who first entred had no Relief nor Supplies sent to them, neither indeed could have, the Enemy being bravely repulsed with great loss in all other Places, so as they retired in disorder to their Quarters; and one whole Regiment of their Horse retreated as far as *White-Church*, four Miles from *Bristol*, with a Resolution never to come on again, had not the Message of the unexpected Parley, and Hopes of the City's Surrender thereupon, drawn them back to their Quarters: And that divers of the Enemies confessed, if they had then been repulsed or beaten out of this Breach, they had raised their Siege, and never come on again. Serjeant *Hill*, Major *Wood*, *James Coles*, depose all this, and the Defendant's Witnesses confessed it.

Seventhly, That from three in the Morning, when the Enemy entred, till about 10 or 11 a-Clock at least, there was no Charge at all made, except only with *Rouswell*, and after by Capt. *Nevill*, who charged them down-hill only with twenty Horse, an Hour or more after their entry, and could have then beaten them out, as he verily believed, and attested upon Oath, had he been seconded with 30 or 40 Horse or Musketeers. A very strange neglect, to suffer the Enemy to lodge so long within the Line, ere they were encountered.

Eighthly, That upon the Enemies Entry Col. *Fiennes*, instead of commanding the next Guards and Companies then at the Out-works, to fall upon and beat them out, as he was pressed to do by Lieutenant *Davison*, Major *Wood*, Capt. *Bagnall*, Mr. *Deane*, Serjeant *Hill*, and others, commanded upon pain of Death, by his Lieutenant *Clifton*, to draw off the Line and Works on that Side of the City the Enemy entred, and to retire into the City

* Col. *Strode*, Col. *Stephens*, Captain *Bagnal*, Mr. *Powel*, Mr. *Cowling*, Major *Wood*, Richard *Lindon*, Edward *Watlin*, Mr. *Hallard*.

with all speed to the Market-place, full fore against their Wills: whereat divers of the Soldiers * were very much discontented and discouraged, and many of them said, *They were betrayed*. Whereupon they retreated from the Line and Out-works in great Disorder, many of them leaving not only their Swords, Muskets, Powder, Bullets, but their very Cannons behind them, which might have been easily drawn off, being down the Hill, and many Colliers Horses ready at hand for that Service; at which the Gunners were so discontented, that some of them spiked and nailed up their Touch-holes, to make their Cannons unserviceable to the Enemy, and the City-Garrison too, in case they had returned to the Works and Line; which by this strange Soldiery, were left naked of all Defence near two miles space together, so as the Enemy might have entered the Line where they pleased, in sundry Places of greater Advantage, nearer to the City, Castle, and Suburbs, by much, than where they had made their first Entry. Which strange Device and unmilitary Policy, if it favoured not of apparent Treachery, yet at least it cannot be excused from extreme Folly, and want of Skill in Martial Affairs; which made Major Lewis, and other of the best experienced Soldiers (who advised not to draw off the Line into the City, but to fall presently on the Enemy from the Line itself, which was the nearer, best, and speediest Way) exceedingly discontented.

Ninthly, That when the Soldiers were thus hastily and confusedly called from the Line into the Market-place, they there stood idle, looking one upon another, without any Command to make a Sally, or do any other Service to secure the City †; whereupon, for want of Command and Employment, divers of the Soldiers who had been upon Duty at the Line four or five Days and Nights together, departed from their Colours, some to the Tavern, some to the Ale-House to drink, others to their Beds to sleep, so as their Companies were broken, and not half full: Whereas if they had marched orderly from the Line, against the Enemies, when they first entred it, which was far the best and shortest Way; or made a Sally as soon as they retreated from the Line, these Inconveniences had been prevented, the Soldiers kept in Heart, the Enemies cut off, or beaten out, the Breach made up, and the City preserved.

Tenthly, That when the Sally was made, ‖ not before, but much about eleven of the Clock, it consisted not of above 200 Men, and that of those called off the Line, the fresh Men at the main Guard, and Captain Stokes's Company purposely kept for a Reserve, with the Garrison Soldiers in the Castle, (who were not in the Fight at the Line, and might have made a present Sally, without calling any from the Line) being not employed on this Service.

Eleventhly, That when the Enemies upon the Sally, tho late, were driven from House to House, and so beaten that they let fall their Arms, and cried for Quarter; and when the Women were so courageous, that they proffered to go with their Children unto the Cannons Mouth, to dead the Bullets, in case the Soldiers were afraid, rather

than the City should be yielded, and thereupon encouraged both the Gunners and Soldiers to fight, working in the very Face of the Enemy, and stopping up Froom-Gate with a very thick Work (made with Earth and Wool-Sacks) where the Enemy should have entered the City; yet such was the Defendant's extraordinary Cowardice, that he even then sent twice out to the Enemy for a Parley, whereas the Soldiers generally desired and offered to fight it out to the utmost **; which so much discontented divers Soldiers, that they said they were betrayed, and in very anger brake their Muskets, Swords, Pikes, lest the Enemy should gain them, swearing that they should never serve the Parliament more, and taxing the Governor for his Parley and Cowardice.

Twelfthly, That the Castle was surrendered, the Prisoners released, †† the Enemy admitted into the Town, long before the Hour agreed on, thro' the Defendant's Hastiness; yea the Soldiers, and Townsmen pillaged before his Face: yet he took no Care to see them righted, but left them to the Spoil, neglecting to take Hostages to see the Articles performed; which (contrary to the Rules of War) were not made between Prince Rupert, the King's General, ††† and the Governor, but between him and the Prince's Commissioners only: and that he made such Haste to quit the Town, that he left Captain Blake, and Captain Husbands, in Brandon-Hill and Prior-Hill Forts behind him, never giving them notice of the Articles, nor any Warrant under his Hand to surrender them to the Enemy, to the endangering of their Lives and Liberties.

Thirteenthly, That Col. Fiennes being moved to send away the Prisoners before the Siege, refused, saying, *He would keep them there to make his own Conditions the better*; thinking of nothing before-hand, but to surrender the City, to save himself: That he told †* Mr. Talboies, that he should not be in Bristol for ought he knew at Saint James-Tide then next ensuing; and used such Expressions to him, as made him believe he meant to surrender the Town by that Time, (as he did the very next Day after Saint James's Feast) who thereupon left the City, as intended to be surrendered by the Governor. That he commanded Mr. Hassard to lay by a Reserve of 30 Barrels of Powder, with Match and Bullets proportionable, to which when he was reduced he would treat: *† That there were about 140 Granados in the Castle, and one new Mortar-piece, and that John Warden one of the Gunners of the Castle did often importune the Defendant to give him leave to make a Shot at the Enemy out of the said Mortar-piece, but the Defendant commanded him under pain of Death not to make any Shot at them: whereat the said Gunner was so grieved, that he oft complained the Town was betrayed. All which Granados with the Mortar-piece were surrendered to the Enemies, and not one of them shot against them, tho they shot many Granados at the Town and Garrison.

Fourteenthly, That the Castle and Forts were very strong and tenable, if not the Town; that the Defendant himself, the *‖ Townsmen and Soldiers reputed them so; that they might have been held divers Months, yea to this very Time, had not they

* Joan Battin, William Whitehorne, Serjeants Gale, Captain Bagnal, Thomas Munday. † Captain Bagnal. †† Major Wood, William Whitehorn. ** Serjeants Gale, Joan Battin, Mrs. Hassard, Thomas Munday. ††† Major Wood, Colonel Strode, and others. †‡ Richard Winstone, Captain Husbands, and others. †* Mr. Talboies's Deposition. *† Richard Butler's testimony. ‡ Colonel Stephens, Colonel Strode, Mr. Powel, Major Wood, Captain Bagnal, Thomas Munday, Richard Lindon, Edward Watlin, Nicholas Cowling, Joan Battin, Nicholas Coles, Mary Smith, Ethelred Huddy, Michael Sparks, and others, attest this.

been surrendred; that the Enemy could not have taken them by force, even by their own Confessions, nor all the Devils in Hell have taken the Castle, had not the Defendant beyond their expectation surrendred them basely into their Hands, and bestowed them upon them: for which Surrender the very Enemy called him a *base Coward*, and said he deserved to be hanged for delivering up such a Town and Castle as that to them so easily, for which they might thank *Fiennes*, else they could not have won them by Force, had not he bestowed them on them beyond their Hopes. From all which Particulars (fully proved) we conclude, *That the Town, Castle, Ammunition, Cannons, Arms, &c. were most Dishonourably, Cowardly, and Treacherously delivered up to the Enemy, and that without and against the Parliament's or his Excellency's previous Consents, who abhorred the Fact, and never gave the least way thereunto, being executed before they had any Thought or Tidings of it, and before the City and Castle was reduced to any Extremity.* And thus was concluded the second Day's Work.

The Sum of the Defendant's tedious Defence, consisted of the ensuing Particulars, to every of which, for Brevity and Perspicuity sake, we shall subjoin the distinct Replies then given, not in a continued Speech, as they were uttered, but in Parcels, as each part of the *Reply, Rejoinder*, and *Surrejoinder* was applied to each Part of the Defence.

First, The Defendant denied, *That all the Arms were surrendred to the Enemy; for it appeareth, by the first Article of the Surrender, that all the Officers of Horse and Foot, were to march out with their full Arms, and the Troopers with their Swords.*

To which Mr. Prynn answered, *That by the first and tenth Articles of Surrender all the common Foot-Soldiers were to march out without Arms, and the Troopers only with their Swords, leaving their other Arms, together with all their Cannons, Ammunition, and Colours, behind them; therefore since all the Arms of the Foot, all the Troopers Arms but their Swords, (which were not many nor considerable) with all the Cannons, Ammunition, Colours, were thus surrendred, the Words of the Article of Impeachment, that all the Cannons, Ammunition, Arms, &c. were surrendred, were sufficiently and literally proved.*

2. That all, both in Scripture; Law, and common Parlace, is frequently taken for the greatest part, or well nigh all: as *Mat. 21. Herod was troubled and all Hierusalem with him. Mat. 27. 10. All the City was moved, saying, who is this? All Men think so, All affirm it; They have taken all their Arms, Baggage, and the like: where all is taken for the greatest part, or all in effect.* And in this Sense the Article is true, since the Officers Arms, and Troopers Swords, in respect of all the other Arms there left, were not considerable.

3. Most of all the Officers Arms, and Troopers Swords were taken from them by the Enemy, as the Defendant confesseth in his Answer, and we have proved; and if any escaped with their Arms by chance, yet all their Arms were quite lost as to the State, which had no benefit by, nor account of them: therefore in this Regard the Article is most true.

Secondly, He denied he surrendred the City and Castle against the Parliament's and his Excellency's Consents, tho it is true he did it without their previous Consents.

To which Mr. Prynn replied, that this was a very frivolous Distinction: For 1. Christ himself by this Speech, *He that is not with me is against me*, resolves, that what is done without the Parliament's and his Excellency's Consents (especially if they dislike and disavow it afterwards) is done against their Consents, and that in strict Propriety of Speech: Hence, if a Man's Servant, Cattle, without his Privy or Approbation, commit a Trespass, in his Neighbour's Ground, or if one casually tread upon anothers Toe, he usually saith in these and such like Cases, *It was against my Will, or against my Liking and Consent.* Bristol therefore being undoubtedly surrendred not only beyond, but contrary to the Parliament's and his Excellency's Expectations and Desires, was certainly surrendred against their Wills and Consents, as well as without them.

2. The Parliament's and his Excellency's express Will and Intention was, that Bristol should be kept to the utmost Extremity, and not surrendred to the Enemy, this being the end wherefore they placed a Governour and Garison there, and made Works about it: the Surrendring therefore of it, contrary to both their express Wills and Directions, must needs be not only without, but against their Wills and Consents. This all the World knows, unless the Defendant can shew their express Consents thereto.

3. The House's and his Excellency's former Opinions of, and calling him to an Account heretofore, and now into Judgment for this Surrender, as directly contrary to his Trust, and their Directions, is a sufficient Proof it was not only besides, but against their Consents: and to think or speak otherwise, is but to lay a grand Imputation on the Parliament and his Excellency, in making them Accessaries to this dishonourable, traitorly Action, which hath almost lost the Kingdom.

Thirdly, He alledged that four Days before the Siege he sent one *Scotten* with a Letter to his Excellency, to acquaint him with the Weakness of the Garison, that he had not above 900 Men besides Citizens, as likewise to see the Estate of his Army, and crave speedy Succours from him: That he found his Excellency had but 4000 Foot able to march, many of his Men being then sick, and not in a marching Condition to relieve him; *that it was clear, they could not expect, nor have had any Relief in six or eight Weeks time.* And to justify this Despair of timely Succours, he produced a Letter written by his Excellency to the Lord Say, his Father, to this effect: *That he was sorry Bristol was in so much Danger, as by Col. Fiennes's Letter to him it seemed to be; and that himself at that present was not in a fitting Posture to relieve it, which troubled him the more, for that his Lordship's Son was engaged there: (which Letter being read, Mr. Prynn inquiring the Date thereof, found it dated the 28 of July, two Days after the Surrender of Bristol, which was on the 26 of that July.)* From all which the Defendant inferred the Necessity of Surrendring the Town and Castle, for want of Succours: which had they been near, he could have made a shift to have held out three or four Days longer, and would have done it; but being hopeless of Relief, he could not in point of Soldiery or Policy have held it longer than he did.

To which Mr. Prynn replied, 1. That he did but his Duty in sending thus to his Excellency, and that this would no more excuse his Treachery and Cowardice

Cowardice in Surrendring the Town, than *Weston*, *Gomineys*, and the *Bishop of Norwich*, their sending to the Governor of *Calais*, and the Lords of the Council for timely Relief, did excuse them.

2. That in this Message and Letter to my Lord General, but four Days before the Siege, he complained neither of want of Ammunition, Victuals, Monies, nor of the Weakness or Intenability of the Works, Town, Castle, (which doubtless he would have done had there been real cause) but of the Smallness of the Garison, which he said were then but 900, besides Citizens. But our * Witnesses prove expressly, that at the Time of the Siege he had at least 2000 Foot and 300 Horse, besides Voluntiers, which were near 200 more: and Major *Allen* attested, that he brought near 200 Men well armed from *Malmsbury*, but a Day or two before the Siege; so as his 900 were increased to 2500 Men, or more: and he might have raised (as Mr. *Powel*, his own Witness attested) at least six or eight thousand able Men more, to bear Arms in the City, had he wanted Men: Therefore the want of Men was but a Pretence. Besides, had he needed only Men, why did he advise Sir *William Waller* to march out with at least 500 Horsemen, lest they should have helped to have spent the Provision of *Bristol*? as he confesseth in his Relation Page 12. Certainly, either he thought the Town tenable with the Men he had, till all the Provisions in it were spent, and so the Garison strong enough to defend it whiles they had Victuals, or else he desired rather to spare the Victuals for the Enemy, (to whom they were surrendred) than for Sir *William Waller's* Men who (had they stayed in the City) would have made up his Garison 800 Horse, besides 2000 Foot, and in all probability have preserved the City, which was partly lost (as himself confesseth) by the Cowardice of the Horse, who refused to charge the Enemy when they entred, whom they might easily have cut off, had they but charged them, as they might and should have done. In brief, the Defendant's own Relation and Letter to his Excellency inform us, that his Garison consisted of at least 2000 Foot, and 300 Horse, and was so strong and sufficient, that when the Enemy stormed the Town on every Side with all their Forces, they were valiantly repulsed, with the loss of near a thousand of their best Men, besides 700 wounded; whereas he lost not above six or eight Men at most, and had very few or none wounded. If then the Garison were thus sufficiently strong to repulse the Enemy with so great loss, when their Army was strongest and best in Heart, much more must it be sufficient to repulse them, and keep the Town, when near a thousand of their best Men were slain, and 700 more wounded, with the loss of six or eight only of the Garison, the Assailants being much weakned, and Defendants as strong or stronger, and more courageous, by reason of their good Success, than they were at first.

3. To his despair of Succours in six or eight Weeks time, by reason of the weakness or sickness of the Army, it was answered, (1.) That as Hope is the last thing that forsakes a Valiant Man, so it is the first that deserts a Coward, who placeth his Confidence any where rather than at home in his own Bosom.

(2.) That no Man, much less a Christian and Soldier too, ought to despair of God's Providence and Protection in a just Cause, even where he can

see no human probability of Succours; but ought to wait and trust on God to the utmost Extremity, who many times sends Relief, exceeding abundantly, beyond all Men can ask or think, as he did to *Jerusalem*, *Samaria* of old, and to *Rochel* of late. *Audaces fortuna juvat*, was the Heathens observation; *Fortes Deus adjuvat*, the Christians. His causeless Despair then of timely Relief from God or Man, the Parliament or his Excellency, argued not only want of Courage, but Faith too, both in God and Men.

(3.) Valiant *Massey* (if this Plea might be admitted) had far more Cause to despair of timely Relief than the Defendant: for both *Fiennes* and *Clifton* his Lieutenant professed openly, after the Surrender of *Bristol*, that they would be hanged if *Glocester* could hold out two Days, if the Enemy came before it: and Colonel *Pury* and Captain *Parry* deposed, that the Walls and Works about it were weaker than *Bristol's*, their Garison not above 1500, Club-Men and all, their Powder not above 32 single Barrells, besides what they made during the Siege, their Provisions not so plentiful as *Bristol's*, their Cannon but seven or eight; whereas *Bristol* had 55 Cannon, besides Sir *Francis Popbam's* Pieces; the Enemies before *Glocester* almost 10000 more than those that besieged *Bristol*, and likewise accompanied with the King's personal Presence. Besides, his Excellency's Army, by reason of Sickness, was now far weaker, and more unable to relieve *Glocester*, than it was when it should have marched for *Bristol's* Relief; yet notwithstanding all these Discouragements, and the great Damage and Discouragement the sudden unexpected loss of *Bristol* struck into all Mens Spirits, *Massey* and *Glocester* Men did not basely yield up the Town to the Enemy, as soon almost as they came before it; but relying on God's Providence, and the Parliament's Care to the uttermost, received timely Relief from both, in less than three Weeks after they sent for Succours; as *Bristol* doubtless would have done, had Colonel *Fiennes* had so much true Faith and Valour as *Massey* had. Now that *Bristol* would have been relieved far sooner than *Glocester*, Mr. *Prynn* proved by these Arguments.

1. Because my Lord General's Army was in a far better Condition almost by half to march when *Bristol* was besieged, than it was at the Siege of *Glocester*, the number of it being much decreased by Sickness in the Interim, and their Courage and Spirits much daunted by *Bristol's* unexpected Surrender in so short a Time, upon such dishonourable Terms, which he doubted not all the whole Council present could experimentally attest.

2. The Parliament, his Excellency, *London*, and the whole Kingdom, looked upon *Bristol* as a Place of the greatest Consequence of any in *England*, next to *London*, as the *Metropolis*, Key, Magazine of the West, which would be all indangered, and the Kingdom too by its Loss: as a Town of infinite more Consequence than *Glocester*; by the gaining whereof the Enemy would be furnished with all manner of Provisions and Ammunition by Land, with a Navy and all Merchandize by Sea, and enabled to bring in the Strength of *Wales* and *Ireland* for their Assistance: Therefore being of so great Concernment, the Parliament, his Excellency, *London*, and the Kingdom, would have been far more careful to relieve it in due Time, than they were or would have been to relieve *Glocester*; of which they had yet a special Care.

* Col. Stevens, Arthur Williams, Able Kelly, Major Wood, and others.

3. *Bristol* was a Town of far greater Commerce with *London* than *Glocester*, many *Londoners* having a great part of their Trading and Estates too in it: Therefore this particular Interest would have made the *Londoners* more forward to march to relieve *Bristol* than *Glocester*.

4. Colonel *Fiennes* and the Citizens of *Bristol* had more powerful active Friends in both Houses, and about his Excellency, (as his Letter to the Lord *Say* imports) to solicit and expedite their Relief, than *Massej* or *Glocester* had; therefore tho the Parliament and his Excellency were very ready to have sent timely Relief to both, yet in all probability, *Bristol* in these Respects had been sooner relieved (had it held out) than *Glocester* was or could have been; the rather, because the Loss of *Bristol* made many Men fall off from the Parliament, more to stand as Neuters, and damped the Activity and Spirits of most Men.

(4.) It was answer'd, that the Defendant produced no proof of his Despair, but only his Excellency's Letter, written and sent to the Lord *Say*, not to him, and dated two days after the Surrender made. This therefore could be no ground, no cause at all of the Surrender, which so long preceded it.

To supply this Oversight and Defect, Col. *Fiennes* next day produced a Witness, to prove, that the Day before the Surrender there came one into *Bristol*, who reported that the Lord General's Army was very weak, and in no posture to march. But who it was, or whence he came, or how he came in thither, the Town being beleaguered, or whether the Governor ever had any certain Information of this Report, there was not the least shadow of Proof.

(5.) It was reply'd, That if a Governor's groundless Surmise of an Improbability of timely Supplies, might be a good excuse to surrender a Town, the strongest, best furnish'd Towns and Forts in the Kingdom might be betray'd, surrendered to the Enemy in a moment under this Pretence. Col. *Massej* might then upon far better Grounds have surrender'd *Glocester* to the King the first Day; the Earl of *Stamford*, *Exeter*; and Col. *Warnlow*, *Plymouth*, the second Day they were besieged; than the Defendant *Bristol* on the third Day, since there was a far greater Improbability of relieving any of these in time, than of *Bristol*. And by this reason, had Col. *Fiennes* been furnished with Men, Ammunition, Victuals, to have kept the Town, five or seven Weeks longer, yet by this way of arguing, he would certainly have surrender'd it when he did, (in less than three days space) and not have kept it to the fifth or seventh Week's end; because he conceived an improbability of Relief in eight Weeks time, out of a panick fear, or out of a mere design to colour his Surrender. He should have therefore held it to the uttermost Extremity, and God or our vigilant Parliament (no doubt) by that time would have sent Relief, as they did to *Glocester*; or if none had come, he had then discharged his Duty, and been excused: But since he kept it not to the last, but prejudged God's, the Parliament's, and his Excellency's care to relieve him in due Season, his Fault is inexcusable and capital.

Fourthly, He alledgeth, That he did not surrender the City, Castle, Arms, &c. traitorously, and that no Treachery was proved against him.

VOL. V.

To which Mr. *Prynn* answer'd: 1. That tho there were no direct Proof of any Correspondency or Intelligence with the Enemy; yet if they were surrender'd before uttermost Extremity, the very Law itself, and the Letter of the Ordinances for War, resolve this to be Treason. And being thus Treason, even in point of Law, he needed no other Proof that it was traitorously surrender'd, but the Law and Fact itself. And we ought to charge it in the Impeachment, that it was traitorously surrender'd, as the Law resolves it to be, else the Impeachment was not good in Law, neither could Judgment be given on it. Hence, by the Rules of the Common Law, if a Man be indicted of any Crime which is Treason, Felony, or Burglary by the Law, the Indictment must run, that he committed the Crime, *Proditorie, Felonice, or Burglariter*, else the Indictment is vicious and defective. Therefore, by like reason, the Surrendering of any Fort, before utmost Extremity, being Treason, it ought to be charged in the Articles, That it was treasonably surrender'd, and for this end was inserted the word *Treasonably* in the Articles.

2. It was answer'd, That Fear and Cowardice were the most traitorly Passions of all others: These have caused many to betray their own Reason, Senses, Liberties, Laws, Estate, Trusts, Friends, Countries, Kingdoms, Souls; whence we find the Fearful, marshalled in the very Front of those, *Who shall have their part in the Lake that shall burn with Fire and Brimstone*; and quite exploded out of God's temporal and spiritual Militia. Therefore if he surrender'd them out of Fear or Cowardice only, tho without any traitorly Compact with the Enemy, the Surrender is properly stiled *Traitorous*, as well as *Cowardly*, even in Reality and Law.

3. It was answer'd, That tho there were no direct Treachery charged or proved in the fourth Article, yet there were vehement Presumptions, Suspensions of it (which oftentimes cast and condemn Felons, Murderers, Traytors, as Experience manifests, as well as positive Proofs) directly charged, and should be proved against him in the seventh; which we would here make use of and bundle up together. First then, his own frequent Confessions in his Answers, That he never undertook to keep or not deliver the City or Castle to the Enemy without the Parliament's and his Excellency's previous Consents: That they neither in Honour nor Justice could expect such a Promise from him: That he ought not to have kept the Castle when the Enemy had enter'd the Line, but ought to have surrender'd the same (alib tenable) to the Enemy, together with the City, by the Principles of Honesty and Justice, the Rules of Wisdom and Discretion, &c. coupled with his wilful Misinforming of the Council of War, when they met about a Parley, that there were not above twenty Barrels of Powder left in the Castle (whenas there were seventy French Barrels, besides what was in the Forts and City) and not above three or four hundred weight of Match; and commanding Mr. *Hassard* the Storekeeper to say there was no more (as he confessed to Capt. *Birch*) whenas Mr. *Hassard* deposeth there were fifty Barrels of Powder, and at least fourteen hundred Weight of Match, besides as much more as four Horses could draw, brought into the Castle that Morning (as *Arthur Williams* and *Joan Batten* deposited) and a hundred and forty Bundles, as Capt. *Busbel* affirmed, of purpose to draw the Council

U u

to

to a present Parley and Surrender, were vehement Presumptions and circumstantial Proofs of Treachery and Indirect Dealing: All which being compared with the Depositions of Capt. Lloyd and Thomas Munday, That the Defendant called Munday *saucy Knave*, when he informed him and Langrish of the Danger and Weakness of the very Place where the Enemy the next Morning entred, refusing to strengthen the Guards there as he was advised by him, and appointing Major Langrish (a noted Coward, formerly complained of to him for his Cowardice and Negligence) to guard this weakest Place, who never once offered to charge the Enemy, but gave them leave to enter, and yet he never questioned him for this Treachery, but countenanced him by his Favour, justified him in print, and produced him before the Council as a competent Witness: With his refusing to send away the Prisoners in the Castle before the Siege, upon Sir William Waller's Advice; saying, *That he would detain them there to make his conditions the better if the Enemy came before Bristol* (attested by Sir William, Col. Cook, and confessed by himself; with his Speeches to Mr. Talboyes (who moved him to respite a Delinquent's Payment of a Sum of Money till St. James-tide then ensuing;) *That he knew not whether he should be at Bristol at St. James-tide, &c.* which made Mr. Talboyes then presently conceive he intended to surrender the City about that time, (as he did the next Day after St. James's Day, viz. July 26, 1643.) whereupon Mr. Talboyes presently removed and left the City; with his prohibiting John Warden the Gunner, (as Richard Butler deposeth) *under pain of death to shoot any Granados at the Enemy, when he pressed him that he might do it*, which made him say *they were betrayed*. All these Particulars laid together, and coupled with Capt. Roper's Deposition, that the Lady Newport told this as a special Secret to the Countess of Desmond, at her being in Oxford, a little before Bristol was besieged, that this City would be surrender'd to the King as soon as his Forces came before it; (which Capt. Roper further attested from the Mouth of the Right honourable the Earl of Denbigh, that there were divers Wagers laid at Oxford, and offer'd to be laid in and near London, as soon as the Siege of Bristol was spoken of, that this Town would be surrender'd the 26th of July, the very Day it was afterwards yielded up;) the calling his Men off the Line under pain of death, and not suffering them to fall on the Enemy, which made many then say, *they were betrayed*, with his late and slender Salley. All these particular Circumstances annexed to the Premises, and subsequent Matters seriously ponder'd, are sufficient to make a vehement Suspicion, if not a punctual Evidence, that Bristol was not only cowardly, but traiterously deliver'd, as well in a proper as a legal Sense, notwithstanding the Defendant's Flourishes to the contrary, till Time shall discover the obscured Secrets of this Mystery more apparently to the World.

His fifth Allegation was, *That the Town and Castle were not cowardly surrendred.*

Before he came to make this good by Proofs and Arguments, he first excepted against our Witnesses to prove the Surrender cowardly, because some of them were Women, others Enemies, who were not competent Witnesses, and were ready to slander their Opposites.

To which Mr. Prynn reply'd, 1. That some of the Witnesses only were Women, and those recorded by Men. 2. That they declared not their own weak Opinions, but the Judgments of Men; yea of the Enemies own Commanders, in private serious Conference among themselves, as well as in open Discourse to others. 3. That these Women-Witnesses, and other Females in the City, shewed more true Courage and Undauntedness than the Defendant and some of his Officers, working boldly in the face of the Enemy, where they durst not appear; opposing a Parley when he sent out twice for it, and offering to go in Person with their Children into the very Mouth of the Cannon to dead the Bullets, if the Soldiers were afraid, rather than the City should be surrendred: Being then such masculine Females as these, he thought them meet Witnesses to prove the Surrender cowardly. 4. To the Testimonies of the Enemies he answer'd, that it was in this case the best and strongest of any other, it being the natural Disposition of every Soldier that takes any strong Fort or City, to extol the Enemies Valour and Difficulties of winning it as much as possible, the more to advance their own Prowess. It's no great Honour in any Man's Judgment to conquer a Coward, or Place not tenable; therefore those who detract from their Enemies Valour or Strength, derogate most from their own Honour, Conquest, Prowess, and as much disparage themselves as their Enemies thereby. Since then the Enemies, both in private Discourses among themselves, and in Conference with others, so frequently censured this Surrender as cowardly, taxed the Defendant for a Coward, and confessed they could not have taken the Town, nor all the Devils in Hell the Castle, had the Defendant held them valiantly out against them, and not cowardly surrendred them beyond their expectation; their Testimonies back'd with the Premises*, must be a most convincing Evidence in this Particular.

Secondly, he objected, that Mr. Prynn had been tampering with some Witnesses, and urging them to testify against him; for which he produced two Instances: The first was, that Mr. Prynn urged Mr. Hassard, who kept the Stores in Bristol Castle, to attest there were more than fifty Barrels of Powder therein when it was surrendred; inasmuch that Mr. Hassard told him, he would not go against his Conscience. Secondly, that he meeting with Lieutenant Col. Davison in the Street, offer'd him a Quart of Wine, pressing him to go to a Tavern, and to set down what he could attest touching his advising Col. Fiennes to sally out upon the Enemy as soon as they entred, and his Dislike of drawing his Men from the Line, and his refusing to follow this Advice: which he denying to do, Mr. Prynn told him that he was engaged to give in his Testimony, because Col. Fiennes had given him the Lye in Print, in his Reply to Mr. Walker. And for Proof hereof he produced two Witnesses, that Davison told him this Story in his Chamber in Arundel House, in the Presence of the Lord Say his Father.

To which unexpected false Calumny, Mr. Prynn returned this Answer, which he was ready to attest on his Oath: First, That being summoned by the Defendant himself to appear before a Council of War, to make good what he had written concerning the Surrender of Bristol, he did thereupon re-
pair

* Mary Smith, Ethelred Huddy, Joan Battin, Joseph Proud, Mich. Sparkes, Nich. Collins.

pair to Mr. *Hassard*, and other Witnesses present at the Siege, to desire them to witness the Truth only of what they knew touching that Action, which he might lawfully do: and because Mr. *Hassard* kept the Magazine, he desired him to inform him how many Barrels of Powder there were in the Castle when it was surrendered; who thereupon answer'd, there were fifty: upon which he demanded, whether there were no more than fifty? for he had sundry Witnesses to prove that he confessed to Capt. *Birch* and *Arthur Williams*, that there were sixty; and to Major *Wood*, that there were seventy Barrels left when it was surrendered; and Capt. *Busbel* (then Prisoner) affirmed he found no less than seventy Barrels there: if then there were no more than fifty, he should do well to declare the utmost Number which he certainly knew to be there. To which he answer'd, he did think there were more than fifty Barrels, but how many more he could not certainly depose; and therefore he would rather testify less than there were, in setting down fifty generally, without adding this Negative to it, and no more, which he durst not swear, for then he was sure not to wrong his Conscience. To which Master *Prynn* reply'd, that he desir'd him by no means to wrong his Conscience in testifying more than the Truth, but to keep a good Conscience, in witnessing the full Truth, and not concealing any thing to smother Truth. At last *Hassard* said, that he was not willing to appear against Col. *Fiennes*, for he had lost most of his Estate in *Bristol*, and that there were Arrears of Pay due unto him, for Payment whereof the Colonel had lately given him a Bill under his Hand, and if he should lose his Arrears it would go hard with him. Whereupon Master *Prynn* then answered, he would not press him to any thing to his Prejudice, and so left him, he promising to give in his Deposition in Writing to the Advocate, which he never did. And whether this were tampering with Witnesses, or who had tampered most with *Hassard*, he or the Defendant against whom he was unwilling to testify the Truth, or all the Truth, he humbly submitted to their honourable Judgments.

Secondly, For Lieut. *Davison*, Mr. *Prynn* protested, he never saw the Man till he came voluntarily to him in *Westminster-Hall*, and told him freely, without any Inducement on his Part, that he was in the Siege of *Bristol* under Col. *Fiennes*, and after that in the Siege of *Glocester*; from whence coming lately to *London*, he met with a printed Book writ by Col. *Fiennes* in Disgrace of Mr. *Walker*, wherein he had given him the Lye, and a base Lye in the Margin, to his Dishonour; whereupon being sensible of this open Injury, he repaired to Col. *Fiennes* to *Arundel House*, and there in the Lord *Say's* Presence, challenged him for giving him the Lye in Print without cause, desiring him to give him publick Satisfaction, or else he would take Satisfaction himself, for he would not take the Lye from any Man in *England*: and withal told him to his Face, that he did advise him not to draw the Soldiers from the Line, but to fall upon the Enemies presently, and cut them off, as they might have done with ease; but he rejecting his Advice, called off the Men, and so not making a timely Salley, lost the Town. Whereupon the Lord *Say* answer'd, Son, you must take heed how you wrong any Gentleman of Quality, especially in Print; and if you have wronged this Gentleman, you may do well to right him: Upon

which Col. *Fiennes* confessed before his Father, he did give him such Advice, and that he had done him wrong in putting the Lye over against his Name: but it was much against his Will, thro' his Boy's Negligence; for after he had sent the Copy of his Reply to the Press, wherein the Lye was written in the Margin against his Name, he remembering this Mistake, sent his Boy purposely to the Printer to charge him to blot it out and not print it, which it seems his Boy then neglected; but he would see it put out in the next Edition. Whereupon I seeing his Freeness with me, and thinking his Testimony material, told him that the Surrender of *Bristol* was now brought into question before a Council of War by Mr. *Fiennes* himself, whom I and Mr. *Walker* were summoned to prosecute; and therefore we should desire his Presence as a Witness there, and so we parted then. Soon after the Council of War was adjourned; and then meeting with Lieut. *Davison* (who made the same Relation to above twenty more in *Westminster-Hall*, as he had done to me) he told me he was going suddenly out of Town to *Glocester*: I desired him to testify his Knowledge touching the Premises before the Advocate ere he departed; whereupon he told me, that the Lord *Say* was his very good Friend, and had promised to help him to his Arrears, and therefore he was loth to appear in the Business, there being other Witnesses sufficient. To which I answer'd, I would have the Judge-Advocate's Warrant to bring him in as a Witness, and then no Exceptions could be taken; which Warrant when I had procured, I coming from the Advocate's, casually met *Davison* on Horseback above *Ludgate* near the Advocate's Lodging in *Paul's Church-yard*, where asking of him how long he stayed in Town, he answer'd that he was to depart to *Glocester* the next Morning: Whereupon I told him, I had a Warrant to bring him in as a Witness from the Advocate, who was then in his Lodging, which was close by; and therefore since he was to depart so soon, I desir'd him to go with me then to the Advocate to set down his Testimony upon Oath; which he excused saying, he had promised to meet some Friends to drink a Quart or two of Wine with them before his Departure, and so we parted without more Discourse. And was this a tampering, only to desire a Witness to set down what he voluntarily informed me, before the Advocate, when I had a Warrant to examine him? As for offering him a Quart of Wine, or inviting him to a Tavern to drink, I protest I never did it; and am so averse from such a Courtesy, that to my remembrance, I have never these eighteen Years space, gone into any one Tavern in *London* or elsewhere, to give or receive one Quart of Wine, but only to eat a Breakfast or Dinner; and therefore it is very improbable I should proffer this Courtesy unto him, who, as I discovered then by his Discourse, had drank sufficiently before, and was going (as he told me) to drink more. But admit I proffered him a Quart of Wine, and that in the open Street, was a Quart of Wine, think you, so considerable a thing as to tempt or corrupt a Witness of that Quality? or the open Street a fit Place for such a Purpose, where so many saw and over-heard us? Certainly if this Gentleman were so ignoble as to be corrupted with so poor a Courtesy as a Quart of Wine in the open Street; I am certain his Arrears of Pay, in Col. *Fiennes's* own private Chamber in *Arundel House*, where he had fair

Promises to receive them, are far more prevalent Temptations to corrupt, and keep him back from appearing here in Person, whither the Defendant might have brought him to testify my tampering with him, had he pleased, he being still in *London*, and under his Command, tho he will not appear upon our Summons to testify the Truth. But if he be such a one as Col. *Fiennes* would intimate him, (tho I have a better Opinion of the Gentleman's Honesty) that a Quart of Wine will bias him more than Truth, I should rather want his Testimony, than put him to his Oath, were he now present: But being neither examined by us, nor yet intended to be, this impertinent Cavil sounds more of Calumny than Judgment.

But because Colonel *Fiennes* hath now given me this just Occasion, I shall in the third Place (which otherwise I should have concealed, but that his Aspersions have provoked me to alledge it by way of just Defence) truly inform your Lordships: First, What Advantages, Obligations, and Engagements he hath upon his own Witnesses, which may probably sway them to over-much Partiality in their Testimonies, of which we are wholly destitute in respect of ours. Secondly, How the Colonel and his Agents have tamper'd with, affronted, threatened and abused our Witnesses. 1. Most of the material Witnesses in this Cause were the Defendant's own Officers and Soldiers, from whom they expect not only future Preferments, but their Arrears of Pay, which they were in danger to lose if they should either appear against him, or he miscarry in this Case. Upon this Ground not only Mr. *Haffard*, as you heard, was unwilling, and *Davison* refused to give in his Testimony, but one Capt. *Oland* (as appears by Capt. *Harrington's* Deposition) with sundry other material Witnesses, denied to speak what they knew: and some of his Officers since they came hither to witness for him have said, that if the Cause went with him, (as they made little question but it would) they should have all their Arrears paid, else they should lose them. Now whether the Promise of Arrears be not a tampering with, and the Loss of them a threatening or terrifying of Witnesses, we leave your Lordships to resolve. Besides, Mr. *Sprig* (Secretary to the Lord *Say*) went to a noble Knight's Lodging at *St. Albans*, produced as a Witness by the Defendant, that same Morning he was to give in his Testimony, with this strange Prologue to an Evidence, that Col. *Fiennes* presented his Respects to him, and desired him to come that Morning to the Council of War to give in his Testimony for him; and that his Lord likewise desired to be remembered to him, and to let him know that two hundred Pounds (of the five hundred) due unto him was ready for him at *London* upon his return, and the rest of the Money should be ready for him as soon as it could be provided, which Capt. *Harrington* then present in the Knight's Chamber heard and deposed; nor could, nor did *Sprig* deny he deliver'd such a Message, but said he had no ill Intentions in it. To which I reply'd, that whatever his Intentions were, the Words spoken at that Season, and upon that Occasion, tended more to corrupt a Witness, than my offering a Quart of Wine in the open Street did (had I offer'd it, as I did not) which was so much insisted on. And tho I knew the Knight so well, that no Offers whatever could corrupt him; yet how such Speeches might work on other Witnesses who expected Debts and Arrears from the Colonel, I could not divine;

and those who durst use such tempting Speeches so openly in *St. Albans* during the Trial, would probably make use of the like or worse Temptations in private to Witnesses, to corrupt or take off their Testimony. However the Court by this might clearly discern, which side was most guilty of tampering with Witnesses. 2. That some of our Witnesses sent for thither by the Defendant, had been openly abused, affronted, quarrelled with by the Defendant and his Witnesses, even in the Council's Presence and elsewhere: as namely Capt. *Bagnal*, who tho an extraordinary Friend to the Defendant, (for whom he took two Journeys to *London* for a Commission at his own Charge, and raised a Company to defend the Town) yet merely for testifying the Truth impartially, was strangely questioned and affronted by the Defendant himself, abused with ill Language, taxed with Perjury, quarrelled with by *Scotten*, (who gave him the Lye in the Council-Chamber, before your Honours were departed thence) challenged, scorned, reviled, threatned to be mischieved, (for all which Affronts we crave your Justice.) And if our Witnesses be thus affronted, menaced, abused in your very Presence, how think you were others dealt with behind your Honours and our Backs, to strangle Truth? A vehement Argument all hath not been rightly carried on that Side.

I shall next consider the great Difficulties on our Parts to procure, and the Impossibility to suborn the Witnesses we produce. First, All our Witnesses for the most part are Strangers to us, all of them better known and more obliged to the Defendant than to us: they are Persons disinterested, disingaged, who neither gain nor lose by the Trial, however the Sentence go; they were never under our Service, Power, or Commands, most of them were such who served the State *gratis*, and were no Mercenaries in that Service. We are no ways ally'd to them, have no Command over them, no Arrears or Debts to pay them, no Rewards or Preferments to bestow upon them, no Engagement to allure or enforce them; whereas on the contrary, the Defendant hath all the Advantages and Bonds that can be, tending to Partiality over his Witnesses. Many of them are *testes domestici*, as his Brother, Kinsmen, Servants, Footboys; most of the rest his Officers and Soldiers, against whom we excepted as incompetent. First, Because they were Parties in this Case, joining with the Defendant in a Petition to his Excellency for this Trial, which was granted at their Request, as the Proclamation of his Excellency attests. Secondly, Because they were Confederates and equally guilty with him in this Treason of surrendering *Bristol*, most of them being of his Council of War, and consenting to this Act; which if it prove Capital and Criminal in him, will likewise be so in them: in swearing therefore to acquit him of this Treason in which themselves are involved, they do in verity swear to acquit themselves, and one to justify and excuse the other, which ought not to be admitted; for then the foulest Treachery that is might and would be excused, yea the greatest Traytors acquitted, if one might testify for the other in that particular Crime whereof they all stand guilty.

3. Because they all depose, as for their own Lives and Safeties, so likewise for their own Honour, Reputation and Reparation; some of them in their Speeches now, and most of them in their Petition to his Excellency, demanding Reparation in their Honour from us by this very Trial: and so

so are both Parties and Witnesses in this respect, very unequal to be admitted.

4. Some of them have carried themselves as passionately in this Case as Parties, in menacing and abusing our Witnesses, and ourselves too, threatening no less than Hanging to us for questioning this Surrender, if the Defendant be acquitted; and can such be competent Witnesses?

5. He hath very strong Obligations upon most of them, the Bond of Consanguinity and Alliance; they are his Kinsmen: of Superiority and Command; they were his Officers, Soldiers, Servants, advanced by him at first, and preferred or promised Preferment by him since: the Bond of sundry Debts and Arrears due to them from him, which they are promised to receive if he be acquitted, and expect to lose if once condemned. And what strong Engagements, what great Advantages all these are to tempt or corrupt Witnesses on his part, and silence them from testifying ought against him on our part; and how far forth such Witnesses, who appear thus to be Parties, shall be allowed of in this Case, especially such as are *Participes criminis* (adjudged incompetent by all Laws) and guilty of the same Surrender, we shall humbly refer to your just Considerations.

3^{dly}. The Defendant answer'd to an Objection made by Mr. Prynne; To wit, that it must needs be cowardly surrendred, because the Enemies that very Morning were valiantly repulsed in all Places (but that one, where only an hundred and fifty of them entred) with the loss of 700 Mens Lives, and as many more wounded, whereas the Garison then lost not above 3 or 4, and had scarce any one Man dangerously hurt in the Assault; so as the Enemy by this great Loss was far weaker, the Garison much stronger, and more courageous than before: Whereto he briefly answered, that the Slaying of 700, and Wounding 700 more, was not so great a Loss and Discouragement to the Enemy, as the Entry of the Line was an Encouragement.

To which Mr. Prynne replied, First, That those who entred the Line, by their own Confessions, were so far from receiving Encouragement by it, that they gave themselves all for dead Men, and had no other hopes but to be quite cut off. Secondly, Their Companions discouraged with the general Repulse in all other Places, knew not of their Entry in two full Hours Space, during which Time their Powder was quite spent, that they might have been all cut in Pieces, had the Defendant done his Duty. Thirdly, A whole Regiment of their Horse retreated four Miles off, with a Resolution never to come on again. Therefore the Entry of so small a Party, compared with their great Loss, could be but a very poor Encouragement, since they might have been so easily repulsed at the first, and sent back by weeping-crofs unto their retreated Companies.

After this he descended to his Arguments, to prove the Surrender not cowardly.

His first Argument was this, That he was no Coward, as appeared; First, by his Apprehending and sending away Col. Effex: Secondly, By his Apprehending and Executing the Conspirators at Bristol in the midst of the City, even at Noon-Day: Thirdly, By quelling the Malignants, and disarming the Train-Bands of the City: Fourthly, By his valiant Behaviour at Worcester, where he and his Brother, when the Forces were there routed,

were some of the last Officers that came off the Field: Fifthly, By his charging at Keinton Battle, one of the next to Sir William Balfour, up to the Cannon of the Enemy, when the Horse killed the Cannoneers, as they lay under the Carriages; and by other following Particulars: Ergo, he did not cowardly surrendred Bristol.

To which Argument, Mr. Prynne replied: 1. In general, That they did not charge him in the Articles, to be a Coward, which was not now in issue; nor yet, that he had shewed himself cowardly in all Actions since he was Governor of Bristol; but only, That he had cowardly surrendred Bristol: And, in hoc individuo he did and might deal cowardly, tho he might be valiant in other Particulars.

2. That the Argument was a gross *Non sequitur*; for as a very Coward may now and then do valiantly upon occasion, and yet be no valiant Man; (as sometimes *desperatio timidos fortes facit*, an experimental Proof whereof we find in *timorous Stags*, who run away at the Barking of the smallest Cur, yet will encounter both Dogs, Horses, and Men in Extremity, when they are at a Bay, and can run no farther;) so a valiant Man may sometimes commit a cowardly Action, and yet be no habitual Coward. To put this out of question, We have a memorable Example in the Apostle Peter, who tho he were of a bold resolute Spirit, and no doubt the stoutest of the Apostles; as appears by his adventuring (at Christ's Command) to walk out of the Ship upon the Sea itself in the midst of a Storm; his resolute telling our Saviour, That tho all else should be offended and forsake him, yet he would not; and tho he should die with him, yet he would not deny him, (which all the other Apostles likewise protested, each for himself;) by his resolute drawing out his Sword to rescue Christ when he was apprehended by the High-Priest's Servants, his cutting off Malchus's Ear therewith, his not putting up his Sword, nor giving over fighting till Christ commanded him; and by his following our Saviour into the very High-Priest's Hall, when the other Disciples forsook him and fled: (all Acts and Arguments of extraordinary Courage) yet after he saw Christ brought into question for his Life, he suddenly degenerates so far from his former Magnanimity, thro' a pusillanimous Fear then seizing on him, that at the very Voice of a silly Maid, and a High-Priest's Servant, he no less than thrice denied the Knowledge of his Master Christ, and that with bitter Oaths and Execrations: Should Peter in this Case argue,

I was valiant when I walked on the Sea, in the Chamber when I told Christ I would rather die than deny him, in the Garden where I fought for him, and in following him into the High-Priest's Hall, whither the other Disciples durst not accompany me: Ergo, I did not cowardly nor unworthily, in thus denying him thrice with Oaths and Curses in the High-Priest's Hall?

Certainly, this were a most irrational, false Argument; because Courage in some Actions is no Negation or Extenuation of Cowardice in others, almost in the self-same nick of Time. Yet this is Col. Fienes's objected Argument; I have shewed myself courageous, (as well as Peter) in some Actions; in removing Col. Effex, executing the Delinquents, disarming the Malignants of Bristol, in the Fights at Worcester and Edgehill; yea, altogether as valiant as Peter, in my vaunting Words and Promises, * That I would dispute every Foot of Ground with the Enemy to the utmost, who should

* See the Depositions of Col. Strobe, Ja. Powel, Captain Bagnal, Mr. Hassard, and others.

win it from me by Inches; that my Flag of Truce should be my Winding-sheet: that I would keep the City, or it should keep me, or I would lay my Bones therein? (O brave vaunting Peter!) yea, I was pretty full of Courage during the Siege, till the Enemy entred the Line, and then I was just like Peter entering the High-Priest's Hall; I followed the Enemy a far off, and fell from fighting to parling; from defending to surrendering the City and Castle; before any Out-Fort taken, or one Shot or Assault made against City or Castle: Ergo, I did not cowardly or unworthily surrender them now, having shewed myself so valiant in Deeds before.

But since Peter's pristine valorous Acts, and Speeches, did no ways mitigate nor extenuate, but aggravate his subsequent cowardly denials of Christ, so will the Defendant's his Surrender.

3. His forementioned valorous Exploits have no relation at all to the Surrender of Bristol, being of a different Nature from them; his Prowess therefore in the one, can never expiate, nor disaffirm his Cowardice in the other, the only thing we now charge and prove, these other objected Actions not being here in Question.

4. He gave this Answer to the objected Particulars; so far forth only as they were applied to Bristol's Surrender, (1.) That the sudden Surprizal of Col. Essex, being done at a private House out of Bristol, when the Defendant had his Troops about him, and Col. Essex only three or four Servants near him; was a greater Act of Prudence than Courage, and a Man not really valiant would have done as much: (2.) That when he apprehended the Conspirators, he had the absolute Command of the City and Castle, a strong Garrison in both, and the major Part of the City and Country siding with him: It was therefore no great Argument of extraordinary Valour, to apprehend them being but few in Number, weak in Power, and suddenly surprized at unawares. And when he executed them, all the Malignants were disarmed, the whole City, and Country generally incensed against them for their horrid Treachery, and their Party unable to make the least resistance, so as a Child might have put them to death as securely as the Defendant. Therefore this could be no convincing Evidence of his Courage. (3.) That the Malignants were quelled by the Discovery of the Plot; and the disarming of the Train-Bands, to arm his own Soldiers and best affected Citizens, was by the general Consent of the Mayor, Sheriffs, and most part of the Citizens, after the Conspiracy detected without any the least Resistance; Ergo, no Act of Courage, but rather of Discretion or Distrust. (4.) That at Worcester, all the Horse were routed and fled, and his own and Brother's Troops among the rest, is no great Argument of their Valours, which received some Blemish by that Action: and that he and his Brother were some of the last Officers of Horse, who there came off the Field, it might be, as well because they were in the rear of all the Horse and so could not possibly fly out of the Field before the rest, as by Reason of any extraordinary Valour in them more than others, and so no convincing Proof of Valour in them. (5.) That his valiant Charging in Sir William Balfour's Regiment at Edgehill where every Man did valiantly, and none turned their Backs in all that Brigade, can be no special Proof of his Courage, since every Coward will charge in Company where no Man

turneth his Back, and where there is greater Danger in flying than charging: However admit it were good Evidence, yet this is a very ill Sequel, if put into a logical Form.

Col. Fiennes charged valiantly with Sir William Balfour at Edgehill: Ergo, he did not cowardly surrender Bristol.

His second Argument to prove the Surrender not cowardly, was his not quitting Bristol immediately upon Sir William Waller's Defeat at the Devises, and his raising of Men, Arms, and perfecting the Works even after that to defend it, when many of the Country-Gentlemen left the Town, and marched to London with Sir William Waller.

To which Mr. Prynn answered: 1. That he did but his Duty in all this, which was rather an Argument of his Diligence than Courage.

2. That it had been the greatest Treachery and Cowardice in the World upon Sir William's bare Defeat, to quit a City of so great Consequence, which he was charged to keep by his Commission, and in fortifying whereof he had spent so great Costs, before the Enemy came before it: who might probably, as things then stood, have no real Intention presently to besiege it, upon that Defeat.

3. Extraordinary Diligence in fortifying, is the greatest Argument of Fear and Cowardice, if not seconded with answerable Prowess in defending what is fortified. A Coward will sooner provide Armour of Proof, than a truly valiant Man; since therefore the City was no longer defended, fortified and manned, this Reason will rather convict than acquit him of Cowardice.

4. The true Reason why so many Gentlemen then deserted the City, was (as themselves have confessed) not for that they deemed it untenable; but because they feared and discerned, the Defendant intended not to keep it to the last, but to surrender it to the Enemy's Hand; which he hath clearly enough confessed in his Answer.

5. This Argument in verity, is no more in Effect, but a Governor provides Arms, Soldiers, Cannons, Ammunition, to defend a Town of Importance, or to encounter the Enemy, and then surrenders (as he hath done) in less than three Days Siege; or runs away after he hath stood a Charge or two; Ergo, he did not Cowardly herein; because he provided Men and Arms, whose valiant Use, not diligent Preparation, is the only proof of Valour.

His third Argument was, No Man could have expected less Safety of Conditions than himself, he only being excepted out of the general Pardon offered to the Soldiers and Citizens; Ergo, he surrendered it not cowardly.

To which was answer'd: 1. That it is probable his speedy, unexpected Surrender of the Town and Castle, before Extremity, proceeded either from a Fear to lose his Life in holding them out till the last, or a Desire to purchase his Peace and Pardon out of which he was formerly excepted from the King, with so rich a Prize of Consequence as Bristol was, which would most certainly procure it, with infinite Advantage to the King, and greatest Prejudice to the Parliament. 2. That if he could have expected less Safety of Conditions than any other, for the Reason alledged, this should have rather engaged him to hazard his Life in defend-

ing

ing it to the utmost Extremity, than to yield it upon any Terms prejudicial to his own Security, which is first provided for in the Articles.

His fourth was, That he could never have undergone more Danger in the Castle had he held it, than he did in the Guards, which he diligently visited; *Ergo*, he surrendered it not cowardly.

To which was answer'd, he received no hurt at the Guards, and lost but six or eight Men at most in the Siege. *Ergo*, if he might with as little Danger and Loss have held out the Castle, his Crime and Cowardice was the greater in surrendering it so dishonourably without Stroke, or once retiring to it.

His fifth was from his Carriage when the Enemies entred, to prevent whose taking the City, he had only two Means left. The first was, to fire the Suburbs, for which he issued out a Warrant, which Warrant was not executed, but revoked for want of Men to fire them: The 2d was to fire the City behind them, and so to retreat into the Castle; which he could not possibly do without the Death of many Innocents, Men, Women, Children, and ruining of many Men's Estates: A Fact so horrid, that his Conscience would no ways permit its Execution, he being loth to begin so ill a Precedent, which would have infinitely redounded to the Parliament's Dishonour. Besides, the Castle being not large enough to contain half his Horse and Foot, and the Streets very narrow, he could not have retired into it, without great Difficulty and Danger of being cut off by the Enemy, and those Horse and Foot which could not be received would have been utterly lost, and exposed to the Enemy's Cruelty. Upon which Considerations only, not out of any Cowardice, he did by *Clifton's* Advice call a Council of War, and propound a Parley, whereupon the Surrender ensued: Therefore it was not cowardly.

To which Mr. *Prynn* reply'd, 1. That it is apparent by this Argument, that if the Suburbs had been fired, the City, and Castle, might have been saved, and the Enemies beaten out when lodged in the Suburbs; therefore he ought in this Case, both by the Common and Martial Law, to have fired the Suburbs to preserve the City, and Castle, and must answer his Negligence in not doing it; his want of Men to fire the Suburbs being a frivolous Excuse, since he had at least two thousand three hundred Garrison Soldiers; and Mr. *Haffard* the Gunner (as he acknowledged to divers) and Major *Wood*, with others, offer'd to bear, or fire them out of the Suburbs, but could not be permitted, tho it might have been done with ease, the Houses being combustible, most of them built with Timber, and that part of the Suburbs not very large.

2. That between that part of the Suburbs and Body of the City, there was a Key on the west side of *Froom-bridge*, unfordable by Horse or Foot every Tide; by reason of the Waters, and at low Water too, thro' the Deepness of the Mud, being so deep in most Places, that Men must stick fast in it (as some of the Conspirators did upon the Discovery of the Conspiracy, who were taken sticking in the* Mud:) That there is no marching over the Key in File or Rank, but only one by one, in confused Order. That on the Key-side next the City, there is a Wall of Stone near eight or nine Foot high above the Mud, which no Horse can enter, nor no Foot scale, unless at a Slip or two, which

are but narrow, and stand four or five Foot above the Water: That there are Houses all along the Key, which commanded the College-side, where the Enemy entred in such sort, that none of them could offer to wade over the Key, but they might be cut off with ease; that two or three Pieces of Ordnance planted at the head and lower-end of the Key, would so scour all that Passage, that none could have passed over without loss of Life, and the Passage there would have been so difficult, that one hundred Men would easily have kept out ten thousand, all which was attested by Col. *Popham*, Lieut. Col. *Paleologus*, Major *Wood*, Lieut. Col. *Andrews*, Capt. *Bagnall*, and some of his own Witnesses upon cross Examinations; therefore there was no Danger of the Enemies Entry there. For *Froom-gate* itself, it had a new *Portcullis*, and after the Enemies entering the Line, and late Salley on them, the very Maids and Women, in the face of the Enemy, made a Barricado and Bulwark against it fifteen or sixteen Foot thick, with Earth and Sacks of Wool, to keep them from entering there, being their only Passage into the City from that Suburbs; that above the Gate was the River *Froom* (which runs under it) with a Wall and Houses between the City and it, so as the Enemy might easily have been kept from entering the Body of the Town, and could not have entred it without infinite Loss and Disadvantage.

3. That had they gotten over the Key, or *Froom* River into the Body of the City, yet the Streets were so narrow and disadvantageous to the Enemy, that their Passage might have easily been hinder'd, the Streets block'd up with Casks, Carts, Sleds, Stools, and a Piece of Ordnance or two placed at the head of every Street, and the Houses lined with Musketeers would have scoured and secured it, that the Enemy must have sustained extraordinary Loss, at least fifty or an hundred Men for one of ours, as they lost before in the Storming. Besides, they must have all marched up the Hill, in paved Streets, which are so slippery that the Foot could have hardly stood to charge, and the Horse would certainly have slipped and fallen: in regard of which Disadvantages, our Men having the Hill, Flankers, the Shelter of Houses, and charging downwards, must needs have repulsed them with extraordinary Loss had they forcibly entred, and made a most safe Retreat into the Castle at any time when they saw just Cause, without any such Difficulty or Danger as was suggested.

4. Admit they had taken the Body of the Town beyond the Key, adjoining to the Castle, which they could not have done without excessive Loss and great Difficulty; yet all that part of the Town being commanded either by the Castle, or other Forts and Outworks all in our Possession (as *Clifton* himself with other of the Defendant's Witnesses confessed, and Major *Wood* prayed) they could not possibly have held it long, and would have been in worse Condition within it than before, and so no absolute necessity of Firing it, had not his Courage and Conscience served him to do it.

5. For his Horse and Foot, Incontainability in the Castle, in case he had been forced to retire into it, there were sundry other Places to bestow them in besides the Castle: As, (1.) The Body of the City adjoining to the Castle, which would have billeted them all till the Enemy had forced it. (2.) That part of the Suburbs, under the Command of the Castle next to *Lawford's* Gate, dis-

* Attested by Col. *Popham* and others.

tinct from the Body of the City if taken, and very defensible; the Castle and Outworks then remaining ours. (3.) The Out-Forts, where the Guards might have been doubled or trebled as there was Cause, especially now when he had an Overplus of Men that he knew not how to bestow. (4.) That part of the City beyond the Bridge in *Somersetshire-side*, which was very capacious, able to contain all his supernumerary Foot and Horse, tho the other Suburbs and Body had been taken; which part (the Bridge being broken down or defended) had been inaccessible, strong, and tenable for a long time against all his Majesty's Forces, we having then all the Out-Forts in Possession which commanded other Parts of the Town, and *Ratcliff Church*, *Tower-Harris*, and the Castle (three extraordinary strong Forts) commanding and securing that Part beyond the Bridge; which being fenced with extraordinary strong Outworks, and deep watery Dikes, *Tower-Harris* and *Ratcliff Church* on the one side, with the River and Castle on the other side, and strongly garison'd with the Soldiers retir'd from other Parts, had been almost impregnable, and might have held the Enemies Play for fundry Months, had the Defendant resolv'd to hold it to the utmost. Having therefore so many several safe Retreats and Receptacles for his Horse, Foot, and not making use of any of them, tho he promised to dispute every Inch of Ground with the Enemy (as he might have done with Honour and great Advantage) his Pretence is false, his Surrender cowardly beyond all Excuse.

6. He hath oft inculcated this to your Honours, that the Citizens were generally very malignant, and disaffected to the Parliament; and we have proved, that the most of the best affected, had carry'd their Estates and three Months Provision into the Castle, where their Persons and Goods were by the Defendant promised to be secured. His forbearing therefore to fire the City in case he had been necessitated to it, proceeded not from any publick Care he had of the Parliament's Friends or Kingdom's Safety, but from his private Respects to the Persons and Estates of Malignants, which he would rather carefully preserve, to enrich, encourage, and strengthen the Enemies, than fire or endanger to preserve the Parliament and Kingdom. Mercy and Compassion are doubtless commendable Virtues in a Governor, who should not use Cauteries or Firing till the utmost Extremity: But when such an Exigency happens, that a City must be fired, or both it and the Kingdom lost or hazarded, it is foolish Cruelty, not Christian Mercy, to be over-pitiful in such a Case. It is a cruel destructive Mercy to save a City (especially a malignant one, as this is averred then to have been) to destroy a Kingdom, yea our Religion, Laws and Liberties with it: Better the greatest part of the City had been turned into Ashes to preserve the Castle and other Parts of it to the Parliament, and secure the Realm, than to surrender the whole so cowardly, so unexpectedly, to the Loss of the West, and Kingdom in all Probability.

7. The Defendant well knew of what extraordinary Concernment the Loss of *Bristol* would be to the Kingdom, of what infinite Advantage to the Enemy, as is evident by his own Letter to my Lord *Say* (dated *March 20. 1643.* before it was fortify'd or fully garison'd) published in his printed Relation, Page 13. where thus he writes:

May it please your Lordship to understand first the Importance of this City of Bristol, &c. The Enemy hath lately cast his Eye upon it, prompted by the witty Malice of our Malignants, to espy his Advantage: If he possesseth this City, he will reap these Benefits by our Loss. 1. He will get much Money, Arms, and Ammunition in a more cheap and less hazardous way, than he can have them out of the Low-Countries; all which he will pay for with Monopolies, and Engrossments of Trade, Things with which the great ones of this Town have been well acquainted, and are therefore Malignant. 2. If he gain this Town, he will soon subdue Gloucester, and become Master of all the Trade between Shrewsbury and the Lizards-Point in Cornwall, a Quarter so plentiful as his plundering Army yet never saw. 3. He will become Master of all the Traffick of that Inland Sea the Severn, and make all the Shipping both of the Welsh and English Coasts his own. 4. His neighbourhood to Wales will from time to time supply him with a Body of Foot. 5. We shall lose a great Port-Town very important for the Service of Ireland, and fit to give Landing to the Rebels of that Place, or any other Enemy. Since therefore he knew this City to be of so great Importance to the Kingdom, and the Loss of it so extraordinarily advantageous to the Enemy, he should in this Respect have held it out to the utmost Extremity, and rather hazarded the Firing of it by the Enemy, which would not have done it, (especially being Malignant) or by himself, than quitted both it and the Castle too, with all the Ammunition, Cannon, Arms, Provisions, Colours, Ships, Merchandize, Wealth therein, upon such poor dishonourable Terms, before any Out-Fort taken, or one Shot made against the City or Castle Walls, he wanting nothing but Courage to defend them, the Enemy having lost so many, and himself so few in the former Stormings.

His sixth Argument was, that he stood in Places of greatest Danger with his Troop, near Alderman *Jones's* House, where a Granado falling into the midst of his Troop, and hurting no Man, he thereupon encouraged his Soldiers, saying, *That God did protect them.*

To which was answer'd, 1. That not one of his Troop (for ought appears) was ever hurt in that or any other Place where he stood with them; therefore the Danger was not very great. 2. That this Place under Alderman *Jones's* House, was more than Cannon-Proof, and most secure against the Enemies Shot, which the House and Garden-Walls guarded off being between the Enemy and his Troop; therefore no Place of Danger but Security. 3. That this Granado's falling in among the Troop at that time, was merely casual, and hurt not any, tho it frighted many, and made the Defendant and his Troop presently to remove from thence, as his own Witnesses deposed. 4. Himself never charged the Enemy in Person with his Troop after their Entry within the Line; his standing therefore with them in this secure Place before the Entry, was no great Proof of his Valour, much less that the Surrender was not cowardly.

His seventh Argument, to prove the Surrender not cowardly, was, That the Parley and Surrender were both agreed on by the Council of War; *Ergo* not cowardly.

To which was answer'd, 1. That himself was both the first Mover, Persuader of this Parley, this Surrender, and the principal Man that advanced it, drawing on the rest to consent to it, and not making the least Opposition against it. 2.

That

That the Council of War wherein the Parley was first propounded, was not general, as it ought to have been, but private, few of his Officers or the Gentlemen there, having notice of it, till a Parley was concluded, and a Drummer dispatc'd twice to the Enemy before they would take notice of it. At this Council no Country Gentlemen were present, but Sir *John Horner*, who gave no Vote, and Col. *Strode* who voted against it, and not above six or seven Officers, of which Lieut. Col. *Davison*, and Major *Holmes*, were two who oppos'd the Parley: as for Mr. *Edward Stephens* (whom Col. *Piennes* averred in Print to be present at it) he denies upon Oath, that he had ever any Notice of it, and so doth Col. *Stephens* too. Being therefore such a private Conventicle and no general Council, and these thus voting against the Parley, it is a greater Evidence than Disproof of a cowardly Surrender.

3. The Defendant, and his Brother *John*, to circumvent the Council, and draw them on both to a Parley and Surrender, misinformed them that there were but twenty Barrels of Powder, and four hundred Weight of Match left; as he confesseth in his Answer to the eighth Article, commanding Mr. *Hassard* (who kept the Stores) to affirm there was no more, when as you have heard it proved there was above three times as much more then in the Castle. His Misinformation therefore being the chief Motive to sway the Council to this Parley and Surrender, their Consents will not excuse but aggravate his Cowardice and Treachery in seducing them.

4. If the Town and Castle were tenable, sufficiently provided with all Necessaries for a Defence, and not reduced to Extremity, as we have proved, the Surrender by a Council of War will not make the Cowardliness and Treachery less but greater, and subject the whole Council to Censure, as appears by the Cases of *Weston*, *Gomineys*, and others adjudged in Parliament: Otherwise, if this Plea should be admitted for a Justification, a Governor and his Officers might safely without Danger betray any Fort or Place thro' Cowardice or Treachery, by voting it in a Council first, and then putting it in execution.

His eighth Argument was, That when he sent to the Enemy for a Parley, and their Hostages came to *Froom-Gate*, which was barricadoed up, they swore, *God damn us we will come in at Froom-Gate (which was the nearest way) or have no Parley at all*: whereupon he sent them this resolute Answer, *That they should not come in there, but at Newgate*, which they were enforced to do after much Contest: Ergo the Surrender was not cowardly.

To which Mr. *Prynn* answer'd; 1. That at that time *Froom-Gate* was barricadoed up with a Bulwark of Earth and Wool-Sacks fifteen or sixteen Foot thick to keep out the Enemy, made by the very Women and Maids, with the Help of a few Men in a short Space; and when the Hostages came to that Gate, the Work was raised so high, that Capt. *Taylor*, the Defendant's own Witness, confessed, *He could not see nor confer with them over it, but was enforced to go to speak with them thro' a Window, when he received their God-damn-me Message, that they would come in at that Gate, or else return*; from which Window likewise he return'd the Governor's Answer to them. Now to demolish such a Barricadoe as this, to let in these peremptory Hostages, and the Enemy too, who might

then have clear Passage into the City, had been such an indiscreet and cowardly Act, as was not only below the Spirit of a Governor, or Soldier, but of a sucking Child; and would have argued the Defendant (if condescended to) a Man utterly destitute, not only of Courage but common Discretion.

2. This braving unreasonable Request argues plainly, that the Enemies had a very mean Conceit of the Defendant's Valour, else they would never have presumed to send him such a disdainful Message, which an heroic Spirit would have so far resented, as not to brook a Parley upon any Terms; and his not yielding to it, is no greater Evidence that the Surrender following was not cowardly, than that the Building of *Tinterton Steeple* was the Cause of the Encrease of *Goodwin Sands*.

His ninth Argument, was his Courage and Speeches at the Parley, wherein he confessed, 1. That the Motion of the Parley proceeded merely from himself. 2. That the Parley was concluded on before ever the Mayor repaired to the Council.

3. He said, *The Mayor was extraordinary fearful, and pressed earnestly for an Agreement with the Enemy*.

4. That when the Enemy's Commissioners at the Parley, upon the Motion of Capt. *Birch*, that the Citizens might have Liberty to carry away their Estates if they pleased, stuck at this Demand, he thereupon rose up, and with great Earnestness protested, that he would break off the Parley, and rather lose his Life, and hold and put it to the utmost Extremity, than not provide for the Security of the Citizens Estates: which Speeches he proved by the Testimonies of Capt. *Birch*, and Mr. *Prickman*. Ergo he did not cowardly surrender the Town and Castle.

To which Mr. *Prynn* reply'd, 1. That the Motion of the Parley proceeding originally from himself before any Solicitation from the Mayor or Citizens, argued that himself was more fearful than the Mayor, tho thus extraordinary timorous; and that both the Parley and Surrender proceeded from his excessive Fear.

2. That we had here *consentem reum*, that he held not the Town till utmost Extremity, as his Duty bound him: For he told the Commissioners, if they would not yield to secure the Citizens Goods (whom he frequently brands for desperate Malignants) he would then venture his Life, and put and hold it to the utmost Extremity; therefore he held it not by his own Confession till such Extremity: and so by the very Articles of War, and Construction of Law, is guilty of a cowardly and traitorly Surrender, for which he ought to die. And here observe the strange Temper and Guilt of the Defendant: My Lords, he was constituted Governor of *Bristol*, not by the Mayor and Citizens, but his Excellency and the Parliament, to preserve it from the Enemy's Hands, rather for the Kingdom's Safety, than Security of the malignant Citizens Goods. He had formerly oft protested to the best affected Soldiers and Citizens, that *he would dispute every Inch of Ground with the Enemy, from the Out-works to the Gates, from thence to the Castle, whither he would make his last Retreat, and there lay his Bones, making his Winding-sheet his Flag of Truce*, and the like, for the common Good and Security of them and the Realm. But now alas, as soon as the Enemy entred the Line, *Heu quantum mutatus ab illo?* he became a quite other Man; and forgetting all for-

* James Powell, Col. Strode, Capt. Bagnall, Abel Kelly.

mer valiant Promises, heroick Resolutions for the Republick, he presently sent for a Parley, and disputes not so much as one Inch of Ground with the Enemy near the Gates or Body of the City, retires not one Foot towards the Castle; and instead of adventuring his Life to preserve the City for the Parliament's and Kingdom's Safety against the *Irish* Rebels, and *Welsh* Malignants Incursions, he hath not so much as one Word or Thought tending that way: but all publick Engagements set aside, he now only looks after the Security of his own Person, and of the malignant Citizens Persons and Estates, for the Enemies future Advantage, and rather than these shall not be saved, he now protests he will lose his Life, and put all to utmost Extremity. Had he really intended to make good this his Protestation for the Citizens Benefit and Safety, in case the Enemies had deny'd his Demand in their behalf, (which I much doubt of since notwithstanding his foresaid Protestations, he would not do it for the Publick;) I humbly conceive he ought much more in point of Honour and Duty to have executed it for the whole Kingdom's Preservation and Utility; which since he did not really perform nor intend to do it, you have here *confitentem reum*, an Evidence dropping from his own Mouth sufficient to condemn him: And therefore my humble Motion to your Honours is, that his Person may presently be secured as by Law it ought. The rather, because it plainly appears by all the Carriages of the Defendant, from the Enemy's first Entry till his Return to *London*, that this Surrender proceeded merely from Timidity and Cowardize at the best, as I shall evidence by these Particulars.

1st. By his * calling the Soldiers from the Line under pain of Death, and not permitting them presently to encounter the Enemy, as he was importuned by divers; and bringing them off in such Confusion, that many of them left their Arms, Ammunition, and Ordnance behind them, which might have been easily drawn off, there being so many Colliers Horses in the City for that Purpose.

2^{dly}. By giving no Order nor Direction to the Soldiers drawn off, for any present Service or Salley in divers Hours, by Means whereof, many of them deserted their Colours †.

3^{dly}. By not employing his Reserve under Capt. *Stokes*, nor his Main-Guard, nor Soldiers in the Castle (consisting of at least five hundred Men) who were fresh and had been upon no Service, to make a present Salley on the Enemy, who might with ease have been cut off by them without calling any from the Line ‡.

4^{thly}. By his contradictory Commands, and pale Looks, attested by *William Deane*, *Mary Smith*, Capt. *Busbell*, *Thomas Thomas*, and generally taken notice of by the Soldiers.

5^{thly}. By his Hattiness to propound and fend for a Parley to the Enemy, even before the Salley made, as Col. *Strode* deposeth, contrary to his Advice; and then again presently after the Salley.

6^{thly}. By the Forgetfulness of all his former Promises, and of the very Castle itself, formerly accounted by him the strongest Rampart and last Retreat, where he would lay his Bones ||; which was not now so much as thought on, altho the Magazine, Ammunition, and Provisions lay there-

in, whereby he betrayed, cheated, and undid the best affected Citizens.

7^{thly}. By his own Confession in his *Relation*, p. 10, he writes, *That all the Conditions they desired were yielded to*; yet had he not then so much Heart or Brain left within him, as to demand or make more honourable Conditions, than to deliver up the Town and Castle, with all Artillery, Arms, Ammunition, Cannon, Victuals, Prisoners, and Colours too (which was all that could be lost or given away from the State) or to demand convenient Time or Carriages to convey away their Goods from thence.

8^{thly}. By accepting Articles in the Commissioners Names, when as they should have been in Prince *Rupert's* then present, who else was not obliged to observe them; and not exacting an Oath or due sufficient Caution for performing them, after so many Experiences of their Treachery and Truce-breaking.

9^{thly}. By suffering one of the Enemy's Hostages to depart the Town as soon as the Articles were concluded, and giving Liberty to the other to do the like; but that Major *Allen* coming casually into the Room withstood it; by Means whereof they had all been wholly exposed to the Enemies Mercy and sudden Assaults, having no Security for himself, his Soldiers or the City; whereas both his Hostages continued still in the Enemies Hands **.

10^{thly}. By his not publishing the Articles after they were concluded, till Capt. *Busbell* (a Prisoner of the Enemy's Party) put him in mind thereof and published them at his Request ††.

11^{thly}. By suffering his Men to fall off their Guards, the Prisoners to get loose, the Enemies to enter the Town and Castle before the time appointed for the Surrender ††, *Whereby many Rapines and Violences were committed both on the Soldiers and Townsmen in the very Streets and Castle, which the Enemy could not prevent, and the Colonel never endeavoured to see righted*; which caused Col. *Gerrard* (foreseeing some Complaints would be made) to desire Major *Wood* (who in these Disorders suffer'd three days Imprisonment there) to carry a Letter from him to Nath. *Fiennes* (which he shewed to Major *Wood*) to this Purpose: *That whereas many Outrages had been committed contrary to the Tenor of the Articles, which might haply be imputed to the King's Grace, he gave him to understand that the Fault was in himself, who had most unsoldierly neglected to look to the Performance of them upon his Party: and if this Declaration did not give him Satisfaction, he should be ready for further clearing of himself to wait upon him with his Sword in his Hand.*

Your Friend whom you call Cavalier,

Charles Gerrard:

Which Letter Major *Wood* deliver'd.

12^{thly}. By his leaving Capt. *Blake*, and Capt. *Husbands* with their Soldiers in *Windmill-Hill* and *Brandon-Hill* Forts §, when he marched out of *Bristol*, and giving them no Notice of the Articles of Surrender, no Warrant under his Hand to deliver up these Forts according to the Articles; the first Notice they had both of the Articles and the Defendant's leaving the Town, being given them by the Enemy, who demanded the Forts which they held after the Governor's Departure, from whom they received no Order to quit them, which might have endanger'd their Lives.

* Capt. Bagnall, William Deane, William Whithorn.

|| James Powell, Mr. Hassard, Capt. Bagnall, Col. Strode.

Mr. Powel, Captain Bagnall.

§ Captain Husbands, Richard Wanston.

† Capt. Bagnall.

** Major Allen.

‡ Major Wood, William Whithorn.

†† Mr. Baynton.

‡‡ Major Wood,

13thly. By his taking no * care to march away with his Men in a Body (which they could not well do because their Colours and Drummers were surrender'd by Agreement) whereby they might have been kept together for the Service of the Parliament: And yet the *Preservation of his Men and Horse in a Body for their present Service*, is the best and only Reason he gives for the Surrender of the City and Castle, both in his *Relation, Letter, and Answer to the Articles*.

14thly. By his cowardly and unadvised Speeches concerning the Intenability of *Glocester* for three days Space, if the King's Forces came before it, and his Discourse to Mr. † Pury after its Relief; his Fear transporting him into such an uncharitable Opinion, as to judge brave Col. *Massey* as pusillanimous and cowardly as himself.

15thly. By his very printed *Relation, Letter, Replies, and Answer to the Articles*; in all which the intelligent Reader may palpably discern a Spirit of Trepidation and Cowardice to have seized both on his Brain and Pen, which made him invent so many unworthy Shifts, untrue Surmises, (as of close deck'd Boats prepared by the Enemy, a Resolution to storm the Castle, and to take it in two days at most, &c.) And utter so many strange Paradoxes, yea Contradictions, unworthy a Man of Honour; and deny, not only Col. *Essex*, but himself to be Governor of *Bristol*, or of the Castle there; of which before. If all these Evidences may be credited against his bare proofless Allegation, the Surrender must needs be cowardly and unworthy at the best.

Upon this Col. *Fiennes* affirmed, that the Report that *Bristol* was cowardly and unworthily surrendered, was first raised by Mr. *Prynn*, the Prosecutor, in his Book intituled *Rome's Master-Piece*, Pag. 35. published the first of *August* 1643. within five days after the Surrender of *Bristol*; and that before the publishing of this Book, it was not so reported, nor reputed by any.

To which Mr. *Prynn* reply'd: That this was a most false Calumny without the least Shadow of Truth; for first, tho the Title of his *Rome's Master-Piece* was written and licens'd for the Press by a Committee of the Commons House (who earnestly desired him to translate and publish the Letters and Plot therein comprized, with such Observations as he thought meet, and they should approve) on *August* 1, 1643. yet the Book itself was not compiled, nor fully printed off till the end of *August* or after, the Publication being near a Month's Space after the License; before which time, not only *Mercurius Aulicus* had informed the World in Print, That *Nathanael Fiennes* (by name, whom I named not) had bestowed *Bristol* on the King, &c. (which Words were read out of *Aulicus*;) but likewise many *London Mercuries* (and namely, that from Monday the 31st of *July*, till *Aug.* 7. p. 17.) had divulged in Print, That *Bristol* was cowardly deliver'd to the Enemy; that if Col. *Massey* had been Governor in his Place it had not been surrender'd at all, but held out still, &c. And in truth the Surrender thereof to the Enemy in so short a Space, was so far beyond all Mens Thoughts or Apprehension, that the very first Tidings of it made most Men openly aver in every Place, it was most cowardly and unworthily at least, if not treacherously sur-

rendred to the Enemies. This was not only *Vox Populi* in *London, Westminster*, and elsewhere, but *Vox Parliamenti*, the Opinion of the Commons House (if not the Lords too) who were much dejected at the News; which the Defendant himself took notice of upon his very first Entry into the House, after his return from his noble Exploit; where every one look'd strangely on him with a discontented Aspect, and few or none of his dearest Friends once moved their Hats unto him, (as they usually do to all other Members upon their Arrival from any publick Service after some time of Absence;) and some of them minded him of *Gominey's* and *Weston's* Case. Whereupon he conscious to himself of the Commons general ill Opinion of this Action, to avoid their Examination and Censure, was enforced to make his Apology for it openly in the House, *August* 5, 1643. in the Close whereof (containing his bare Relation, no ways satisfactory) he desired, That what he had affirmed might be examined at a Council of War, that so he might be cleared or condemned according as they should find the Truth or Falshood of what he had declared. Which Passage of his, published in Print long before *Rome's Master-Piece*, is a pregnant Evidence and Acknowledgment, that the very House of Commons conceived this Surrender proceeded either from his Cowardice or Treachery; else there had been no need of any long Apology, or such a Reference as this to a Council of War. And indeed, his own printed Relation is so full of palpable Shifts, and Expressions of a timorous Spirit, that the very reading of it confirmed me and others in this Opinion, that the Surrender was cowardly or treacherous; and my Passage in *Rome's Master-Piece* concerning the Inconveniencies of *Bristol's* Surrender, with reference to the *Welsh* and *Irish* Rebels, were taken verbatim out of his own printed Relation, p. 13. where thus he writes, *If the Enemy possessed Bristol, his Neighbourhood of Wales will from time to time supply him with a Body of Foot. We shall lose a Port-Town very important for the Service of Ireland, and fit to give Landing to the Rebels of that Place or any other.* By all which it is clear, that I was not the first Raiser of the Report of its cowardly Surrender, but that himself and others then in Print had raised this Report, before I published any thing to this Purpose. Secondly, to put this out of question; 1st. It evidently appears by the Deposition of Mr. *Edward Stephens*, *Thomas Monday*, *William Deane*, *John Battin*, *Abel Kelley*, *Arthur Williams*, Mrs. *Haffard*, *Richard Butler*, *Mary Smith*, *Ethelred Huddy*, *Joseph Proud*, *Jeremy Holway*, *Anthony Gale*, and others, that both the Soldiers and Citizens of *Bristol* were much discontented with the Governor's Parley and Surrender, when it was but in Agitation, and openly said they were betrayed; and that not they only, but the very Enemies, concluded the Surrender to be cowardly, before we had any Tidings of it. 2dly, Sir *John Horner* (his own Witness) deposeth, that in their coming up to *London*, before we had any Notice of it, (they being the first who came thence and brought Tidings of it) two or three Ministers spake against it, as cowardly and unworthy. 3dly, Major *Allen* attesteth, that he and some other Officers present in the Siege, concluded it so in their private Discourse, as they retreated from *Bristol*

* Major Wood.

† Mr. Brown, Mr. Pury.

before they came to *London*. 4thly, It was generally reported cowardly or traytorly both in *London* and *Westminster* upon the first notice of it; and some Women in the Streets openly called the Defendant a Coward, for this unworthy Action; which his own Lady-Mother condemned, and would not believe at first (affirming, that her Son was of a more valorous Spirit and honourable Extraction than to deliver up a Place of such Consequence as *Bristol* in so short a time, where he had promised to spend his Life and lay his Bones, rather than quit it;) and all this before I took any special Notice of it. Whereupon having some Relation to *Bristol*, in and near which I had divers Friends, I made a more particular Enquiry into this Action, from such Soldiers and Citizens present in the Siege, who could give me the best Information; and upon due Examination of what was alledged on either Part, I found the Surrender such as I published it to be in *Rome's Master-piece*, by Approbation of a Committee of the Commons House; who both authorized the Book, and concurred with me in this Opinion. From all which it will appear, that I was not the Raifer, nor first Inventor of this Bruit, *That Bristol was cowardly and unworthily surrendred*, it being published in Print by divers, and the common received Opinion of all Men in City and Country, before I gave my Censure of it, which I have here made good.

His tenth Argument was, That both the City and Castle were untenable against the Enemy; Therefore the Surrender not cowardly, nor unworthy. Their Intenability he endeavoured to prove,

First, From the Weakness and Insufficiency of the Line, Outworks, Walls, Fortifications both of the City and Castle.

Secondly, From the want of a sufficient Garison to defend the Town; to manifest which, he alledged, that he had not above two thousand Foot and Horse to guard the Place, which were not half enough, the Works being near five Miles in compass, and divided by a River, so as his Men stood very thin upon the Line, and had no Reserves at all, unless for some particular Places; by means whereof his Soldiers in most Places, continued four or five Days and Nights together upon Duty without Relief. And to prove the Garison insufficient, he insisted, (1.) On the Letter printed in his Relation, *Pag. 14.* complaining of the weakness of the Garison of *Bristol*, and desiring an Augmentation of it. (2.) On his Excellency's Opinion, *ibid. Pag. 16.* who thought it necessary this Garison should consist of three Regiments of Foot, two Troops of Horse, and one Company of Dragoons. (3.) On a draught of an Ordinance presented to the House of Commons by the Lord Say; for the settling of a sufficient Garison at *Bristol* (*ibid. Pag. 17.*) wherein he propounded, that the Garison might consist of three Regiments of Foot, the first consisting of 1200, the second of 1000, the third of 800 Men, and of two Troops of Horse, and one Company of Dragoons; with less than which he could not possibly (as he said) maintain the City against the Enemies Forces that came then against it, who had few less than seventy Colours of Foot (*Lieutenant Clifton* affirmed, who told them) on *Glocester*-shire Side, which Captain *Husbands*, telling them with his Prospective-Glass, multiplied the Colours to one hundred.

Thirdly, From his want of Powder and Ammunition, he having no Match at all, and but fifty Barrels of Powder left, which would not have served

them above two Days; which he endeavoured to prove by the Proportion of Powder they spent in two Days before, and by a Letter from Col. *Warnloe* from *Plymouth* (attested by Master *Nichols*) who writ, that they spent forty Barrels of Powder there in one Day, when they beat the Enemy out of their Works.

The City and Castle being therefore untenable in all these Respects; and no Succours near to relieve them in due Season, his Surrender could not be deemed cowardly, but discreet and honourable to preserve the Citizens Goods, and the Garison (consisting of above 1500 Foot, and Horse) to serve the Parliament (which then wanted Men) in other Places of Advantage.

To which Particulars Mr. *Prym* gave these ensuing Answers, First, That the Works about the City and Castle were very strong, defensible, tenable, against all the Enemies Power, which he proved; 1. By the Judgment and Opinion of the Defendant himself, who never once complained of the Weakness or Insufficiency of the Works or Castle till the Surrender, but oft affirmed the Works to be very strong, sufficient, and tenable, before the Siege, and that he doubted not to make them good against all the Enemy's Power, as Col. *Stephens*, Col. *Strode*, Capt. *Bagnal*, Master *Powel*, with others depose. And he publickly confesseth in his printed Relation, *Pag. 10.* that himself (and some others too) had a great Opinion of the Strength of the Castle, before it was surrendred; tho now upon a sudden, he would make your Honours believe, and endeavours to prove it, the weakest most untenable Place in the World, having spent one whole Day's time in demonstrating its several Weaknesses, or rather in them his own, who notwithstanding all these Imbecillities had so great an Opinion of its Strength: And indeed did not the Defendant deem the Works sufficient, the City and Castle strong, he must discover himself Guilty, either of extraordinary Folly, in putting the Parliament, Country, City, to so great Costs to fortify, garison, furnish the City and Castle with all Necessaries to hold out a Siege, if it were not really tenable, and of no considerable Strength at all in the Upshot; or else of extraordinary Treachery, if he knew it not tenable, and yet gave it out to be very defensible, on purpose to induce the Gentry and Country in those Parts to bring their Money, Plate, Estates, Provisions thither, as to Places of Strength and Security, as we know they did, upon his Promises to defend them to the last; that so they might become a Prey to the Enemies, who had all the Ammunition, Provisions, Arms of those Parts delivered into their Hands at once, which they could have never gained, had not the Defendant fortified the Town, and Castle, and affirmed them to be strong and tenable. Besides, his own many liberal Promises to defend the Castle to the utmost, in Case he was forced to retreat into it, and there to secure the best affected Citizens and their Goods, argues its Tenability in his own Apprehension. 2. As the Town, but Castle especially, was tenable in his own Judgment, so likewise in the Opinion of others. (1.) Of the Gentry and Country who repaired thither, as to a most secure Sanctuary against the Enemy, towards whose Fortification and Defence they liberally Contributed. (2.) Of the Citizens, who all deemed the Town but the Castle especially (to which they carried their Estates and above three months Provisions) to be defensible against all the Enemies Power, as appears by the Depositions of *James Powel*, *Abel*

Abel Kelly, William Deane, Mistress Haffard, and others, and by the Tragedy of Bristol, lately published by Capt. Birch, Mr. Powel and other Citizens of it; who write thus of the Castle, Pag. 5. *The Castle being strongly fortified and victualled, as being the last Place to retreat unto, if the Town should be taken; being assured we should be able to keep it (till Relief came) as a Sanctuary for the Persons and Estates of such as were most active for the Parliament; divers of us accordingly brought in our Goods, with Provisions for ourselves, and to help victual the Soldiers that were to be entertained in it, &c.* (3.) By the Opinion of divers Soldiers of our own Party, as Col. Stephens, Col. Strode, Lieutenant Cols. Paleologus and Andrews, Major Wood, Major Allen, Captain Bagnal, Nicholas Cowling, Mr. Haffard, Richard Linden, Edmund Warthorne, Thomas Munday, and Richard Butler attest. (4.) By the Speech of the Enemy's own Commanders, who viewing the Works of the said Castle soon after its Surrender, swore, *God damn them, all the Devils in Hell could not have taken the Castle, it was so fortified, had not the Governor cowardly surrender'd it; that they might thank Fiennes for it; and that they could not have taken the Castle, had it not been yielded up to them beyond Expectation: as Mary Smith, Etbelred Huddy, Joan Battin, Thomas Thomas, and Michael Spark senior, witnesses.*

And whereas he alledged, that Sir William Waller, and Sir Arthur Haslerig, deemed Bristol not tenable, which he endeavoured to prove by this Passage in their Letter to him, dated July 1. 1643. — (attested by Mr. John Ash, and printed in his Relation, Pag. 27.) *We think the Enemy will fall on this Night, if not, to morrow Morning; and if so, what good will this Regiment do Bristol if we perish? It is a wonder to us, to see our Friends delay Help where there is Safety, &c.*

Mr. Prynn answered, 1. That this Letter declares not their Opinion concerning the Intenability of Bristol, but their Importunity to have speedy Supplies from thence. 2. It expresseth that Bristol's greatest Security consisted in their Army's Success, there being no Danger of a Siege as long as their Army were Masters of the Field. 3. It proves nothing, that either the City or Castle might not have held out till Relief should arrive from his Excellency; or that it could not hold out above three Days longer. 4. The Defendant confesseth that had Col. Popham's Regiment continued in the Town, it had not been lost; and that his sending of them to Sir William Waller, was the Loss of the Town: therefore the Castle and Town in respect of the Fortifications were both tenable, and had no want at all but of Col. Popham's Men, which he supplied by his new-raised Regiments before the Siege.

2. Whereas he alledged, that divers Gentlemen left the Town, and went away with Sir William Waller, and Sir Arthur Haslerig, because they deemed it not tenable:

It was answered, That the Reason of their Departure (as themselves have confessed) was, the Fear and Assurance they had, the Defendant would not hold it out to the last; whereas Col. Strode, Col. Stephens, and others, who had his Promise to hold it out to the utmost, continued with him still.

Fourthly, It was answered, That the objected Weaknesses and Defects of the Works and Castle, were mere Inventions of the Defendant since the Surrender, not thought or spoken of before, nor once propounded at the Council of War when the

Parley was in Agitation; where the Debate of this Particular of the Tenability of the Town and Castle was never disputed, for if it had, the Town would have been held some four Days longer, while this point had been debated, which hath taken up four Days here. As for the Castle, the Defendant himself confesseth, and his Lieutenant Clifton with Major Holmes depose, that in the whole Debate of the Parley and Surrender, the Castle was never mentioned nor thought on: therefore the Weakness and Untenability of it was no Ground of its Surrender, as is now pretended. Finally, the Defendant in his printed Relation, Pag. 9, 10. and in his Answer, affirms; that the Cause why the Castle was not tenable against the Enemy, was for want of Match and Powder, not in regard of its inconvenient Situation and weak Fortification, the only Causes now insisted on; therefore this is but a mere Pretence invented since the Surrender.

To the second Pretence of wanting a sufficient Garison to hold it; Master Prynn answered, 1. That the Defendant had two thousand Foot, besides two hundred Voluntiers, and three hundred Horse and Dragoons at least; which were sufficient to defend the Town against all the Enemy's Power, as is infallibly evident by the Repulses every where given to the Enemies when they stormed it, and the great slaughter of hundreds of their Men, with the loss but of three or four of ours, attested by his own Witness, and published in his own Relation and Letter to his Excellency. And if the Garison were sufficient thus to repulse the Enemy in his greatest Strength and Assaults at the very Outworks, then certainly they were abundantly able to defend the Town and Castle after the Slaughter and wounding of above 1700 of the Enemies, had they been discreetly and courageously commanded by him; but doubtless they were more than enough to have defended the Castle, the Body of the City, and that Part beyond the Bridge, after the Suburbs entred, and the Line wholly quitted on Gloucestershire Side. 2. If the Garison had been too weak, he might have raised six or eight thousand able Men more in the City, or retained five hundred of Sir William Waller's Soldiers, whom he sent out of the Town to save the Expence of Provisions. 3. The Garison Soldiers that were in it, would have fought, and held the City and Castle out against the Enemy, thinking themselves strong enough to do it, but the Defendant would not permit them, as sundry Witnesses attest; the want therefore of a sufficient Garison is but a mere Pretence. 4. A Garison must be judged to be sufficient or insufficient to defend a Place, only in regard of the Enemy's Strength that comes before it; that Garison being sufficient to defend a Town against seven or eight thousand Besiegers, which perchance is insufficient to guard it against twenty Thousand. Now we confidently affirm, that the Garison then in it, was sufficient to guard it against all the Power then before it, as appears by the Enemy's several general Repulses with extraordinary Loss to them and none to the Garison; by the Enemy's Paucity, not being above seven or eight thousand at most, (most of them Horse) and their Quarters divided with an unfordable River, so as they could not come to rescue or relieve one the other. And whereas he pretended the Enemy was near fourteen thousand strong, because they had about seventy or one hundred Foot Colours only upon Durdham Down; this is a most fallacious Argument: because every puny Soldier knows

knows it is a common Policy in Wars, to carry and display a Multitude of Colours more than there are Companies, afar off, at a distance, of purpose to amaze or terrify the Opposites, and make themselves appear more numerous than in truth they are; which Policy was now used. And whereas Captain *Husbands* affirmed, that he told one hundred Foot Colours on *Durham Down*; he saith, that it was but with his Prospective Glas (an uncertain Instrument to tell Colours with) which multiplied the Colours more than they were, Lieutenant *Clifton* telling not seventy at most. And how full these Companies under those Colours were, we shall produce only the Testimony of Mr. *Savidge*, a late Soldier in *Ireland*, who deposed *viva voce*, That he was in *Bristol* within two Days after its Surrender, when there was a general Muster of Prince Rupert's Foot in the Marsh there, at which both Prince Rupert and Maurice were present, where he told (to his best remembrance) 52, but for certain above 42, of the Enemies Colours, which had not above 1400 Soldiers at the most belonging to them, for he particularly told, and took special Notice of them: Whereupon he demanded of one of the Officers on the Place, why they had so many Colours, and so few Men? who answered, that they had many of their Men slain and wounded in the Siege. So as by this Account, they had more Foot in the City, by seven or eight hundred, when it was surrendered, than Prince Rupert had without it, whose Forces were most Horse; and therefore a sufficient Garison to defend it against so small a Force. Besides, it appears by the Relation of *Glocester Siege*, Pag. 1. (attested by Mr. *Pury* to be true) that there were about nine thousand Men more before *Glocester* than there were at *Bristol* Siege. If then *Glocester* Garison, consisting at the most but of 1500 Men, were sufficient to guard it against 9000 more than were before *Bristol*, then *Bristol* Garison of above 2000 Foot, and 300 Horse, must needs be abundantly sufficient to defend it against 9000 Enemies less than were before *Glocester*. And whereas the Defendant alledged his Letter of Complaint for want of a sufficient Garison; this was in *March* 20, 1643. when he had but one complete Regiment of Foot, and but two Troops of Horse, not at the Siege, when he had above twice double the Number. 5. For his Excellency's Opinion, and his own Propositions, that the Garison should consist of three Regiments of Foot, and three Troops of Horse and Dragoons: It was answered, that he had above that Number of Horse, and almost his full Number of Foot at the Siege, and might have raised more had he pleased; therefore a competent Garison, according to his own Desire. But that which quite takes off this Objection, is, That such a large Garison as this, was not desired by him, or thought meet by his Excellency, only to defend *Bristol* against a Siege, but likewise to defend *Bath*, *Berkley-Castle*, and the Country round about for twenty Miles space, and to suppress Insurrections, if any should happen in the Western Parts; as appears by his Excellency's Letter and his own Propositions. Therefore this Pretence, that he had not a full Garison to defend the Town, because he wanted some of his number of Foot, which should have defended *Bath* and the Country twenty Miles round about, is but an impertinent Plea. 6. For his want of Reserves to relieve his Men, himself confessed, that Reserves might have well been drawn from the

main Guard and Castle Garison, who were not in any Fight or Action during the Siege; that he had some few Reserves for some particular Places, as there was Occasion; that Captain *Stokes*, whose Company was a mere Reserve, stood in Saint James's Church-yard, when the Enemy entered, tho not employed to repulse them at the first, nor afterwards in the Sally. If then he had Reserves for some special Services, he had no doubt a competent Garison; it being unusual to have a whole Reserve, and a vast unnecessary Expence to maintain a double Garison in any Place. 7. Whereas he alledged, that his Men for want of Relief and Reserves would have quite been tired out in three or four Days more, having been near five Days on Duty without Relief; and that a Man might die of a lingering Consumption as well as of a Fever. It was answered, That the Garison of *Glocester* had no Reserves at all, and were constantly upon Duty without Relief, above thirty five Days and Nights together, yet held it out courageously, without dying of a Consumption; and why *Bristol*-Garison might not have done the like (being furnished with good Store of *Bristol* Milk, strong Wines and Waters) with as good Success, had the Defendant put them to it, (especially having some Reserves to relieve one another) he could see no Reason, but only his willingness to yield up the Town to the Enemy, for fear of a Consumption, of which none are willing, or use to die, till Nature be totally spent. 8. There was then no Sickness at all in the City, no want of Provisions, or Necessaries; no Loss but of eight Men at the most when yielded: how then the City and Castle could be surrendered upon this Pretence of an Impossibility to keep them longer, for want of a sufficient Garison, we cannot conceive; especially since the Women with their Children profered to go unto the Cannons Mouth to dead the Bullets.

Thirdly, To the pretended want of Match, Powder, Ammunition, (for a Sufficiency of all other Provisions and Victuals was acknowledged) it was answered, 1. That we had proved * there were 1400 weight of Match (besides a Dray-load more of Match) in the Castle itself, when surrendered; and a Match-maker with Materials to make more Match in the Castle as fast as they could spend it, besides much Match in the City: and he might as soon have alledged want of Water in the River *Avon*, as of Match in *Bristol*, which makes Match and Cordage for all the West of *England* and other Parts. 2. For Powder, we have proved by some Witnesses, that there were at least sixty Barrels in the Castle only; besides as many more in the City, Forts, and what was weekly made in the Town: yea some Witnesses prove there were seventy double Barrels in the Castle, left to the Enemy. Captain *Husbands* confesseth he had two Barrels of Powder in his Fort, *Arthur Williams* attesteth there were sixty Barrels in the Town, and Major *Allen* brought nine Barrels more from *Malmesbury*: And by his own printed Relation, there must be at least 90 Barrels left; For he therein confesseth that he found 45 Barrels of Powder in the Town, when he first entered upon the Charge thereof; after which he received 30 Barrels more from London, 126 Barrels from France, besides six or seven Barrels weekly made in the City, all the Powder taken out of Shops, Ships, and the nine Barrels

* Joan Battin, Arthur Williams, Major Wood.

from *Malmesbury*; all which (admit the Barrels out of *France* single) amount to 210 Barrels; but to 336 Barrels, if those from *France* were double, as they were: Of these he saith, Sir *William Waller* had about 60 Barrels, and that he spent about 60 more in the Siege: deduct then 120 Barrels out of 336, there remained no less than 216; or 120 out of 210, there were left 90 Barrels at least by his own confession, allowing him all that was made or found in the City and Ships merely for Waste and Musters. And whether there were a Necessity of surrendring the Town for want of Powder, when so many Barrels remained only in the Castle, besides what was in the Forts and City, let all Men judge: there being 60 Barrels more than Col. *Massey* had when *Glocester* was first besieged.

But his grand Pretence is, That this Powder would have lasted them only two or three Days at most; whence this Prodigal of his Powder, not Blood or Coin, writes thus in his *Relation*, Pag. 9, 10. *That which made it evident, we could not hold out the Castle above two or three Days, was, because we had Ammunition for no longer Time, having only 50 Barrels of Powder, and no Match, at all, (No Match for himself, he means for Cowardice, else there was Match enough) and according to the Proportion of Powder, we had spent the Days before, would not have served us above two Days, and it is clear we should not have had any Relief in six or eight Weeks.* A pretty prejudicating Fancy, not to be admitted on any Terms: For by the same Argument he surrendred it up now, when he had 90, or admit but 50 Barrels left; he would have then yielded it had he 500 remaining: For thus he would have argued, 500 Barrels after the rate of 50 Barrels we spent the two first Days, would have lasted us but twenty Days at most; and we could have no succour in six or eight Weeks, therefore I was necessitated to render the Town for want of Powder to hold out till Relief might come: Nay, if he had 1000 Barrels then left, he would by this Reason have yielded the Town up, for want of Powder: for he argued thus; Col. *Warnslow* at *Plymouth* spent 40 Barrels in one Day; *Ergo*, I should have spent so many every Day at *Bristol*, and by this Computation a 1000 Barrels would have lasted me but 30 Days: and I had no hopes of Relief in forty or fifty Days at nearest; *Ergo*, I was necessitated to yield for want of Powder to serve me till Relief might come. Had valiant *Massey* argued thus at *Glocester*, he might have surrendred it to the King on this Pretence the very first Day and Hour he came before it. He might have alledged (with better Reason than Col. *Fiennes*) we have but 30 Barrels of Powder in all to defend the Town with, and these will not last above one Day, for Col. *Fiennes* spent thirty Barrels a Day at *Bristol*, and Col. *Warnslow* 40 in one Day at *Plymouth*: Therefore 30 Barrels against a far greater Army of Enemies, will not last above one Day, and we lawfully may and ought, in true Military Policy, to surrender *Glocester* to the Enemy the first Hour they come before it, for want of Powder, since Col. *Fiennes* surrendred *Bristol* for this very Cause, when he had twice as much Powder as we. Had *Massey* done or argued thus, what had become of *Glocester* and the Kingdom ere this? But since he made no such anticipating Argument, but with his little store of Powder (far less than was in the Castle of *Bristol* only) maintained the Siege for 31 Days, and preserved the Town when he had more Cause to despair of Relief than Col.

Fiennes, Why the Defendant might not, should not have done the like at *Bristol*, I cannot yet conjecture. Indeed, he saith, in his Answer to the eighth Article, *That he was less able to defend the Town four, or the Castle fourteen Days, than Massey was to defend Glocester 24 Days with the same proportion of Powder.* Certainly, if it were possible for *Massey* to defend *Glocester* against a far greater Force than was at *Bristol* with 50 Barrels of Powder for 31 Days, it was more possible for the Defendant to have defended the Castle of *Bristol* of less Circumference by three Parts than it, with 90 single or 70 double Barrels (which he surrendred) for three times 30 Days, and till Succours had arrived. But to exclude all Pretences, Mr. *Prynn* affirmed, that there must the same Rule and Law be observed in case of Powder, Ammunition, and Men, as there is in case of Victuals: And what that is, the King of *Sweden's* and his Excellency's Articles of War (newly reprinted) define, *to wit, a present and absolute want of Victuals, and all edible things to sustain Nature:* And so a present absolute Want and Expence of all Powder and Ammunition; else any Fort may be betrayed upon remote pretended Necessities. A Governor must not argue thus, It may be I may spend 50 Barrels of Powder in two Days: *Ergo*, 50 being all my Store, I will presently surrender before I put it to the Hazard, and yield up my present Stores to the Enemy before the two Days expire: for then what Place can be secure, or will hold out to real extremity? But on the contrary, he must thus resolve, I have thus much Powder yet left, and by good Husbandry it may last much longer than I apprehend; the Enemy's Ammunition, for ought I know, may fail before it, who knows not how small our Stores now are; however it is better I should spend that little I have left against the Enemy, rather than yield it up to supply their Wants and annoy our Friends: Therefore I will, yea, I ought in Reason and Duty to be reduced to a present real, not a surmised possible Want of Powder, before I would yield up the Fort, committed to my Trust, to the whole Kingdom's prejudice. This was Col. *Massey's* Resolution, this ought to be the Conclusion of every Governor whatsoever, and of the Defendant at *Bristol*, which wanted neither Fortifications, Men, Victuals, Ammunition, Cannon, Powder, Wine, Beer, Match, Water, nor any Necessaries when it was surrendred, to defend it till Supplies might have arrived. Therefore it was yielded up before any the least Extremity, and so unworthily, and cowardly, both in Law and real Verity.

Fourthly, as to his best and most special Plea or Inducement, That he surrendred the City and Castle so speedily as he did, of Purpose to preserve a Body of 1500 Foot and Horse for the Service of the State, then wanting Men; and the Lives and Estates of divers of our Friends.

Mr. *Prynn* answered, 1. That he might be ashamed of such a poor absurd Pretence as this, to veil his Cowardice: his Surrender in Truth being but to save his own Life and Estate, not the Garison's, who were safer in the Town and Castle, than in any other Place whatsoever; and lost both themselves and their Estates by surrendring them, which they had preserved (as *Glocester* Men did their City and Estates) had they manfully held them out to the last.

2. The Parliament had no less than 2000 armed Foot, and 300 Horse in the City, to serve them there

there immediately before the Surrender: yet this thrifty Governor would for their Service and Advantage, surrender both City and Castle, with all the Cannon, Ammunition, Arms, Magazines, Provisions, Wealth, Ships, Prisoners, Colours in it, to preserve them only 1500 disarmed, plundered, dismounted Men, to serve them God knows where or how. A very frugal Steward surely for the Republick, to lose them no less than 800 Men in the very Bargain, with the City, Castle, Arms, and Premises to boot.

3. Neither did he save those 1500 naked Men, as he pretended, nor yet a Body of three hundred to serve them elsewhere, he bringing scarce one hundred of them with him into *London*. He lost the City, Castle, Arms, all else in them before, only to save the Men, and their Estates; and after lost both the Men and their Estates, to save himself, never reserving so much as one Ensign, Drum, Trumpet, upon the Parley, to call or keep his Men together, nor yet mustering them into Order, nor marching away with them in a Body, nor relieving them when dismounted, plunder'd, abused in his Sight, leaving every Man to shift for himself the best he might. And was not this a pretty saving of Men to serve the Parliament elsewhere, thus carelessly to lose them, and of twenty three hundred Men compleatly armed to serve them, to preserve scarce two hundred, stript of all their Arms, and quite disbanded? God preserve the Republick from such frugal Stewards, such pernicious Bargains.

4. Admit he had saved full fifteen hundred unarmed Men to serve the State, was not this a sweet Purchase (think you) to save so many Mens Persons with the Loss of such a Place of Consequence, Strength, Shipping, Trade, Command by Sea and Land, with the Hazard of the whole Kingdom? Better himself, and all those fifteen hundred, nay, better ten thousand Men had bravely lost their Lives in Defence thereof; yea better the whole City had been ruined, if not possible otherwise to be secured to the State, than that the Enemy should have so easily possessed it, to the City's, Country's, and whole Kingdom's infinite Prejudice.

5. The Parliament needed no Men at that time to serve them elsewhere, but they would extremely want *Bristol* were it lost, far more than they wanted Men. It was a bootless Service then, to lose what they should certainly most of all want, to preserve only what they needed not.

6. These Mens Service was useful no where but in *Bristol*, where the State only needed and expected it; and those who would not do them the best, the uttermost Service there where they most needed it, with the Hazard of their Lives, would hardly do them Service elsewhere, unless they might have Victory in a Bag, (as *Ulysses* had the Winds) and might fight only where they were sure of no Resistance, to gain *Sarmacida spolia, sine sanguine & sudore*.

7. They could do the Parliament no such good Service any where as there, in keeping *Bristol*; there most of them were in their proper Center, their Native Soil, where they fought for their Lives, Estates, Lands, Houses, Wives, Children, Liberties, in the very height and strength of their Spirits; there they were entrenched in strong Forts and Bulwarks, well mann'd, victuall'd, ammunition'd; where, in respect of the Enemy's Disadvantage in assailing,

and their own Conveniency in defending, they might have slain one hundred Enemies for one of ours, as they had done before, killing and wounding above fifteen hundred of the Enemies, with the Loss only of eight of the Garrison; after which Rate they might have slain the Enemy's whole Army with the Loss only of one hundred Men, (a Service they could never hope to attain to in the open Fields), and also have saved not only fifteen hundred, but two thousand two hundred of their own Men, to serve the State, together with the City, Castle, Ships, Arms, Magazines, and Western Parts, all depending on them; and that with the total ruin of the Enemies Forces.

8. It is very improbable that these Garrison Soldiers and Citizens would adventure their Lives to serve the State in any Place else, who would not do it on their own Dunghil, and in their proper Charges, where they were most concerned; those that will not fight it out to the utmost in a Fort where they have all Advantages, will certainly not do it in the open Fields, where the Enemy and they are upon equal Ground. And it is not very likely, that Men disarmed, discouraged, left to the Scorn and Plunder of the Enemies, stript of all their Fortunes, driven from their native Habitations, and brought to trust to the Enemy for their Lives, rather than to God and their own Swords for Victory and Security, should fight for the Parliament without Arms, or any other Encouragement in the open Fields.

9. Admit he secured the Parliament fifteen hundred pillaged naked Friends to serve them elsewhere, yet sure I am, he hath truly gained them fifteen, nay fifty thousand Enemies, with all the Arms, Strength, Ports, Forts, Traffick, Provisions, Wealth, that the West of *England, Wales, or Ireland* can afford, whence divers Thousands of Enemies and Rebels are lately arrived in *Bristol* Ships, to cut our Throats, possess our Estates, yea lay our Kingdom waste. And was not this a good piece of publick Service worthy our highest Applause?

10. The very Loss of *Bristol* (for ought any wise Man can yet perceive) is like to cost the Parliament and Kingdom the Lives of above fifteen thousand, nay thirty thousand Men, as it hath cost them some thousands already) ere *Bristol* and the West be reduced to that Condition they were when this City was surrender'd. And is not this a sweet piece of good Husbandry, to endanger the Loss of thirty thousand Mens Lives, but to save the Lives of fifteen hundred only, and that when they were in greatest Security, and no danger at all of being lost, had they stood it out?

11. The Defendant and his Men were purposely placed in the City and Castle, (to the Kingdom's vast Expence) to this very end, that they might preserve them from the Enemy, even with the Loss of their Lives, rather than the Enemy should possess them to the publick Prejudice: And yet this valiant Gentleman is so discreetly sparing (at leastwise of his own, if not of their Lives) as rather certainly to lose the Town and Castle, than to hazard the Loss of all or any of their Lives, contrary to his very Trust and Duty.

12. Might not every Governor and General upon this Pretence deliver up any Fort, City, Town, Country to the Enemy, without Shot or Stroke, to preserve the Lives of their Men to serve the Parliament elsewhere? Had Colonel *Massey* at *Glocester*,

Glocester, or Col. Warrslow at Plymouth, made this Plea of saving their own and their Garisons Lives, to serve the Parliament elsewhere, these Towns might have been yielded up upon better Articles than Bristol long ago. Had his Excellency been acquainted with this frugal State-Policy by Col. Fiennes, at the famous Battles of Edge-Hill and Newbury, he might easily before the Fights began, have sounded a Parley, and yielded up all his Ammunition, Cannons, Arms, Carriages, Colours, Drums, Cornets, Prisoners to the Enemy, and given them the Honour of the Field, of purpose to save the Effusion of Christian Blood, and preserve the Lives of his Soldiers to serve the Commonwealth in other Places, (there being the same Pretence of Reason in these Cases as in Bristol :) And then I pray, what had become of our Parliament, Religion, Laws, Liberties, Estates, and Lives too ere this? I doubt they had all been lost by this new kind of Saving. And then what Service could these Men do the Parliament or State when all was certainly lost? We owe our Lives, Limbs, Fortunes, all we have to our dear Country; delete this Principle out of Mens Hearts, and you dissolve, yea ruin all civil Society. It is therefore no excuse at all for the Defendant to lose this Place of Consequence to save a few Mens Lives, or Estates, together with his own.

13. It is the greatest Honour of a Governor, and a Soldier, to die fighting; to lose his Life to save his Country. The very Heathen Romans, and Tully, teach us thus much Martial Divinity: *Dulce est decorum est pro patria mori*. But this unmanly Governor was clear of another Mind, he will neither hazard his own, nor other Mens Lives to save a City, a Parliament, a Kingdom. Better all these were lost than his Life, or Garison endangered by any bloody Assaults. And is not then this his principal Excuse the highest Manifestation of a degenerate cowardly Spirit? Our Saviour Christ informs us, *He that loseth his Life* (by adventuring it for his Religion, God, and Country) *shall save it*; yea, and the Place committed to his Trust, as Massie and others have done: but he that will save his Life (or others) by a cowardly and unworthy Surrender, as this Gentleman did, shall lose it, and that deservedly, by the Ax of Justice for such unmanly Cowardice. It was Caiaphas's Divinity concerning Christ himself, *It is expedient for us that one Man should die for the People, that the whole Nation perish not*: And it should have been the Defendant's Honour and Integrity to have said the like; better that I, being but one Man, yea, better my whole Garison had died in defending this noble City, than that the whole Nation should perish thro' its Surrender, to preserve our Lives. It was the Defendant's Promise before the Siege, *to die in Bristol's Defence, and lay his Bones therein*; but this he now professeth, was spoken only in Policy, to encourage and keep the Soldiers in heart, not in reality with any intent to perform it. Certainly if it be a sign of a good Shepherd, or Governor, *to lay down his Life for his Sheep*, his Country, it is an undoubted Badge of an evil and timorous one, to refuse to do it after so many Promises. This is the Defendant's Case, who would rather adventure his Head in a martial Trial, than his Life in a Breach, and for this deserves the Loss of both.

The next Debate was of a Point of principal Concernment; namely, *What should be judged uttermost Extremity in regard of Men, Ammunition, Vic-*

Vo L. V.

tuals, or Intenability of any Fort, to justify the Governor's Surrender of it to the Enemy? And whether the Defendant were reduced to any such Extremity ere he surrender'd Bristol?

For resolving of this grand Question, Mr. Prynne alledged, that his Excellency's Ordinances of War determined, *That whosoever yieldeth up any Town, Fort, Magazine, Victuals, Ammunition, Arms, or that moveth any such thing but upon Extremity, and that to the Governor, or in Council, shall be executed as a Traitor*. This is the general Law. Now what this Extremity is, will be the sole question; for Resolution whereof we need go no further than to the several Cases of Gomineys, Weston, Cressingham, Elmham, and the Bishop of Norwich, antiently resolved in Parliament, to the late King of Sweden's Military Laws, and his Excellency's own Explanation of this Point (taken out of them) in the second Edition of his Laws and Ordinances of War, which reduce Extremity to these three Heads; (where there is no absolute present want of Men thro' Slaughter or Mortality to defend the Place.)

1. *If the Garison be reduced to an utter Extremity of all eatable Things whatsoever, so as they have no kind of Food whereby to subsist, but must necessarily perish by Famine if they yield not presently.*

2. *If there be no hope at all left them in such a Case of any Succour or Relief.*

3. *If without parlying at the very Instant, both the Forts, Men, and Arms, must of necessity fall into the Hands of the Enemy.* If the Governor can prove by pregnant Witnesses that he was really reduced to all these Extremities, then he is to be acquitted; but if he fail in real Proof of any one of these, then he is to be condemned and executed as a Traitor, both by the King of Sweden's and his Excellency's Martial Laws: and this is the general Law-Martial of all Nations, approved by our own Common Law, of purpose to establish Military Discipline against Cowardice, Negligence, and Treachery, which are apt to be varnish'd over with specious tho false Pretences.

To prove this Definition of Extremity, Mr. Prynne produced the last Edition of his Excellency's Ordinances of War, printed by his special Command, and the Judg-Advocate's License. But the Judg-Advocate opposed the reading of them, pretending they were not yet approved by his Excellency so far as to be used at a Council of War, and that they were made since the Loss of Bristol.

To which Mr. Prynne reply'd, that they were printed by his Excellency's special Direction, and enjoined to be observed by all, (as appears by the Title) having been first voted and agreed on at a Council of War; that the publishing of them in Print, by special Command, was the highest Approbation that might be; and it were in vain to ratify and publish them, if we might not make use of them at this Council of War, in a Case which falls punctually within their Resolution: and tho Bristol was surrender'd before the last Edition of these Ordinances, yet this Clause which defines Extremity, being only an Exposition of the former Laws, and no new additional Law not formerly published, we might and ought to read it of right, to determine this Difficulty, for which it was purposely added. But the Advocate being very earnest against the reading thereof, the Council referr'd it to my Lord General, whether the Explanation in the new printed Ordinances and Laws of War should be used at this Trial? Who declared his Judgment, they should not now be read, or used.

Y y

Whereupon

Whereupon Mr. Prynne laid down this Conclusion for a positive and necessary Principle in War, that utmost Extremity to justify the Surrender of any Garrison, Town, Fort, or Place of Consequence, must not be an imaginary, or possible Extremity, or a conjectural Improbability of holding out any long time, but a real, necessary, and present Impossibility of holding out any longer against the Enemy: affirming, that no Governor of any fortify'd Town or Castle ought to surrender the same upon any pretence of Extremity, but where there is an absolute, real, and present Impossibility of holding out any longer than that very instant time wherein he makes the Surrender. The Reasons whereof (he said) were very observable, grounded upon the highest Principles of Policy and War; as namely,

1. To retard the Enemy's Progress and Conquests, lest a whole Kingdom should be lost in a Moment, as all England would have been long ere this, had Gloucester, Hull, Plymouth, Exeter, and other Places, made no longer nor better Resistance than Bristol, tho' not of such importance to the Realm, nor so well furnish'd as Bristol with all manner of Provisions for a Siege. A General of an Army, Governor of a Town, must defend his Part with respect to the whole Kingdom; and therefore tho' he cannot hold his Ground, or guard his Fort absolutely, or for any long Space against the Enemy, yet he must lose Ground but by Inches, not give it away by whole Towns or Countries; and tho' he cannot defend his Charge still, yet he must hold out till the last Minute to stay the Enemies Progress, and prevent a sudden total Conquest of the Realm.

2. To spend the Enemies Men, Ammunition, Provisions, a long Siege being the usual Bane of any Army; an infinite Charge, Disadvantage, Discouragement to the Besiegers, but great Advantage, Encouragement to the opposite Party.

3. To give a good Precedent and Encouragement to other Governors, Garisons, Forts, adjacent Counties, and to uphold Martial Discipline thereby; the holding out of a Place of Consequence (as is evident by the late Example of Gloucester) giving great Encouragement to the adjoining Places to hold out strenuously to the last, and animating all the Party adhering to them: whereas the sudden Loss, or yielding up of any eminent City, strikes Terror into all adjoining Towns, Forts, Counties, who presently wheel about to the conquering Enemy, as appears by the Example of Bristol; whose unexpected Surrender drew on the Loss of Dorchester, Barnstable, Exeter, Dartmouth, with most of the Western Parts; and it had hazarded the Loss of London, yea of the whole Kingdom, had the Enemies pursued their Victory to London Walls, and not been unexpectedly beaten off at Gloucester, endanger'd by Bristol's Surrender, and quite given for lost by Col. Fiennes and his Officers.

4. To give Advantage of surprizing other Places, or Quarters of the Enemies, to cause either a Raising of the Siege by such Diversions, or to get something equivalent to the Place besieged, in case it should be lost, or not relievable: whereas a sudden unexpected Surrender forestals all such Diversions and Compensations of Losses. Had Bristol been held out to the utmost, in case his Excellency could not have timely relieved it; yet he might have carry'd Oxford, or surprized divers of the Enemy's Garisons, Forts, Men, Arms, Horse, in other Quarters, whilst they were occu-

pied at Bristol; when as its sudden Surrender before three full days Siege, anticipated all Diversions, and Recoveries in Value, to help ballance Bristol's Loss.

5. To deprive the Enemy of the Ammunition, Provision, Victuals, and Magazines in the Town and Castle; which if spent in their Defence, to the Enemy's Loss and Slaughter, the Cannons cloyed, the Arms made unserviceable to the Enemy, they could not have readily been supply'd from other Parts, and so the Town and Castle might have been easily regained by a present Siege, in case they had not been seasonably relieved: however, the Victory at least had been less honourable, less advantageous to the Enemy; who by an unworthy speedy Surrender gained a City and Castle ready fortify'd, victualled, ammunition'd, provided with all Necessaries to their Hands, fit for present Defence, without any Cost or Labour; with Cannon and Arms almost sufficient to furnish an Army by Land, and Shipping enough to set out a strong Fleet by Sea.

6. To preserve the adjacent Towns, Forts, Counties, depending upon the holding out of the Place besieged, who by a cowardly present Surrender may be in danger to be surprized on a sudden, and taken unprovided of Ammunition, Men, Arms, Victuals, or sufficient Fortifications. If a Town well fortified, manned, victualled, to hold out three Months Siege in most Mens Opinions, shall be cowardly yielded up before Extremity, in three Days space, as Bristol was; all the neighbouring Garisons, Counties, Cities, Castles, who depend upon its three Months Defence, are in danger of surprisal, and being taken unfurnished at unawares, as infinite historical Examples evidence; and the unexpected Surrender of Bristol (as the Relation of Gloucester Siege truly styles it) was likely to have endangered Gloucester, whose vigilant Governor would doubtless have been better furnished with Men, Ammunition, Victuals, had not Bristol's over-hasty Surrender forestalled his Intentions. And who knoweth not, that this Surrender might have endangered the Loss of London thro' an unexpected surprize, had the Enemy presently advanced towards it, as some advised?

7. If any Town be yielded up before absolute Extremity and Necessity of holding out longer, there is a most certain present Loss to the State, (perchance irrecoverable for the future too) but if held out till Extremity, there is still either a probability or possibility of securing and preserving it left, even to the utmost minute of its Tenability, and that by infinite Casualties, Contingencies, and Passages of divine Providence, transcending all human Apprehension. As, (1.) By unexpected Supplies from other Parts. (2.) By Diversions or Invasions of the Enemies Quarters elsewhere, engaging them to raise their Siege. (3.) By successful Sallies. (4.) By extraordinary slaughters of the Enemies upon disadvantageous Assaults, of which they of Bristol had former Experiences, where the Enemy lost an hundred Men to one of ours, and had near 1700 slain and hurt in less than three Days, with the Loss only of seven or eight. (5.) By sudden Sickness in the Enemies Camp. His Excellency (as this Defendant affirmed) had two or three hundred Men that fell sick about this time in his Army in one Day, and one thousand or more in one Week's space, and the Enemies (for ought he knew) might have undergone the like Mortality. We read that God's Angel in

one Night flew in the King of Assyria his Host, an hundred fourscore and five thousand Men, and thereby raised Jerusalem's Siege: And for ought the Defendant knew, God might have sent an equivalent destroying Plague among the God-damn-me Army of Cavaliers, who besieged Bristol. (6.) By unseasonable tempestuous Weather, which had broke up many Leaguers. (7.) By the Death or Slaughter of some principal Officers or Commanders. (8.) By sudden pannick Fears and Apprehensions of approaching Rescues, of which we have an eminent Scripture Precedent in the Besiegers of Samaria; to omit profane Histories. (9.) By sudden Mutinies and Discords among themselves, which in Scripture, and Stories, are copious. (10.) By Scarcity of Provisions, with which the Enemy before Bristol was very much pinched, as Mr. Savidge deposeth. (11.) By want of Ammunition, the Enemies condition at Bristol, who had spent most of their Powder, and Shot, of which they had far less in their Camp, than the Defendant surrender'd to them in the Castle. (12.) By Despair of Success, for which very reason the Enemies had retreated from Bristol in two or three Days more, had those who entred the Line at first been repulsed, as they might have been with ease, tho the Defendant alledged they had taken a solemn Oath, not to raise the Siege till they had taken the Town; which might have been as easily frustrated, as the Oath of the Jewish Conspirators, *Who vowed they would neither eat nor drink till they had murdered Paul*; yet missed of their Design. Besides all these (whereof Histories afford plenty of Examples) there are infinite other Contingencies frequent in Story, whereby God out of his divine Providence hath many times miraculously preserved Forts and Cities, even in their utmost Extremities, against their potent Enemies; when they have been resolute to stand out to the last, especially in the Cause of God, Religion, or their Country. And in such a Case as this is, where we may with Confidence expect the best and speediest assistance the Lord of Hosts, and God of Heaven can provide for us, (if we dare rely upon his Promises, or Providence without distrust) he deserves not the Title of a Soldier, much less of a *Christian Soldier, Governor or Commander*, who will not trust God to the utmost Exigency, and rely upon his Power, Wisdom, Faithfulness for seasonable Deliverance and Relief; which the Defendant (for want of Faith as well as Courage) durst not do, and so yielded up all.

8. If absolute and present Impossibility of longer Defence, be not made the only Rule of utmost Extremity, we shall open a wide gap to the Treachery, Cowardice, Negligence, Indiscretion, Avarice, Ambition, Discontent of every Governor and Commander, to the overthrow of all Martial Discipline, and expose the whole Kingdom to speedy Loss and Ruin; it being an easy matter for any Governor or Commander, how cowardly, false or treacherous soever, to invent many plausible Excuses, many forged, supposed, probable Extremities, and to find Witnesses under his Command to attest them; and by pretext thereof, to betray and yield up the most considerable Towns, Castles, Forts, thro'out the Realm, to the Enemy, without any Stroke at all, or after a few Days counterfeit Siege, the better to palliate his treacherous Designs. And therefore upon all these grounds, as likewise to reduce Extremity to a certainty, no other Extremity ought to be admitted,

VOL. V.

but only a present absolute Impossibility of holding out any longer; to which the Defendant was no ways reduced, as we have already proved.

In opposition to these Reasons, Col. Kiennes maintained these three Things.

The first was this, That whenever the principal Rampart of any Town was once entred by the Enemy, this was a sufficient Extremity to justify both a Parley and Surrender. But the Line of Communication which the Enemies entred at Bristol was the principal Rampart, as he pretended: Therefore his Surrender of it upon their entering the Line, was justifiable.

To which was answered: 1. That the Enemies entering the principal Rampart, is no lawful sufficient ground of a Parley or Surrender, no nor yet the taking of the principal Fort (for the Reasons aforesaid) as long as the other Forts or Towns are tenable; by holding whereof the Enemy may in time be repulsed out of the Works they have entred. If this were true military Doctrine, then London should by like reason be surrendered to the King, in case he came before it, together with the Tower, as soon as the Line of Communication (the chief Rampart) were entred, or any Out-Fort taken; and an whole Army should yield the Field, if one Troop or Company of the forlorn Hope were routed. 2. Tho the Line of Communication of Bristol were entred in one only place, yet not one of the Out-Forts was taken; the body of the City defended by the Key, and all that part beyond the Bridge, together with the Castle (the chiefest Fort, Rampart, Sconce) and every Street in the Town both tenable and defensible, as we have formerly proved; therefore the Enemies bare entry within the Line of Communication only, was no Extremity at all to justify its Surrender, in the Judgment of any but extreme Cowards. 3. That the maintaining of such a cowardly Paradox to excuse this Surrender, was an Argument it proceeded from Cowardice, and a sufficient Proof of a timorous Spirit.

The Second was, That if the Enemy had once entred or possessed the Town, the Castle ought not to be kept to the Prejudice of the Citizens, but ought to be surrender'd together with the Town, by the constant Practice and Policy of War in all Places, all Ages. In which he was so confident, that he challenged Mr. Prynne to shew one Precedent to the contrary, and produced divers Examples in foreign Parts out of *French Mercuries* and *Gallobelgicusses*, with some late Examples at home to justify this Assertion: As namely, the Example of *Leipsick, Mentz, Philippsburg, Prague, Aufsburg, the Bursé, Breda*, and other Towns abroad; of *Portsmouth, Exeter, Lincoln, Worcester, Winchester, Chichester, Malmesbury, Hereford, Taunton-Town and Castle, Bridgewater, Dorchester, Dartmouth, Lime, Reading*; where he saith the Towns and Castles were both surrendered together, and not the Castles held out when the Towns were taken; yet none of these Governors were ever questioned by the King or Parliament. And he gave this Reason to prove this Paradox, that if Castles should hold out when the Towns were taken or yielded, it would much dishearten the Citizens, and make them unwilling to entertain or assist any Garisons in the Castles.

To which Mr. Prynne retorted, That this was the grossest Absurdity that ever was broached by any Man in his right Senses, and had he not been in-

Y y 2

toxicated

toxicated with a Spirit of Pusillanimity, he would never have invented such a poor Subterfuge, or made such an ignorant Challenge as this to save his endangered Life. For, 1. Castles and Citadels in most Towns are usually the strongest, most tenable, most impregnable Places of all others, best able to resist and annoy the Enemies; the Out-works, Line, and Towns themselves less tenable and resistible than they: to argue therefore, that the Castle ought to be surrender'd as soon as the Town is enter'd or taken by the Enemy, is in effect to aver, That the strongest Fort of all must be yielded, because the weakest part of all is entred. If this were a good soldiery Argument; then by the self-same Reason, if there were twenty strong Forts or Castles about a Town, and but one weak one, the whole twenty strong ones, tho tenable, must be yielded, because only the weakest one was forced; and the Lord Mayor of *London* (in case that City were besieged) might yield up both the Tower, Town, and all the other Forts to the King, if the weakest part of the Line were but entred, or *Hide-Park* or *Issington* Fort once entred by the Enemy; yea, by this kind of Soldiery, if the weakest Troop or Company in an whole Army be routed, the main Body and Batallion of it must presently yield up themselves and the Field too, because this weak Party thereof is defeated: and his Excellency at *Edge-hill* Fight, where some of his Horse and Foot run shamefully away upon the first Charge, should by this senseless Policy have fled or yielded, and not won the Day, (as he did with greater Honour) because the worst and weakest part of his Army was routed. But since all Men know, that the strongest Forts and Parties are to defend the weakest, not the feeblest them; and the Castles in Cities made more strong and tenable than other Parts, for this very purpose, that they might hold out when the weaker Parts are taken, (this being the only Use for which they were built and made so strong) the Reason holds good on the contrary part; that because the Town which is the weakest is taken, therefore for this very Reason, the Castle which is the strongest Part, ought to be held out and not surrendered.

2. Castles in most Towns command the whole Towns where they are, and those who are Masters of them, are still Masters of the Places, and will soon regain the Towns; but if once surrendered, the Enemies become presently absolutely Masters of both; and no Hope is left of regaining either Town or Castle again, without a Siege, or infinite Expence and Danger. Therefore there is all the Reason in the World to maintain the Castles to the utmost, when the Towns are entred, and not to yield them up together, both to preserve the Dominion of the Place, and regain the Towns with Ease and Speed.

3. As long as the Castles hold out, the Enemy can enjoy little Benefit by the Towns, and have less Security in them. Besides, their Conquest is incomplete, less terrible, not advantageous; their Progress from thence to other Places retarded, unless they leave the Castles unbesieged. And their forcing of the Castles will consume them far more Men, Ammunition, Money, than the entering of the Towns, which without the Castles commanding them, are little worth. Therefore for all these Reasons it is apparent, that Castles ought to be kept by the constant exquisitest

Grounds and Policy of War, when as the Towns themselves are taken or surrendered.

4. Neither will this be a Discouragement, but the greatest Encouragement that may be to the Citizens, that the Castles must thus hold out to utmost Extremity: (1.) Because the Persons and Estates of the wealthiest Citizens will be there secured against the Enemy's Rage and Plunder, (as the honest *Bristolians* thought to have saved their Persons and Estates, by retiring into the Castle when the Town had been forced, which were lost by surrendering it.) (2.) Because by keeping the Castles, the Towns are certain to be preserved or regained in a short time, and thereby their Liberties and Privileges. (3.) Because by this means they shall not be long under the absolute Power of the Enemy and new Lords to controul them; whereas if the Castles be yielded, their Persons, Estates, Laws, Liberties, will be wholly exposed to the Enemies Will and Pleasure, and subjected to their Tyranny. Therefore upon all these Grounds the Defendant ought to have kept the Castle of *Bristol*, being strong and tenable, to the utmost Extremity, and not to have surrendered it with the Town, tho the City had been taken or yielded by Composition.

5. For Examples, Mr. *Prynn* answered, That if he had his Books about him, he could shew him at least one thousand Examples in Story to one of his, where Castles have held out when the Towns were taken or yielded; but since his Challenge was to produce but one Example to the contrary, he should out of present Memory furnish him with divers. The first, was a very antient and memorable one recorded in Scripture, (which he wondred the Defendant who had read the Scriptures could forget) to wit, that of *Thebez*, *Judg.* 9. where we read, *That Abimelech went to Thebez and encamped against it, and took it. But there was a strong Tower (or Castle) within the City, and thither fled all the Men and Women, and all they of the City, and shut it to them; and got them up to the Tower; but did not yield it up tho the City was taken. And Abimelech came to the Tower and fought against it, and went hard to the door of the Tower to burn it with Fire: And a certain Woman cast a piece of a Millstone upon Abimelech's Head, and all to break his Skull: Then he called hastily to his Armour-bearer, and said unto him, draw thy Sword, and slay me, that Men say not of me, a Woman slew him; and he thrust him thro' and he died: and when the Men of Israel saw that Abimelech was dead, they departed every Man to his place.* Thus the Siege was raised, the Town preserved, regained, and that by a Woman. Had Col. *Fiennes*, in case the City of *Bristol* had been taken, retired to the Castle, according to his Promise, and there stood upon his Guard, perchance Prince *Rupert* coming for to assail it as *Abimelech* did the Tower of *Thebez*, might have been slain with a Millstone by one of those valiant Women who offered to go up to the Cannons-mouth to dead the Bullets, in case he or his Soldiers were afraid to charge; or at least by some Musket or Cannon-Bullet; and so the Siege might have been raised, and the Town regained: No Man could tell whether such an Accident might not have happen'd, had the Defendant patiently expected the Issue of God's Providence in the Castle till utmost Extremity, which no Man ought to despair of, since (as the wise Man informs us) *Time and Chance*

Chance happen alike to all Men. Besides, the Siege might by sundry other forementioned Casualties have been raised, and the City preserved: But alas, the Defendant was so far from having the Faith and Courage of a Man, that he fell infinite short of the Courage and Prowess of this Woman of *Thebes*; styling the holding out of the City and Castle, tho but a Day or two longer, a *desperate Resolution*, &c. not staying till they were assaulted, but presently yielding up both without any Assault, contrary to this Scripture Precedent, which he had neither Heart nor Courage to imitate. But lest he should pretend this one Example to be singular, I shall furnish him with sundry others, which I wonder he could forget. If he had read the *Roman* Story, he should have found the *Capitol* defended against the *Gauls* when the *City of Rome* was taken; and preserved from surprise only by the crying of a Goose. In our unhappy antient Civil Wars, the *Tower of London* hath oft-times been held out when the City hath been yielded; the like we read of the Castles of *Edinburgh*, *Berwick*, *Northampton*, *Salisbury*, *Devizes*, *Oxford*, (in the time of *Maud* the Empress) *Rochebester*, *Bedford*, *Nottingham*, *Pomfret*, frequently kept in former times, when the Towns were yielded, or taken: and not to rove farther for Precedents; even *Bristol-Castle* itself was held out by *King Edward II.* and the younger *Spencer* (in the last Year of this King's Reign) against the *Queen* and her Son *Prince Edward*, after the Town was yielded up to them by Composition, to save their Lives and Goods; and in these Days *Bristol* was styled and reputed, a good Town, and a strong, well closed, standing on a good Port of the Sea, having a strong Castle, and the Sea beating round about it, writes the Historian. Certainly had this Gentleman well studied the History of *Bristol* while he was there, he might have found a Precedent for holding out this very Castle after the City surrendered, and then he would not have made such a silly Challenge, to shew him one such Example. But if these antient Examples had been forgotten, yet we have fresh Precedents enough of this kind, which he cannot but remember. The Castles of *Warwick* and *Nottingham* both held out lately against the King's Forces, when the Towns were taken. Nay, the very Close at *Litchfield* (tho no Castle but a Cathedral) held out against the Lord *Brooks*, when the Town was yielded; and since the Parliament took it, against all *Prince Rupert's* Forces, almost as many Weeks as *Bristol* itself did Days, and against near as great an Army, tho it had not above eightscore Soldiers in it: Yea, when the Prince had drained the Mote about it, sprung a Mine, blown up a great part of the Wall, and entered the Breach with above 200 Men (being 50 more than first entered the Line at *Bristol*) yet the Garrison there was so far from yielding the place by a Parley, that they encountered the Enemies, took 200 of them Prisoners, beat the rest out, made good the Breach, till all their Powder within half a Barrel was spent; and then came off upon more honourable Terms by far than the Defendant at *Bristol*, (which was not so much as assaulted, much less entered) even with their Colours displayed, their Bag, Baggage, Arms, and restitution of their Prisoners taken by the Enemy: which Conditions were most punctually performed, because they shewed themselves Men of Valour, and had their Arms about them to defend themselves from Violence; whereas the Defendant yielded up both

Arms and Colours. To these I might add the Examples of *Limerick* and *Galloway* Castles in *Ireland*, who held out many Months against the *Irish* Rebels, after the Towns were yielded: Of *Stafford* Castle, defended long against the Parliament after the Town taken; and the fresh Example of *Lincoln*, where the Close was kept against the Earl of *Manchester*, after the Town surrendered. But Examples of this kind are so frequent in all Stories, and so experimentally known to every one who hath been bred a Soldier, that I shall forbear to trouble this honourable Council (so well versed in Histories and War) with any more Precedents of this kind.

6. To his objected Precedents, Mr. *Pryn* answered: (1.) That they were only alledged, not proved by Witnesses or Records; *Gallo Belgicus* being neither a legal Testimony, nor Record to be given in Evidence at a Trial. (2.) That many of his Precedents were foreign, and it did not legally appear what were the grounds of those Towns or Castles speedy Surrenders; which in all probability was want of Food, there being such a scarcity of it in *Germany* by reason of the long continued Wars, that few Towns or Castles were victualled for one Fortnight's Siege: and perchance they wanted Ammunition as well as Food. (3.) It appears not whether those Governors were not questioned, and capitally punished for delivering up these Towns and Castles; since we find that in these late *German* Wars, some have been condemned and executed for yielding up Towns too suddenly. (4.) Many of our Towns he named had no Castles in them, at least none fortified to keep out an Enemy. (5.) Altho the surrendring and quitting of these Towns to the Enemy, was connived at, and never brought legally into question, as the Surrender of *Bristol* now is; yet they deserved to be both questioned and punished, (as the quitting and yielding of *Taunton*, *Dorchester*, *Lincoln*, *Banbury*, *Oxford*, and other places:) And if so, these Examples can be no justification or extenuation of the Defendant's Crime. It is no Plea for a Thief, when taken and arraigned, to say, such and such Thieves have robbed others, and yet were never indicted nor punished for their Robberies: Ergo, my Robbery is lawful, and I must not be condemned for it. Had they been apprehended and indicted, it had been no Plea for them, that some other Thieves escaped without questioning, therefore no justification or excuse for him who is arraigned; yet this is the Sum of the Defendant's Argument: Other Governors in *Germany* and *England*, who have cowardly and treacherously surrendered and quitted Garrison-Towns, have not been questioned for it; Ergo, I must not be condemned or blamed for my cowardly, traitorously Surrendring of *Bristol*, now I am actually impeached and convicted for it. If this be a good Plea, to what end are martial Laws? Every Coward and Traitor shall then scape scot-free, tho he undo and betray a whole Kingdom.

7. Some of the Towns he instanced in, were cowardly quitted, or yielded up upon his Surrender of *Bristol*, (as *Barnstable*, *Dorchester*, &c.) whose Loss must be put upon the Defendant's Score. As for the loss of *Exeter*, which he instanced, it was answered: (1.) That *Exeter* was besieged, and held out more Months than *Bristol* did Days; being beleaguered above three Months space ere it yielded: and had he held out *Bristol* so long, as he easily might, it would have been relieved

relieved in half the time, and kept safe till now. (2.) That the yielding up *Bristol*, was the loss of *Exeter*, which was much discouraged by its ill Precedent, and left destitute of all Hopes or Probabilities of Relief by its Surrender; being too remote for his Excellency to relieve it, without endangering the loss of *Kent*, *London*, and *Essex*, during his absence hence; and there being no other Forces near, that could in any possibility or probability relieve it; yet tho it were thus hopeless of all Succours, and much discouraged with the ill Examples of *Bristol*, *Barnstable*, *Dorchester*, *Bridgwater*, *Taunton*, and other Western Towns, it held out till the principal Fort was taken, and all their Powder spent; yea the Garison and Citizens were all resolved to have kept it with their Pikes and Swords when their Ammunition was exhausted, had they had but any probable Hopes of Succours from any part; of which being utterly hopeless, they did for want of Powder, after above three Months Siege, surrender the Town and Castle upon somewhat more honourable Terms than the Defendant did *Bristol*. Wherefore this Precedent was so far from justifying his ignoble Act, that it was a pregnant Testimony and Conviction of his Guilt in not holding out *Bristol* three Days, when *Exeter* held out above three Months Siege, and spent all their Ammunition before they fell to Parley.

The third thing maintain'd by Col. *Fiennes* was, That some Generals had sentenced Commanders to Death for being too obstinate in defence of Forts, and standing it out over-long; and that a *French* Author (there produced) affirmed, it was a capital Offence to stout out a place over-long.

To which Mr. *Pryn* answered, 1. That this new Doctrine was certainly calculated only for that Meridian where this great Soldier was born, and fit for none but it. 2. That the Defendant was so far from this fault of stouting it out over-long, that he deserves to lose his Head for yielding *Bristol* up too soon; which certainly, in all Mens Judgments, is the more capital Crime of the two. 3. That no one Precedent could be produced in Story, where ever any Governor of a Town or Fort was judicially condemned or executed by the Prince or State that intrusted him to keep them, for holding them against the Enemy over-long: And if the Defendant had been guilty of this Crime, we would have been so far from impeaching, that we and the whole Kingdom should have honour'd him highly for it, tho we have both just Cause to prosecute him for the contrary; for which sundry Governors have legally been condemned. 4. That it was a most ingrate Requital to execute any Man for his over-much Valour and Fidelity; and if this were once allowed for Martial Law, it would quickly make all Governors and Soldiers, Cowards or Traitors; therefore certainly the Defendant had much mistaken his *French* Author, who writes only in general, that some have been put to death for stouting and holding out a Town over-long, without defining by whom this was done. He pretends it was done by those who intrusted them with the Towns, of which no Example can be produced; but certainly the Author meant it only of the Enemies, who have sometimes put a Governor to death when a Town hath been forced, for holding it over obstinately out against them, for which there are divers Precedents. And in this Sense (which doubtless is

the true) it suits very well to the Defendant's Case. The poor Man was excepted (as he tells us) out of the King's Pardon sent to *Bristol*, and so like to suffer if he held the Town or Castle till it were forced by the Enemy: Wherefore to prevent all Danger, and save his best-beloved Life, he thought good to avoid the Rigour of this Law, by purchasing his Impunity with the over-hasty Surrender of them to the King; and so by this unworthy shift,

Incidit in Scyllam qui vult vitare Carybdin:

Forfeiting his Head to the Parliament and Kingdom, to secure it from the King.

Mr. *Pryn* concluded his Reply to the Defence of the fourth Article, and those that followed it, with Col. *Fiennes*'s Commission for *Bristol*, and some Precedents in point resolved in Parliament; the Transcripts whereof out of the Parliament Rolls, proved upon Oath to be true Copies, he there delivered to the Council*.

Col. *Fiennes*'s Commission (the Original whereof he there produced) was read as followeth.

RObert Earl of *Essex*, &c. To Col. Nathanael *Fiennes*. By virtue of an Ordinance of the Lords and Commons in Parliament, I do constitute and appoint you Governor of the City of *Bristol*, as also Commander in Chief of all the Forces raised, or to be raised and employed for the defence of the said City, and the Liberties of the same, and of the Garison there, to serve for the Defence of the King, Parliament, and Kingdom. These are therefore to will and require you by virtue of this Commission, to take the said City and Forces into your Charge as Governor in Chief, and by all possible ways and means (except in point of Civil Government) to provide for the Defence and Security of the same, and to maintain the same against all Enemies and Opposition whatsoever: and from time to time diligently to exercise the said Forces within the said City and Liberties, in Arms; commanding all Officers and Soldiers to obey you as their Governor and Commander in Chief, for the Service above-mentioned, according to this Commission given you. And you are likewise to observe and follow such further Order and Direction as you shall receive from myself, or from both Houses of Parliament. Given under my Hand and Seal of Arms this first Day of May, 1643.

E S S E X.

From this Commission it appears, 1st, That Col. *Fiennes* was constituted Governor of *Bristol* by Commission from his Excellency, under his Hand and Seal. 2dly, That he had the Command in Chief of all the Forces and Garisons there, who were to be employed for the Defence of the said City, and the Liberties of the same; and to serve for the Defence of the King, Parliament, and Kingdom. 3dly, That he was specially charged by that Commission, to take the said City and Forces into his Charge as Governor, and by all possible ways and means to provide for the Defence and Security of the same, and to maintain the same against all Enemies and Opposition whatsoever; and that all Officers and Soldiers were there to obey him as their Governor and Commander in Chief for this Service: Therefore he and his Officers were expressly enjoined by this Commission to defend and keep it against the Enemy,

* See these Records at large, with some others to the same purpose, at the end of this Trial.

to the uttermost Extremity, and were there placed for that very purpose : and that he sent for and accepted this Commission upon these very Terms, and not only to rule his Soldiers, not to keep the Town and Castle, as he falsely at first pretended. 4thly, That he was to observe and follow such further Order and Direction from Time to Time, as he should receive from his Excellency and both Houses of Parliament ; therefore not to surrender the City and Castle without their special Order or Direction, which he never had to do it, as himself confesseth. His very Commission therefore being expressly violated in all these Particulars by this his Surrender, before he was reduced to utmost Extremity, is a sufficient Evidence to declare and condemn him for a Traitor, by the very Ordinances of War, especially since he knew the grand Importance of the Place, for the Kingdom's Safety.

For Precedents adjudged in Point, I could produce many out of foreign * Histories, which I shall pretermitt, because they are no binding Evidence in Law ; wherefore I shall confine myself to such domestick Examples of this Nature, as have been formerly adjudged in Parliament, (the supreme Council of War, whose Judgments must direct all others) registred amongst our Parliamentary Records, which cannot be controlled, and are the best Evidence of any other. The Records themselves (examined by the Parliament Rolls) are long, and written in Law French, which perchance some of this Honourable Council understand not ; I shall therefore briefly open them in English, and apply them to the present Case, in order as they are opened.

The first † Precedent is the Case of John Lord of Gomineys, who in the Parl. of 1 R. 2. n. 38, 40. was indicted and arraigned before the Lords, for that he being made Governor of the Town and Castle of Arde (in France) by K. Edward III. to this Intent, That he should safely keep the same for the King and his Heirs, without Surrendring them to any Person without their Command, did yet in K. Richard II's Reign, deliver and surrender the same to the King's Enemies, without any Command from him, to the dishonour and disinheriting of the King and his Crown, and of the Realm of England, against his Undertaking aforesaid, without any dures or default of Victuals or Artillery, or of any other things necessary for the Defence thereof. To which Indictment the Defendant pleaded, that the Town and Castle were so weak, that he could not well keep them against so great a Power of the Enemies as was then ready to assail them : Whereupon he assembled all the Knights, Esquires, and others in the Town, and informed them of the Danger the Town was in, and of the Enemies Forces ; and by common Counsel and Consent of them all, he entred into a Treaty with the Enemies, to save the Lieges of the King within the Town and Castle ; and thereupon yielded up the same upon Terms of Composition, receiving no Reward at all for surrendring the Town or Castle. But because one Geoffery of Argentine, Knight, affirmed in Parliament, that he was then in Person within the said Town and Castle, in the Defence whereof he was always ready to live and die, never consenting to the Surrender thereof ; and because Sir Ralph de Ferrers Kt. had valiantly defended them in former Times against a great Force of the Enemy, when they were not so strong as at the time they were surrendred : And because de Gomineys had

undertaken to keep them, and if he could not have done it, he ought in no wise to have undertaken to keep them ; and that another should and would have undertaken the safe keeping of them, had he not undertaken it ; and for that he yielded them up in this sort before utmost Extremity, when he wanted neither Men, nor Victuals, nor Ammunition, he was adjudged to lose his Head, notwithstanding his Plea, that he did it by the Advice of a general Council of War, to save the King's Liege People's Lives and Estates, and that the Town and Castle were weak, unable to resist the Enemies Power.

This Town was of far less Importance to the Realm of England than Bristol ; no Treachery at all appeared in the Surrender, made by the Vote of a general Council of War ; yet we see the Governor adjudged to lose his Head, for not holding it out to the utmost Extremity, according to his Duty. And if his Plea could not secure him from such a Sentence, Col. Fiennes's Plea being the very same with his, that he surrendred the City and Castle of Bristol to the Enemy before utmost Extremity, because they were weak and untenable for any long time, to save the Lives and Estates of the Garison, and Parliament's Friends, and that by the Counsel and Assent of all the Knights, Esquires, Soldiers, and Inhabitants thereof, must needs be frivolous, and can no way extenuate his Fault, nor save his Neck from the Block ; the rather because Bristol was of far greater Consequence to the Kingdom now, and better provided, fortified, manned, victualled, and more likely to be relieved, than Arde was then.

The second Precedent was of Pierce de Cressingham, and John de Spikefworth Esquires, who were arrested and arraigned in Parliament 7 Rich. 2. num. 17. for yielding up the Castle of Drinkham in Flanders to the Enemies, from whom it was gained by the Bishop of Norwich, tho it were well and sufficiently stored with Victuals and other Necessaries, and strong enough to be held against the Enemies, without the Will or Command of the King or his Lieutenant. To which Spikefworth pleaded, That he had never the Custody of that Castle, or any thing to do therewith, but was chased into it by the Enemy, it being then in the Custody of Pierce de Cressingham : That soon after the Enemy assailing the Barbican he was unbappily routed, and one of his Varlets slain close by him : That he had never any thing to do in the Castle, neither as a Soldier thereof, nor in any other manner whatsoever, but only continued in it in manner aforesaid, till it was surrendred by the said Pierce ; and therefore prayed, that it would please the King to have him excused. Whereupon it was ordered he should be set at Liberty, if nothing else could be said against him. Pierce Cressingham, who had the Custody of the Castle, alledged, That upon the yielding up of the Town and Castle of Burburgh to the Enemy, of all the Garison Soldiers he had with him at Drinkham, none would continue with him for the safeguard of that Castle but only five Persons ; by reason of which great Necessity, he was constrained for the safety of his own Person and People, to enter into a Treaty with the Enemies to deliver up that Fort ; and thereupon he yielded it up, and not for any other Cause, nor in any other manner, but only by Constraint of the Power of the Enemies aforesaid ; denying that he ever received any thing from the Enemies by way of Gift, or in any other

* See Grimston's History of the Netherlands, p. 827, 828.

† 1 R. 2. num. 38, 40.

manner: Whereupon he conceived that no Man ought to impute any manner of Blame or Reproach unto his Person; but if it should be thought he had done ill in any manner, he most humbly cast himself upon the Grace of his Liege Lord. But because this Excuse was held insufficient, he was committed to Prison, till the King should otherwise declare his Opinion concerning him.

Here was a Case of far greater Extremity than Bristol, without any apparent mixture of Treachery; but only five of the Garison left to defend the Castle, whereas the Defendant had 2300 Soldiers at least in Bristol; and a Surrender by common Advice for the Governor's and Inhabitants safety: yet because Cressingham the Governor, by virtue of his Office, was bound to hold it till the utmost Extremity, he was for the present adjudged to Prison, and to expect a farther Sentence afterwards; whereas Spikeworth was acquitted, because he came casually into the Castle, as forced by the Enemy, and had no Charge of it, as a Governor, Officer, or Garison-Soldier; all which (as appears by this Resolution) are answerable and punishable for delivering up the smallest Fort before utmost Extremity.

The third Precedent is the Case of the Bishop of Norwich, accused in Parliament 7 R. 2. num. 32. for Surrendring the Town of Gravelin to the Enemy, before utmost Extremity, upon Condition that it should be totally demolished. To which the Bishop pleaded, that by reason of the Disobedience of his Captains, who quitted the field, and betook themselves to their Forts, he was constrained to retire with his Forces to the Town of Gravelin, which he would have held out well enough against all Men, and did hold out till the other Captains had surrendered their Forts adjoining to the French; and after that, until speedy Supplies might have arrived from England: But because there were six or 7000 Englishmen, who came out of the Forts surrendered, lying on the Sands near Calais, who could not get into the Town, and were in danger to be slain by the French within two or three Days, (the Truce being then expired) whose Loss would have been charged principally upon him; thereupon he was commanded by the King himself to render the Town to the Enemies, or else to demolish it, and then to march to succour the said English, and after that towards England, to save himself and others of his Army, in case they were in any great Want of Victuals, as in Truth they were: and because it becomed him to abate and void the Town, as it was lawful for him to do at his Pleasure, being gained by his proper Conquest from the Enemy; it seemed to him, that he ought to be well excused of whatever was surmised against him (for * compounding with the French to raze the Town to the Ground, and to depart whither he would with his Bag, Baggage, and Men.) To which was answered by the Lord Chancellor, That there was sufficient Victuals in the Town when the King's Letter came there; after which the King sent other Victuals thither in great Plenty, with Letters importing, how he had appointed his Uncle to come speedily to his Aid and Succour: yet notwithstanding he departed thence, leaving the Town to the Enemies, against the Form of his Indenture, by which the King granted him whatsoever he should conquer, not at all to surrender, sell or leave the same to the Enemy, but to hold and possess it. And as for the Disobedience and Defaults of his Officers, and their Surrender of the Fortresses, they neither could nor ought at all to excuse him, seeing they were all named

and chosen by himself, not by the King or his Council, and the Articles of the Surrenders sealed between them and the Enemies, were made without the Authority and Consent of the King: Wherefore by the Assent of the Earls, Barons, and other Lords temporal present in Parliament, it was assented and decreed; That the Bishop should be in the King's Mercy, (who out of his Grace would forbear to lay Hands on his Body in regard of his Function, tho he might justly have proceeded against him as a Lay-man;) that he should be put to a Fine and Ransom, according to the Quantity and Quality of his Offence, for which his Temporalities should be seized, and whatever Monies he had received from the King, and employ'd to his own Use, he should presently make full Payment thereof into the King's Treasury, without Delay or Difficulty. Had he been a Lay-man his Censure had proved capital, and more rigorous.

Here we have all Col. Fiennes's Excuses pleaded to justify this Action: 1. The saving not of a Body of 1500, but 7000 Englishmen to serve the State, whose Lives were all endangered, not in a Garison-Town or Castle well victualled, or ammunitioned, as those in Bristol were, but lying on the open Sands without Defence, and that not in their own native Soil, but beyond the Seas in an Enemy's Country. 2. Despair of timely Relief, and greater Want of Victuals than was in Bristol, where there was too much Plenty. 3. A Letter from the King himself, injoining the Bishop to quit the Town to the Enemy in case they wanted Victuals, as he alledged they did; whereas Col. Fiennes received no such Letter from the Parliament or his Excellency, to quit or yield up Bristol. 4. This Town was won from the Enemy by the Bishop himself, not immediately committed to him to guard by the King or Parliament, as Bristol was to the Defendant, who had less Right to surrender Bristol, than this Bishop Gravelin, being his own Conquest. 5. He did not yield up the Town, with all the Cannon, Arms, and Provisions in it to the Enemy, as the Defendant did Bristol; but only demolished it and slighted the Fortifications, departing thence with Bag, Baggage, Cannon, and his Men: yet notwithstanding all these Particulars, and the gallant Service this martial Bishop had done in this Expedition, he incurred this heavy Censure, and had his Temporalities seized divers Years for his Fine and Ransom. And if he deserved such a Censure, no doubt the Defendant deserves a far greater, notwithstanding his Excuses.

The fourth Precedent is that of Sir William de Elmham, Sir John Tryvet, Sir Henry de Ferrers, and Sir William de Farendon, Knights, and Robert Fitz-Ralph Esquire, impeached in the Parliament of 7 R. 2. rot. Par. n. 24. for Surrendring the Town and Castle of Burburgh to the Enemy, and receiving Monies for the Arms, Victuals, Prisoners, and Goods within the same. To the which Sir William de Elmham, and most of the others pleaded, that they were enforced to surrender the Town and Castle to the Enemy of fine Force, for the Salvation of themselves, the Garison and People therein, the Enemy having besieged and assaulted it in very great Numbers, and set the Town on Fire within, who would have taken it by force, and taken or slain all those within it, had they not yielded it by Agreement: And that the Monies they received, was only for the Prisoners, Victuals, and other Goods within the same, not for the Surrendring of the Town itself.

* Walsingham Hist. Angl. p. 327 to 330. Holingshead, Speed, Grafton in 4ns 6 Rich. 2.

Yet notwithstanding, this Excuse was adjudged insufficient, and the Parties ordered to make full Payment to the King of all the Monies received from the Enemy, to stand committed to Prison, to make Ransom at the King's Will according to the Quantity of their several Offences; and Sir William de Farendon left to the King's Mercy, both for his Body and Goods, to do with them what he pleased.

Here we have a Town assaulted by a Multitude of Enemies, fired in Part, and thereupon a Surrender upon Composition, to save the Officers and Soldiers from being taken or slain by the Enemy; yea, a better Market than the Defendant made at Bristol, even a Sale of the Prisoners, Victuals, and Goods in the Town to the Enemy for Money, when endangered to be all surprized by Force; yet this was judged no Excuse: Therefore certainly the Defendant's pretended Necessity, and Danger of forcing the Town by the Enemy, not half so real as this, cannot excuse his Crime, nor extenuate his Guilt, nor yet his Pretence of saving his Officers and Garison's Lives and Estates, to do the Parliament Service elsewhere.

The fifth Precedent is that famous Case of William de Weston in the Parliament of 1 R. 2. num. 38, 39, 40. The Commons in this Parliament prayed, that all those Captains who had rendred or lost Castles or Towns thro' their Default, might be put to answer it in this present Parliament, and severely punished according to their Deserts, by award of the Lords and Barons, to eschew the evil Examples they had given to other Governors of Towns and Castles. Whereupon John de Gomineys, (whose Case I began with) and William de Weston, then detained Prisoners in the Tower, because they had lost and rendered the King's Towns and Castles to the Enemies, were brought by the Constable of the Tower before the Lords in full Parliament in the White-chamber; where Weston by the Lords Command was arraigned by Sir Richard Lescop, Steward of the King's House, in Manner following:

William de Weston, you took upon you from the most puissant Prince (whom God assail) Sir Edward late King of England, Grandfather to our Lord the King that now is, safely to keep to him and his Heirs, Kings of England, the Castle of Outhrewyke, without Surrendring it to any one but to the said Grandfather, or to his said Heirs, or by Command from him, or from his said Heirs: Have you William, who are a Liege-man of our Lord the King, in times of the same our Lord the King who now is, true Heir to the said Grandfather, delivered and surrendered the same to the Enemies of our Lord the King, without Command from him, to the Dishonour (or Damage) of him and his Crown, and of the Estate of his Realm of England, against your Allegiance and Undertaking aforesaid? What will ye say hereunto?

Whereupon the said William put in his final Answer in this behalf: To the most sage Council of our Lord the King, and to the other Lords and Commons of the Parliament, supplicates and sheweth William de Weston, That albeit he be accused of this, that he hath maliciously rendred the Castle of Outhrewyke, of which he had the Custody by delivery and assignment of our Lord the King; may it please your sage and just Discretion to have the said William excused thereof, for these Causes ensuing. First of all, May it please you to remember how that the said William was lately informed by a Spy, that a great Power of the Enemies would come upon him to besiege the said Castle, with very great and very grievous Ordnances; whereupon he the said William presently by his Attorney, and by his Letters, required of the

said Council that it would please them to re-enforce the said Castle with more Men, for the Defence and Safeguard thereof, in regard that the Garison of the said Castle that then was, were not half sufficient in respect of Multitude to resist so great a Force in so large a Place; but in conclusion, for all this, he could not have any Succour from the said Council: And so the said William, not at all thro' his Default, was left without People sufficient for to keep and defend the said Castle any long Time; which he beseecheth you to take into your just and benign Consideration. Also please you to know, how upon a Monday about one of the Clock the Enemies came to besiege the said Castle, to the Number of 2600 Men of Arms, and 700 Arblasters Genevoyes, and with 5000 of the Commonalty of the Country, having nine great Cannons, divers Engines, and one great Mortar-piece, beyond all Measure greater than ever they had seen any before in those Marches; and the same Hour presently a great Number of the Men of Arms and Arblasters aforesaid came before the Gates for to assail the said Castle, and at this Time a Knight of theirs was slain who was Cousin to the Lord de Clifton as was reported, and many others were likewise then slain and wrecked. And within a short Time after they began to shoot with their Ordnances and other Engines, and so continued their Assault from one Day to another, that is to say, Tuesday, Wednesday, Thursday; and then were the Walls and Houses of the Castle battered down, and bruised in many Places; and they had likewise by Force trenched the Ditches of the said Castle in three Places, so as the Water was drained out; and that Night came a great Party of them, and by fine Force made an Assault, and abated the Barricados; and the next Day (which was Friday) they came about Day-breaking with all their Forces to assault the said Castle, but with God's Assistance they were yet repulsed with Force from their Assault, and of the one part and the other were some slain and wounded. And the same Day the Marshal of Burgoyne sent to the said William and others of the said Castle to render it; whereupon having consideration that the said Castle could not be kept, as well in regard of the small Number of the People, as by reason that the Walls in many Places were enfeebled by their marvellous Ordnance, there was a Treaty with the Lords to this End; That the said William and his Company might advise themselves against the next Morning; and so they departed each to his own. Also this same Night the Enemies caused all their Ordnances, Engines, Mortar-piece, Cannons, and Faggots, with Scaling-Ladders, Galleries, and all other Necessaries, to be drawn up near to the very Ditch of the aforesaid Castle; and the next Day (which was Saturday) they made all things ready plainly for to assault the Place: And then first of all sent an Herald to the said William, to know if the said Castle should be rendred to them or not? Whereupon the said William, by Advice of the wisest of his Companions, taking consideration how that the said Place was destroyed and enfeebled with their Ordnance, and also that they were too few Men for its Defence, by reason that twelve of their Companions were in this Time slain, wounded and sick, so as there remained of all the People in the Garison in Health, but only 38 Men to defend the same; hereupon by common Assent the said Castle (which could be kept no longer) was by Force surrendered, for to save their Lives granted to them, and their Goods. And that all these things aforesaid are true, the said William puts himself upon his Proof, according to your most discreet Ordinances. Also it is to be remembered,

that when the said Castle was thus rendred as afore-
 said, certain French People bargained with the said
 William for his Viſuals, to buy them, together
 with certain Prisoners which the said William held
 imprisoned within the said Castle, for which things
 he received of them for his Payment 1500 Franks;
 of which he paid his Companions for part of their
 Wages which was behind unto them for one quarter
 of a Year and an half, 78 Franks; likewise after
 was paid at Calais for the Viſuals of the said Cas-
 tle before that time due, 442 Franks; also for the
 Passage of the said William, and of his Companions
 into England, and likewise for the Expences of the
 said William being at Calais, 135 Franks. And
 therefore the said William prayeth in this Regard
 your Justice and Benignity, seeing by envious Sug-
 gestion he hath against all Reason been accused,
 whereby his Estate and Name, by the grievous Sin of
 Mis-informers, and he also, is ruined; having like-
 wise Consideration, that out of his proper Goods he
 hath for the greater part paid his Companions their
 Wages which were due unto them as aforesaid, and
 also for the great Costs he hath been at before this
 time, for to viſual the said Castle, (for which he hath
 given his Obligations in divers Places, and oweth great
 Sums, by reason whereof he is on all sides undone, if
 your just Benignities do not succour him) that you
 would be pleased for God's sake, and for Pity, to
 ordain likewise for him, that he may by your dis-
 creet Nobleness recover his Estate and Goods. Also
 the said William Weston sheweth, how the first
 Day when the Enemies came before Arde, that he
 went in haste to Calais unto the Captain, and desired
 of him more Succour and Aid of Men, for the better
 guarding of his Fort at Outhrewyke, and to defend
 it if the Enemy should come thither: and the Captain
 answered him briefly, that he would not deliver nor
 give him Aid nor Succour at the same time, because
 he doubted that the said Enemies would come before
 the Town of Calais. But notwithstanding all these
 Pleas, the Lords in this Parliament, together with
 the most valiant and discreet Knights and other
 Members thereof, after good and mature Delibera-
 tion hereupon, delivered their Judgment and Reso-
 lution against Weston in form following. It seemeth
 to the Lords aforesaid, that you, William, who had
 taken upon you safely to keep the Castle of Outhre-
 wyke, as before is said, that you have without any
 Dureſs or Default of Viſuals evilly delivered and sur-
 rendered the same to the Enemies of our Lord the
 King, by your own Default, against all apparent
 Right and Reason, and against your Allegiance and
 Undertaking aforesaid: and having by due Informa-
 tion read the Case of the late Baron of Grayſtock,
 who was a Lord, and one of the Peers of the Realm,
 who had taken upon him safely to keep for the fore-
 said Grandfather the Town of Berwick; the said
 Baron perceiving afterwards that the said Grandfa-
 ther addressed himself to go into the Realm of France,
 the said Baron (without Command of the said Grand-
 father) committed the said Town of Berwick to a va-
 liant Esquire, Robert de Ogle, as Lieutenant to the
 said Baron, for to keep safe the said Town of Ber-
 wick to the said Grandfather; and the said Baron
 went as an Horseman to the Parts of France to the
 said Grandfather, and there remained in his Com-
 pany; during which time an Assault of War was
 made upon the said Town of Berwick by the Scots;
 and the said Robert, as Lieutenant of the said Baron,
 valiantly defended the same; and at last by such for-
 cible Assaults the said Town was taken upon the said
 Robert, and two of the Sons of the said Robert there

slain in the Defence of the same. Notwithstanding,
 because that the said Baron himself had taken upon
 him the Safeguard of the said Town to the said Grand-
 father, and departed himself from thence without
 Command of the said Grandfather, and the said
 Town of Berwick was lost in the Absence of the Ba-
 ron, he being in the Company of the said Grandfa-
 ther in the Parts of France, as is aforesaid; it was
 adjudged, by Advice of the said Grandfather, the
 King of Castile, who is present, the Nobles,
 Dukes, and Counts, Henry late Duke of Lancaster,
 the late Earl of Northumberland and Strafford,
 and Sir Walter de Manny, that the said Town was
 lost in default of the said Baron; and for this Cause
 he had Judgment of Life and Member, and that he
 should forfeit all that he had: and to render his
 Judgment in these Words, the said Sir Walter had
 a Command from the said Grandfather. Which
 things consider'd, and this also, that you, William,
 surrendered the Castle of Outhrewyke to the En-
 mies of our Lord the King aforesaid, without any
 Dureſs or Want of Viſuals, against your Allegiance
 and Undertaking aforesaid, the Lords above-men-
 tioned sitting here in full Parliament adjudge you to
 death, and that you shall be drawn and hanged.
 But because that our Lord the King is not yet in-
 formed of the manner of this Judgment, the Execu-
 tion thereof shall be respited until the King be inform-
 ed thereof: Whereupon it was commanded to the said
 Constable safely to keep the said William, until he
 had other Command from our Lord the King.

This Case is very punctual, this Judgment fatal
 to the Defendant; wherein all his former Pleas,
 and far better than he could make, are over-ruled
 against him long since, even in full Parliament.
 (1.) This Weston, as soon as he heard of the En-
 emy's Approaches and Intent to besiege Outhrewyke
 Castle, sent post to the Council, and to the Go-
 vernour of Calais, acquainting them with the
 Weakness of the Garison, and craving present
 Aid, (as the Defendant pretended he sent to his
 Excellency) yet could receive no Supplies from
 either. (2.) His Garison was not half enough to
 resist the Enemies great Power, neither had he
 Means to increase it; whenas Bristol Garison was
 abundantly sufficient to resist the Enemy, and the
 Defendant might have doubled it had he pleased,
 there being six thousand or eight thousand able
 Men more in the Town, whom he might have
 employed in its Defence. (3.) There were eight
 thousand four hundred Enemies before it, as many
 or more than were before Bristol, and but fifty Men
 only in the Castle to defend it; whereas there were
 two thousand Foot and three hundred Horse at
 least to guard Bristol; a vast Disproportion. (4.)
 They had nine great Pieces of Battery, a great
 Ram, or Mortar-piece, greater than ever were
 seen in those Parts before, with many other En-
 gines, as many or more than the Enemy had at
 Bristol. (5.) The Siege, Battery, and Assault
 thereof, continued from Monday till Saturday;
 whereas Bristol was besieged only from Monday
 till Wednesday-noon (not half so long) and then
 yielded upon Parley. (6.) All the Walls and Hou-
 ses of the Castle were beaten down and battered
 exceedingly, and the Ditches drain'd of the Water
 by Trenches, and all their Barricado's beaten down,
 yet they still held it out; whereas not one Shot at
 all was so much as made against the Castle or Walls
 of Bristol, but against the Out-works only. (7.)
 After the Walls and Barricado's were thus broken
 down, and the Ditch drained, they manfully re-
 pulsed

pulsed the Enemy, who fiercely assaulted it, and slew divers of them, with the Loss and Wounding of some of the Garison; whereas *Bristol* Castle, and the Body of the Town were yielded up before the least Battery, Mine, or Assault. (8.) They made all things ready for an Assault, planting all their Ordnance, Engines, Galleries and Faggots close to the Castle-Ditch, and sent two several Heralds and Messengers to him for a Parley ere he would treat; whereas the Defendant before any Battery or Assault against the City or Castle, sent out twice to the Enemy for a Parley, with so much haste, that he would not hearken to any who would beat them out, or oppose or delay the Treaty. (9.) Twelve of his fifty Men were by this time slain, sick and wounded, so that he had only thirty eight left to make good the Castle, thus batter'd and assaulted with so great a Power; whereas the Defendant lost but eight Men at most, and had at least two thousand three hundred Horse and Foot when he fell to Parley. (10.) He surrender'd the Castle by the Advice of a general Council of War, upon better Grounds than the Defendant yielded up *Bristol*; to wit, because the Walls were beaten down, the Garison over-small to defend it, the Enemy very likely to force it by the Assault, no present Relief near at hand, and to save his own with the Soldiers Lives and Goods, which else were endanger'd to be lost; none of which the Defendant can justly alledge, as we have manifested. (11.) He made the most of an ill Bargain, by selling the Victuals and Prisoners in it to the *French* for fifteen hundred Franks, with which he paid his Soldiers their Arrears of Wages, discharged the Debts of the Castle owing for Victuals, and defray'd the Charges of their Passage into *England*; whereas the Defendant yielded up all the Prisoners and Victuals to the Enemy *gratis*, with which Provisions the Ships that brought over the *Irish* Soldiers were victualled, and left the State to pay the Soldiers Arrears and other Debts contracted by him there, amounting to many thousand Pounds, which ought to be made good out of his own Estate. Therefore in these Respects he ought to undergo the self-same Judgment of Death, and to be drawn and hanged, much more justly than he.

To these Precedents Col. *Fiennes* answer'd, 1. That these Governors had all of them Commissions under the Great Seal of *England* to keep these Towns and Castles, and that made their Offence so great; but he had no such Commission under the Great Seal of *England* to be Governor of *Bristol*: and this he conceived differenced the Cases much.

To which Mr. *Prynn* reply'd, (1.) That the Defendant was much mistaken in this Point; for these Towns and Castles lying in *France*, if the Commissions of their Governorships were under any Seal, it was under the Great Seal of *France* not of *England*, as appears by the express Statute of 14 Ed. 3. Stat. 4. & 1 H. 6. Rot. Parl. Num. 14, 15. (2.) That the Great Seal being carry'd from the Parliament when his Commission was granted, he could not expect any such Commission under the Great Seal, but from the King himself in opposition to the Parliament, to whom he surrender'd *Bristol*, perchance for want of a Commission under the Great Seal to keep it. (3.) If this were a good Plea or warrantable Distinction, then all the Governors of Towns and Castles within the Parliament's Power might treacherously or cowardly surrender them forthwith to the King

without Punishment or Danger, because they wanted a Commission under the Great Seal to keep them. (4.) He had a Commission under his Excellency's Hand and Seal to keep the City; under whose Authority he took the Custody of it for the Parliament's and Kingdom's Safety, in these distracted Times, by virtue of a Commission of both Houses granted to his Excellency: therefore his Offence is as great and capital for surrendring it contrary to his Trust and his Excellency's Commission to keep it, as if it had been under the Great Seal. (5.) When his Commission was first granted, the Parliament had not made a new Great Seal to seal it, but since his Surrender of *Bristol* they had made one: and he durst assure the Defendant, had his Courage and Fidelity been such as to hold out *Bristol* till the new Seal was made, he would have procured him a Commission under it to keep *Bristol*, rather than he should have yielded it up cowardly to the Enemy, for want of a Commission under the Great Seal of *England*. But because he held it not till such Commission might be obtained, he must be condemned for rendring it contrary to that Commission, which he both sent for and received from his Excellency under his Seal of Arms alone.

Col. *Fiennes*'s second Answer was, That it appear'd not in these Records what other Matters and Proofs were produced against these Persons, besides those mentioned in them; and therefore for ought he knew, they might be condemned for something else besides what is alledged in these Records, else the Cases might seem very hard, and the Sentences none of the justest.

To which Mr. *Prynn* reply'd, That the Defendant by this strange Answer betray'd his extraordinary Ignorance in Matters of Law and Records, into which no Depositions of Witnesses are wont to be inserted, but only the true State of the Case it self, and the Judgment given thereupon: and therefore to surmise they were condemned for any thing else, than what is expressly mentioned in the Records and Judgments themselves, is to aver against the very Records, and the Judges that gave the Sentences, and so to falsify and nullify all Records. The Cases therefore being admitted to be really such as the Records relate, in nature of a Demurrer or Confession, and the Judgments determining them to be such; this Answer must rather be deemed an ignorant Mistake than any solid Reply.

Col. *Fiennes*'s third Answer was, That the Castle of *Outbrewyke*, *Arde* and *Burburgh*, were Places of no great Consequence or Wealth, and therefore ought to be held out to the utmost: But *Bristol* being one of the richest, chiefest Cities in the Realm, and of great Importance, ought not to be endanger'd or ruined by holding it to the utmost Extremity, as Castles and other such Places of less Concernment might be.

To which Mr. *Prynn* answer'd, (1.) That if Places of smallest Concernment ought to hold out to Extremity, and if it be Death to yield them up before; then certainly *Bristol*, and Places of greatest Consequence to the Ruin or Safety of the Realm, ought much more to be kept to Extremity, and the yielding of them up must be more capital; else he that betrayeth the greatest Trust, and doth most Mischief to the State, shall be less culpable, and undergo a milder Censure, than he that betrays the smallest Fort: yea, if this were either good Justice, Law or Logick, the Defendant might argue, that he who steals ten thousand Pounds, or murders

murders a Man, deserves not Death; but he who steals thirteen Pence Half-penny, or strikes a Man, ought to be hang'd without Pity. The Precedent and Argument therefore held *a minori ad majus*: If these were condemned for their cowardly Surrendring of those inconsiderable Towns and Castles before utmost Extremity, which did but little Prejudice to the Republick; then much more ought the Defendant to lose his Head for yielding *Bristol* thus, a Place of highest Concernment to the Kingdom, which is almost lost in and by its Loss. And doubtless the Defendant, who would not adventure his Life to preserve such a considerable City as *Bristol* to the utmost Exigence, would never adventure it to hold out any other inferior Places till the last, but yield them up without Resistance. Since therefore it appeared by these Precedents, that the Parties impeached for Surrendring up any Forts were always detained under Custody during their Trial; he desired the Council the second time, that Col. *Fiennes* might presently be put under safe Custody, and Judgment given against him according to these Precedents and the Laws of War; the rather because they were seconded by his own late Judgment against *Yeomans* and *Butcher*, whom he condemned and executed by Martial Law only for endeavouring to deliver up *Bristol* to the Enemy before it was fully fortify'd, whenas himself thus cowardly and traitorously surrender'd it to them after it was fortify'd, and abundantly furnish'd with all Necessaries to hold out a Siege, their intentional Surrender being not so criminal or fatal to the Republick as his actual.

When we had thus made good the several Articles of our Charge, and fixed the Loss of *Bristol* and the *West* too on Col. *Fiennes*, who by his not denying it in his Answer to the fourth Article, did thereby in point of Law confess it; the Colonel to free himself from this heavy Charge, averr'd before the Council, *That Bristol and the West were not lost by him but Sir William Waller*: to prove this he produced several Allegations. Upon which Mr. *Prynn* humbly moved the Council, that a Gentleman of his Worth and Honour might not be thus publickly traduced, where he was neither present to make his Defence, nor a Party to the Articles; desiring that either he might substantially prove this palpable Slander by pregnant Evidences, or else be exemplarily punished for it.

Hereupon the Defendant first alledged, that he sent Sir *William Waller* twelve hundred Foot out of *Bristol* (to wit, Col. *Popham's* whole Regiment) very well armed, who at the Rout of Sir *William*, near the *Devises*, lost all their Arms, (not many of these Men returning to *Bristol*, and those without Arms;) the Loss of which Regiment so weakened the Garison, that it lost both *Bristol* and the *West*, which he could not defend for want of Men.

To which Mr. *Prynn* answer'd, (1.) That *Bristol* was not lost for want of Men; and that this Regiment was fully made up and supply'd, by the Defendant's own Confession, with a great over-plus; Sir *William Waller* not receiving above seven or eight hundred Foot out of *Bristol*, in lieu whereof the Defendant raised 1100 or 1000 at the least, besides those from *Malmesbury*. (2.) That when he sent forth that Regiment he had an independent Commission, and could not be enforced

to it, nor ought to have sent them if the City were thereby endanger'd, without special Command from the Parliament or his Excellency: His sending out then of this Regiment being his own voluntary Act, (as his own Letter to Col. *Popham* attests, and he confessed) it is clear that himself only was the Loss both of *Bristol* and the *West*: and if there were no other Evidence, this alone would endanger his Head, it being Capital by all Laws of War for any Governor to send out his Garison, or to absent himself from his Charge, without special Command, if the Place be by this Means lost or surprized, as was adjudged in Parliament in the Case of the Baron of *Greystock*, cited in *Weston's* Case; of the Earl of *Northumberland**, *Henry Percy*, in 7 R. 2. and others. Upon which Ground we find the Governor of *Calais* refused to part with any of his Garison for the Defence of *Outhrewyke* Castle: And the reason is apparent, because if Governors might draw out their Garisons, or desert their Charges at their Pleasure, their Forts might be easily surprized, betrayed, and a Gap opened to infinite Treacheries.

2. He produced his Cousin Capt. *Temple* to testify, that a Gentlewoman of his Acquaintance, and of Kin to Col. *Fiennes*, overtook another Gentlewoman upon the Highway, newly come from *Oxford*; of whom asking what News, she answer'd, that the greatest News now at *Oxford* was, that tho Sir *William Waller* had occasioned the Loss of *Bristol* and the *West*, yet Col. *Fiennes* was like to suffer for it, and become his Sacrifice; who being the great *Diana* of the People, and so necessary a Man to the Parliament, now in the Field with an Army, they would forbear to question him, and sacrifice Colonel *Fiennes* to humour him and his Party.

To which Mr. *Prynn* answer'd, (1.) That this extravagant Report, testify'd only at the third or fourth hand, was no Evidence at all, and favoured rather of a direct Plot to traduce Sir *William Waller* than to justify Col. *Fiennes*. (2.) That all the Western Gentlemen had a quite contrary Opinion of this Business, that *Bristol* and the *West* were lost by the Defendant, not by Sir *William*, as appear'd both by their extraordinary Respects unto him, and present Employment of him to regain the *West*. (3.) Admit this fabulous Report to be bruited in *Oxford*, (to asperse Sir *William* and the Parliament, and justify the Defendant) yet it signify'd no more, but that Col. *Fiennes* had better Friends and Respect at *Oxford* than Sir *William Waller*, perchance for his good Service in Surrendring up *Bristol* to them at so easy a Rate in so short a time, (enough to purchase him both Friends and Favour at the Court) where Sir *William* was not so grateful, because he never did them so great a Courtesy, or good Piece of Service, nor the Republick so grand a Mischief.

3. Col. *Fiennes*, for a Conclusion of his Defence, informed the Council, *That this Trouble, Prosecution, and Disgrace had never befallen him, but for that constant Affection and Service which he and his Family had always shewed to his Excellency and his Army, for which Sir William Waller and his Party did malign him.*

To which Mr. *Prynn* reply'd, That this was a most false, scandalous and seditious Speech, discovering who they were that raised and fomented the late unhappy Differences between his Excellency and Sir *William*, and to what sinister end; that nothing

could be utter'd more effectual to set all the Parliament's several Armies into a Faction against one another, instead of joining against the publick Enemy; and therefore having neither the least Ground nor Proof to justify this Calumny, he desired he might be exemplarily proceeded against for it.

In fine, after some hear-say Proofs, what Opinion the Enemies had of his valorous Defence of *Bristol*, and the Intenability thereof, and a Recapitulation of all the Heads of his Defence, he concluded with this Peroration.

My Lords, I have at last ended my Defence, and (as I hope) sufficiently cleared both my Honour, Valour, and Fidelity to the State in the Defence of *Bristol*: And now I beseech you to consider, whose Honour or Life can be in Safety, if Lawyers (fee'd by their own Malice) may sift and turn up all his Actions, and snarl at his Words; if such who are no Soldiers, may upon the Information of Attorneys, and Testimony of Shop-keepers, Ale-Wives, Enemies, but of no Soldiers at all, (except such who appear out of particular Spleen) be brought thus upon the Stage for their Lives, and the great Privileges of Parliament broken by such an Impeachment of a Member of it, which could not be parallel'd but by that Accusation of the five Members. Wherefore I desire, that as I have served my Country faithfully, and done many good Services for it, so I may by this honourable Council be justified in my Faithfulness, and repaired against the Prosecutors in my Honour, more dear unto me than my Life; that so after all my publick Services, I may not now be cast behind the Door like a Dish-clout, unfit for any further Employment.

To which Mr. *Prynn* reply'd, (1.) That he wonder'd much why the Defendant should thus except against him as an unfitting Prosecutor, since himself (without his Privy or Desire) had by a Proclamation under his Excellency's Hand and Seal, posted up at *Westminster* and the *Exchange*, selected him and Mr. *Walker* by Name to prosecute this Business against him: if then we were unmeet Prosecutors, it was his own, not our Error, and he must blame only his own Judgment in the Choice, not us. (2.) That tho he were but a common Lawyer, yet he deemed one of that Profession a very fit Prosecutor of him who had betrayed his Trust, and in it the Kingdom, contrary to Law: And whereas the Defendant scandalously objected, that he was fee'd by his own private Malice, he protested that there was never any Malice, nor Cause thereof between them; that he formerly honour'd the Defendant for his Pen, but never for his Sword, and bestowed some Courtesies on, tho he never received any from him; that he was born not far from *Bristol*, bred up some Years therein, had many Friends and Kindred in or near it, who lost much, and himself not a little, by its Surrender; that nothing had engaged him in this Prosecution but the Defendant's own Summons, nor fee'd him but the publick Service of the Parliament, and Security of the Realm: that altho he had lost and suffer'd much for the Church and State, yet he never received nor expected the least Recompence, much less Reward from either, nor ever had any Pay for publick Services, whereas the Defendant received good Wages for all his Services, and for losing *Bristol* too: that himself had never lost any thing of the State's, as he had done, but only what was his own, (his Liberty, Calling,

Estate, Members) and that only for doing the Church and Kingdom Service, none of all which the Defendant had parted with for the publick. And therefore whereas the Defendant boasts of his publick Actions, he could without Vanity or Prejudice truly affirm, he had done ten times more Service for Church and State, and suffer'd a thousand-fold more for both, not only gratis, but even with the Loss of all his earthly Comforts, than this Boaster had done upon Pay; and that he doubted not thro' God's Assistance he should be able to do the Church and State as good or better Service for the future as he: wherefore he had little Reason to extol himself so much, or depreess him so low, as not to be a fitting Prosecutor of such an unworthy Action. That tho he were no professed Soldier, yet he doubted not but he had read as many or more Treatises of Military Affairs than himself; that he had for eight Years Space of his Restraint in the Tower of *London* and *Mount-Orgueil* Castle, conversed with old Soldiers, (and by Name with Sir *William Balfour* for five Years in the Tower) from whom he gained so much Experience in Martial Affairs, as he would have undertaken to have kept the City and Castle of *Bristol* till this Day, had he been Governor there as the Defendant was, notwithstanding their pretended Intenability, and the Enemy's Power: That in the managing of this very Business before this Honourable Council, he had in sundry Particulars manifested himself, if not a better, yet at least as good a Soldier as the Defendant, (for which he appealed to the Council) and in regard of his long Suffering and Restraint in Castles was the antienter Soldier of the two: That the Defendant had confessed to the Lieutenant Colonels *Paleologus* and *Andrews*, when he first undertook the Government of *Bristol*, That he was no Soldier; and his yielding it up in a short time, before Extremity, upon such poor Conditions, manifested him in truth to be no Man at Arms; and therefore tho he were no professed Soldier, yet why he should not be a Soldier sufficient to prosecute him, who, by his own Confession and Action, is no real Soldier, he could yet discern no Reason. For his Witnesses, whom he here vilified and traduced, they were many of them Persons of Quality and Honour, some of them Members of Parliament; others more expert Soldiers, and Persons better versed in martial Affairs, than any of the Defendant's Witnesses; all of them Persons of good Fame and Conversation, disinterested, and disengaged in the Cause, against whom no Exceptions can be taken: when all his material Witnesses were his own Officers, Brother, Kinsmen, Servants, Creditors, and Parties in the Cause, most of them involved with him in the self-same Guilt. That his Life and Honour were now drawn in question only by himself, upon his own Motion and Engagement of us; and if he lost them (as he lost *Bristol*) he might thank himself for interesting us in this publick Service, for our Country's Honour and future Security, the only thing we aimed at in this present Prosecution. That his pretended Breach of Privilege of Parliament was but a Fancy, already answered and over-ruled in the Commons House, who referred him to a Trial before a Council of War, by two several Orders, upon his own Motion and pretended voluntary waving of his Privilege, before any Impeachment put in against him; which Impeachment was first tendred to the House of Commons, who upon the reading of it, with one unanimous Vote referred it to his

his Excellency, to be proceeded on by a free and fair Hearing before this honourable Council : and if the Proceedings on this Impeachment upon his own Motion, by the Commons Direction, be a Breach of Privilege, it is only in himself and the Parliament, not in us ; and it hath no more Resemblance to the Case of the five Members, than an Ape to a Lion. That he was now questioned, not for his faithful but unfaithful Service to the Republick and Parliament, in the Surrender of *Bristol*, in which he presumed he durst not manifest himself so far a Papist as to plead a Justification by Works, or Absolution by preceding Merits. That he needed not to crave Reparation of his Honour and Reputation from us or any other in this Case, since they were both impaired and ruined by himself thro' this ignoble Action : That he had given the whole Kingdom an incurable fatal Wound, an irreparable Loss, (which the Loss of his Head and Estate could no way recompense) by this Surrender, for which in the whole Kingdom's behalf we here demand Judgment against him according to the Quality of his Offence : That our Services for the Republick were every way equivalent to, if not transcending his, our Credits, our Reputations, as dear to us as his to him, which he hoped should no ways suffer for our Zeal and Fidelity in this publick Prosecution upon our own Expences, without Thought of Recompence. That if the Defendant should be pronounced Guiltless by this honourable Council, after so full a Charge and Hearing, he was obliged to us for bringing him to such a publick Vindication of his suspected Fidelity, which else would have lain eclipsed under a black Cloud of Jealousies : But if he were pronounced guilty of the Impeachment, (as we made no doubt he would, the Evidence being so clear, the Proofs and Precedents in point so punctual) we should deserve Thanks, if not from him, (who pretended a Desire to be tried to the uttermost) yet at least from the Parliament, Kingdom, and our native Country, for bringing such a grand, politick, daring Delinquent to his Trial and condign Judgment ; who by surrendring *Bristol* hath endanger'd the Loss of three whole Kingdoms, and of our Laws, Religion, Liberties, Lives, and present Parliament.

And now (my honoured Lords and Gentlemen) lest we should incur your just Censure (according to the Defendant's Doctrine) for flouting out this Cause over-long, which by the Defendant's Tedioufness hath lasted nine Days Dispute, (tho the City's Siege continued not three full Days) we shall close up all in a Word or two : We render you many hearty Thanks, in our own and the Kingdom's Names, for your nine Days Pains, Patience, and that fair, honourable, impartial Hearing, you have afforded both Parties in the Trial of this great publick Cause, in which the whole Realm is interested, and whereon their Eyes are fixed ; not doubting but as you have granted us a most full, fair, indifferent Hearing, so you will in due Season (after serious perusal of your Notes and the Evidence on both sides) give such a just and equal Sentence as shall chronicle your Justice

to, and make this Case a leading Precedent for all future Times, to deter all Governors of Towns or Castles from cowardly, traiterly, or unworthy Surrenders of them.

Thus ended the long Debate of this great Cause, begun on *Thursday* the 14th of *December* 1643, and concluded on *Saturday* the 23d of *December*. After which both Parties were ordered to attend the Council again on *Friday* following, being the 29th of *December*, to hear Sentence, the Council desiring so much Respite to peruse their Notes and prepare their Judgment. Who sitting again, and we attending them, on the designed Day, the Council first delivered their several Judgments of the Cause among themselves in private ; after which Colonel *Fiennes* was disarmed at the Council-Chamber-door, (whereat he was much appalled) and then he and we being called in, the Judge-Advocate read his Sentence out of a Paper *in hæc verba*.

Colonel Nathanael Fiennes, you have been arraigned and convicted before this honourable Council, for Surrendring and Delivering up the Town and Castle of Bristol, with the Forts, Magazines, Arms, Ammunition, Victuals, and other things thereunto belonging, and for not having held the same to the utmost Extremity, according as by your Duty you ought to have done : For which Offence this honourable Council hath adjudged you to be executed according to the Tenor of the Articles of War, by having your Head cut off. God have Mercy on your Soul.

The Defendant, astonished at this Sentence, told the Council, that he little expected such a Sentence from them ; and demanded upon what Grounds and Reasons they thus condemned him ? and whether they did allow of our Paper-Witnesses, or disallow the Testimonies of his Officers ? Whereupon all being commanded to withdraw for a short Space, and then called in again, the Defendant was told, *it was against the Style and Honour of the Council, to be demanded the Reasons of their Judgment after it was once pronounced.* Upon this the Defendant alledged, that he was a Parliament-man, and claimed his Privilege ; that he ought not to be condemned without the Privy of the Commons House, to which he appealed against this Sentence, and desired his Appeal might be entred.

To which Mr. *Pryn* answered, That he had formerly appealed from the Parliament (the ancient proper Judge of his Cause) to a Council of War, and by his own voluntary Motion waved his Privilege to put himself upon this Trial, as appeared by two Orders of the House ; therefore he could not now appeal back again to the House, or resume or claim his waved Privilege after Judgment. Notwithstanding, upon his Request, his Appeal was entred ; yet a Guard was set upon his Person at his Lodging : and upon better Consideration he sent to withdraw his Appeal that Night. *He was afterwards pardon'd by the Lord General.*

Cases of Cowardice, *referr'd to in the foregoing Trial, as stated from the Records by Mr. Prynne.*

BY the *Laws of King Edward the Confessor, he who flieth from his Lord or Fellow-Soldier for fear of War, or Death, in the Conduēt of the Heretock (or Captain) in any Expedition by Sea or Land, let him lose all that is his, and his very Life, and the Lord may lay Hands on the Land which he had formerly given to him. And he who shall be slain in War before his Lord, be it in the Land or elsewhere, let his Reliefs be pardoned, and his Heirs enjoy his Money and Land without any Diminution, and divide it among themselves.

By the Statutes of 18 Hen. 6. c. 19. 7 Hen. 7. c. 1. 3 Hen. 8. c. 5. 2 Ed. 6. c. 2. 4 & 5 Phil. & Mary c. 2, 3. 5 Eliz. c. 15. It is made no less than Felony and Death for any Soldiers to depart from their Captains without their License under Hand; for which many Soldiers have been condemned and executed, Coke's 6 Rep. f. 27. in the Case of Soldiers: And before these Statutes, Thomas Earl of Lancaster was † proclaimed a Traitor by the whole Army, in the twelfth Year of King Edward II. for departing in Discontent from the Army at the Siege of Berwick, by means whereof it was not taken, and the Siege raised.

Henry de Essex's Case, 2 Hen. 2.

Henry de Essex, † Standard-bearer to the Kings of England by Right of Inheritance, was accused of High-Treason in the second Year of King Henry II. by Robert de Montford his near Kinsman, and vanquished by him in a Duel at Reading for his cowardly abandoning and throwing down the Standard-Royal in North-Wales, in the Battle against Prince Owen, amidst the Mountains, and flying when fiercely assaulted by the Welsh, whereby the King's Army was endangered to be routed: Whereupon tho his Life was pardoned, yet his Lands were seized into the King's Hand, and he shorn and shut up a Monk in the Abbey of Reading, where he died.

Thomas Kattrington's Case, 50 Ed. 3.

Sir *† John Annesly Kt. in the Parliament of 50 Ed. 3. (commonly styled, *The good Parliament*) had accused Thomas Kattrington Esq; of Treason, for selling and delivering up the Castle of St. Saviour's (built by the Lord John Gbaundois within the Isle of Constantine) to the French, for an inestimable Sum of Money; whenas he wanted neither Means of Defence, nor Victuals: which Castle, had it not been thus traitorously alienated, had descended to the said Sir John in right of his Wife, being next Heir to the Lord Gbaundois, offering to make good this Accusation, and try it out by Duel: whereupon the said Thomas Kattrington was then apprehended and imprisoned; but soon after, by Means of the Duke of Lancaster and the Lord Latimer, (who then did what they pleased) released, being formerly their Instrument and Creature in Peace and War, in all just and unjust, in true and false Things; neither could the said Sir John obtain the Effect of his Suit till the Parliament of 3 R. 2. An. 1380. some Men affirming, *That it was against the*

Laws of the Realm for any Man of the Realm to fight such a Duel for such a Cause; many who feared the like Tax and Accusation did most of all hinder this Trial: but at last, in this Parliament, the antientest and Truth-speaking Knights of the Realm being assembled, it was resolved, that for a foreign Cause, such as the present was, which arose not within the Limits of the Kingdom, and for the Possession of transmarine Things, it was lawful for any Man to fight a Duel, if the Cause were before certify'd to the Constable and Marshal of the Realm, and the Duel accepted by the Parties in their Presence. Whereupon a Day of Battle, and Lifts were appointed them in the Court at Westminster, where this Duel being solemnly fought on the 7th of June between these two Champions, in the Presence of the King, Nobles, and an infinite Multitude of People; the traiterous Esquire was vanquished by the Knight, to the Joy of the Common People, and to the Grief of Traitors: The Esquire who fainted in the Place, died the next Morning.

Gomeney's and Weston's Case, 1 Ric. 2.

In the Parliament Rolls of 1 R. 2. Num. 38, 39, 40. The Record is thus: *Item, 'Whereas it was prayed by the Commons, that all those who have rendred or lost Castles or Towns thro' the very Default of the Captains, might be put to answer it to this Parliament, and severely punished according to their Desert, by Award of the Lords and Barons, to eschew the evil Examples which they have given to others who are Governors of Towns and Castles, it was commanded to Sir Alexander de Buxhall, Constable of the Tower of London, that he should cause to come before the Lords in Parliament at Westminster, on Friday the 27th of November, in the Year aforesaid, Sir John de Gomeney, and William de Weston, apprehended and detained in the said Tower by the Command of our Lord the King, because they had lost and rendred Castles and Towns to the Enemies of our Lord the King, to answer thereunto, upon the Articles which shall be surmized against them for the said Cause, on the behalf of our Lord the King. Upon which Day of Friday the said John and William, being brought by the said Constable before the Lords aforesaid in full Parliament, sitting in the White-Chamber, they were severally arraigned at the Commandment of the said Lords, by Sir Richard Lescrop Kt. Steward of the House of our Lord the King, in manner as ensueth.*

'William de Weston, you took upon you from the most Puissant Prince, whom God affoil, Sir Edward late King of England, Grandfather of our Lord the King that now is, safely to keep to him and his Heirs, Kings of England, the Castle of Oubrewyk, without surrendering it to any one but to the said Grandfather, or to his said Heirs, or by Command from him or from his said Heirs: Have you, William, who are a Liegeman of our Lord the King, in Times of the same our Lord

* Lambard. Arch. fol. 1. §. De Heretochiis. in 12 R. 2.

† Wallingham Hist. p. 89. Holingshed, Grafton, Stow, Speed, Trussel, Dan. p. 18. Speed, p. 502. Holin. and Stow, An. 2. H. 2.

*† Walling. Hist. Ang. p. 245 to 248.

the

the King who now is, true Heir to the said Grand-father, deliver'd and surrender'd the same to the Enemies of our Lord the King, without Command from him, to the Dishonour (or Damage) of him and his Crown, and of the Estate of his Realm of England, against your Allegiance and Undertaking aforesaid? What will you say hereunto?

Whereupon the said William said, that he had put his Answers in Writing, and produced before them a Schedule containing many things comprized within the same, and came and read the said Schedule in full Parliament. Whereupon it was demanded of him by the said Steward, if he presented before them this Schedule for a final Answer in this Behalf, or not? And hereupon the said William prayed that this Schedule might be re-deliver'd to him, and that he might put in his final Answer; which Schedule, for the Cause aforesaid, was re-deliver'd to him; and after the said William deliver'd the said Schedule, with an Addition put thereunto in full Parliament for his final Answer in this Behalf; the Tenor of which Schedule is such as followeth. To the most sage Council of our Lord the King, and to the other Lords and Commons of the Parliament, supplicates and sheweth William de Weston, That albeit he be accused of this, that he hath maliciously rendred the Castle of Outhrewyk, of which he had the Custody by Delivery and Assignment of our Lord the King; may it please your sage and just Discretion to have the said William excused thereof, for these Causes ensuing. First of all, may it please you to remember, how that the said William was lately informed by a Spye that a great Power of the Enemies would come upon him to besiege the said Castle, with very great and very grievous Ordnances; whereupon he the said William presently, by his Attorney and by his Letters, required of the said Council, that it would please them to reinforce the said Castle with more Men for the Defence and Safeguard thereof, in regard that the Garison of the said Castle that then was, were not half sufficient in respect of Multitude to resist so great a Force in so large a Place; but in Conclusion for all this, he could not have any Succour from the said Council. And so the said William, not at all thro' his Default, was left without People sufficient for to keep and defend the said Castle any long time, which he beseecheth you to take into your just and benign Consideration. Also, please you to know, how upon a Monday about One of the Clock the Enemy came to besiege the said Castle, to the Number of about 2600 Men of Arms, and 700 Arblasters Genevoyes, and with 5000 of the Commonalty of the Country, having nine great Cannons, divers Engines, and one † Mortar-piece, beyond all measure greater than ever they had seen any before in those Marches; and the same Hour, presently a great Number of the Men of Arms, and Arblasters aforesaid, came before the Gates for to assail the said Castle; and at this time a Knight of theirs was slain, who was Cousin to the Lord de Clifton as was reported, and many others were likewise then slain and wrecked; and within a short time after they began to discharge and shoot with their Ordnances, and other Engines, and so continued their Assault from one Day to another, that is to say, Tuesday, Wednesday, and Thursday, and then were the Walls and Houses of the Castle batter'd down and bruised in many Places; and they

bad likewise by force trenched the Ditches of the said Castle in three Places, so as all the Water was drained out; and that Night came a great Party of them, and by fine force made an Assault and abated the Barricadoes; and the next Day, which was Friday, they came about Day-breaking with all their Forces to assault the said Castle, but with God's Assistance they were yet repulsed with Force from their Assault, and of the one part and other there were some slain and wounded. And the same Day the Marechal of Burgoyne sent to the said William and others of the said Castle to render it. Whereupon having Consideration that the said Castle could not be kept, as well in regard of the small Number of the People, as by reason that the Walls in many Places were enfeebled by their marvellous Ordnances, there was a Treaty with the Lords to this end, that the said William and his Companions might advise themselves against the next Morning; and so they departed each to their own. Also this same Night the Enemies caused all their Ordnances, Engines, Mortar-piece, Cannons, and Faggots, with Scaling Ladders, Galleries, and all other Necessaries to be drawn up near to the very Ditch of the aforesaid Castle; and the next Day, which was Saturday, they made all things ready plainly for to assault the Place; and then first of all they sent an Herald to the said William, to know if the said Castle should be rendred to them or not? Whereupon the said William by Advice of the wisest of his Companions, taking Consideration how that the said Place was destroyed and enfeebled with their Ordnances, and also that they were too few Men for its Defence, by reason that twelve of their Companions were in this time slain, wounded, and sick, so as there remained of all the People of the Garison in health but only thirty eight Men to defend the same: Hereupon by common Assent the said Castle which could be kept no longer, was by Force surrendered for to save their Lives granted to them, and their Goods. And that all these things aforesaid are true, the said William puts himself upon his Proof, according to your discreet Ordinances. Also it is to be remembred, that when the said Castle was thus rendred as aforesaid, certain French People bargained with the said William for his Victuals to buy them, together with certain Prisoners which the said William held imprisoned within the said Castle, for which things he received of them for his Payment fifteen hundred Franks; of which he paid to his Companions for part of their Wages which was behind unto them for one quarter of a Year and an half seventy eight Franks; likewise after was paid at Calais for the Victuals of the said Castle before that time due, four hundred forty two Franks; also for the Passages of the said William and of his Companions unto England, and likewise for the Expences of the said William being at Calais, one hundred thirty five Franks: And therefore the said William prayeth, in this regard, your Justice and Benignity, seeing by envious Suggestion he hath against all Reason been accused, whereby his Estate and Name, by the grievous Sin of Misinformers, and he also are ruined; having likewise Consideration that out of his proper Goods he hath for the greater part paid his Companions their Wages which were due unto them as aforesaid, and also for the great Costs he hath been at before this time for to victual the said Castle, (for which he hath given his Obligations in divers Places, and oweth great Sums, by reason whereof he is on all sides undone, if your just Benignity does not succour him;) that you would be

* Num. 39.

† Trebuchet.

pleased for God's sake, and for Pity, to ordain likewise for him, that he may by your discreet Nobleness recover his Estate and Goods. Also the said William Weston sheweth, how the first Day when the Enemies came before Arde, that he went in haste to Calais unto the Captain, and desired of him more Succour and Aid of Men for the better guarding of his Fort of Outhrewyk, and to defend it if the Enemies should come thither. And the Captain answer'd him briefly, That he would not deliver, nor give him Aid nor Succour at the said time, because he doubted that the said Enemies would come before the Town of Calais. And the same Schedule being viewed and read in full Parliament, immediately after was the said John brought thither by the said Steward in the manner following.

John Lord of Gomeney, you took upon you to the most Puissant Prince, whom God assign'd, Sir Edward late King of England, Grandfather to our Lord the King that now is, safely to keep to him and his Heirs, Kings of England, the Town and Castle of Arde, without surrendering the same to any Person, except to the said Grandfather and his Heirs, or by Commandment of him or of his Heirs. These have you, Lord of Gomeney, in time of our Lord the King that now is, true Heir to the said Grandfather, deliver'd and surrender'd to the Enemies of our Lord the King without Commandment from him, to the Dishonour of him and of his Crown, and of the Estate of the Realm of England, against your Undertaking aforesaid: What will you say thereunto? Whereupon the said John answer'd, That the said Town and Castle of Arde were so weak, that he could not well keep them against so great a Power of the Enemies, which was then ready to assail the same Town and Castle; and therefore he caused to assemble all the Knights, Esquires, and others, being in the said Town, and informed them of the Perils of the said Town, and Force of the said Enemies; and by common Counsel and Assent of the said Knights, Esquires, and others, he issued out to the Enemies to treat with them, for to save the Lieges of our Lord the King, being within the said Town and Castle of Arde; without that, that he ever took any thing for to surrender the said Town and Castle of Arde. Upon which one Geoffry of Argenton Kt. said in full Parliament to the said John, that he the said Geoffry was at that time in the said Town in company of the said John, and that the Town and Castle of Arde were never deliver'd nor surrender'd by his Counsel nor Assent, but that he was always ready to die and live upon the Safeguard of the same; and the said Geoffry offer'd to prove it, if any would deny it. And further, it was demanded of the said John, if he would say any thing else? and he said he would not. Whereupon the said Constable was charged with the safe Custody of the said John and William until the next Day, the Saturday next ensuing, and to bring them again safe before the said Lords in the said Parliament at the Place and Day aforesaid. At which Day of Saturday, that is to say, on the 20th Day of November in the Year aforesaid, it was shewed unto them severally by the said Steward on the same day, by the Commandment of the Lords aforesaid, how upon the Answers that the said John and William had given in the said Parliament as before is said, the Lords of the said Parlia-

ment, that is to say, the King of Castile and of Leon, and Duke of Lancaster, Edmund Earl of Cambridge, Edmund Earl of March, Richard Earl of Arundel, Thomas Earl of Warwick, Hugh Earl of Stafford, William Earl of Suffolk, William Earl of Salisbury, Henry Earl of Northumberland, John Lord Nevil, Roger Lord Clifford, and many other Lords, Barons, and Bannerets being in the said Parliament, who had assembled and advised together from the time that the said Answers were given in Parliament the Friday, until this Saturday at three of the Clock, of things touching the Answers aforesaid, and came and examined diligently the said Answers and other Articles touching those Matters, and taking thereupon good and mature Deliberation and due Information of the most valiant and most discreet Knights and others being in the said Parliament, it was thus said. First of all, in manner as followeth, to the said William by the Steward, reciting the things aforesaid touching the said William: It seemeth to the Lords aforesaid, that you William, who had taken upon you safely to keep the Castle of Outhrewyk, as before is said, that you, William, have without any Duress or Default of Victuals, evilly deliver'd and surrender'd the same to the Enemies of our Lord the King by your own Default, against all apparent Right and Reason, and against your Allegiance and Undertaking aforesaid: and having by due Information read the Case of the late Baron of Graystock, who was a Lord, and one of the Peers of the Realm, who had taken upon him safely to keep to the aforesaid Grandfather the Town of Berwick; the said Baron perceiving afterward, that the said Grandfather addressed himself to ride into the Realm of France, the said Baron (without Command of the said Grandfather) committed the said Town of Berwick to a valiant Esquire Robert de Ogle, as Lieutenant to the said Baron, for to keep safe the said Town of Berwick to the said Grandfather, and the said Baron went as an Horseman to the said Parts of France to the said Grandfather, and there remained in his Company. During which time, an Assault of War was made upon the said Town of Berwick by the said Scots, and the said Robert, as Lieutenant to the said Baron, valiantly defended the same; and at last by such forcible Assaults the said Town was taken upon the said Robert, and two of the Sons of the said Robert there slain in the Defence of the same. Notwithstanding, because that the said Baron himself had taken upon him the Safeguard of the said Town to the said Grandfather, and departed himself from thence without Command of the said Grandfather, and the said Town of Berwick was lost in the Absence of the Baron, he being in the Company of the said Grandfather in the Parts of France, as is aforesaid; It was adjudged by Advice of the said Grandfather, the King of Castile, who is present, the Nobles, Dukes, and Counts, whom God assign'd, Henry late Duke of Lancaster, the late Earls of Northampton and Stafford, and Sir Walter de Manny, that the said Town was lost in Default of the said Baron; and for this Cause he had Judgment of Life and Member, and that he should forfeit all that he had: And to render this Judgment in these Words, the said Sir Walter had a Command from the said Grandfather. Which things consider'd, and this also, that you, William, surrendered the said Castle of Outhrewyk to the Enemies of our Lord the King aforesaid, without any Duress or Want of Victuals, against your Allegiance

and Undertaking aforesaid, the Lords above-named sitting in Parliament, adjudge you to Death, and that you shall be drawn and hanged: But because that our Lord the King is not yet informed of the manner of this Judgment, the Execution thereof shall be respited until the King be informed thereof. Whereupon it was commanded to the said Constable safely to keep the said William, until he had other Command from our Lord the King. And as to the said John Lord of Gomenys, touching his Answers aforesaid, it was shewed unto him by the said Steward, how the said Lords had assembled and considered of the said Answers as afore is said; and moreover it was shewed to him, how that in the time that Sir Ralph de Ferrers Knight had the Custody of the said Town and Castle of Arde, the said Town of Arde was not half so strong as it was at the Time the said John surrendered the same; and the said Ralph had a Command from the said Grandfather to surrender the same for the Feebleness thereof, before that the said Ralph would put himself into very great Peril for the Safeguard thereof; notwithstanding the said Ralph valiantly defended and maintained the same against a very great and strong Assault of War. And thereupon, and the things aforesaid, and other Evidences touching the Answers of the said John in this Behalf; it was said in manner as followeth to the said John being in Parliament, by the said Steward, reciting all things aforesaid touching the aforesaid John; and also the forecited Judgment of the said Baron, and the Cause thereof in manner aforesaid, That it seemed to the Lords aforesaid sitting here in Parliament, considering your Answers in this Behalf, and the Examinations and Informations had thereupon as before, and having regard also to this, that there were lately sent unto you to the said Town and Castle of Arde, above the number of Men with which you had at another time undertaken the safe guarding of the said Town and Castle, twenty Men of Arms, and twenty Archers to enforce the same, according to your Request then made to certain Lords, late being upon a Message at Calais on the Behalf of the said Grandfather; and this also, that at that time it was said unto you by the King of Castile, who is here present, that if you could not well keep them, you ought in no manner to undertake to keep the same, and that another should have and keep them, who would take upon him safely to keep the same to the said Grandfather and his Heirs aforesaid; and thereupon you undertook to keep them safely without surrendering them to any, except in manner as aforesaid; and now you, John, without Duress or Default of Victuals or Artillery, or of other things necessary for the Defence of the said Town and Castle of Arde, without Command of our Lord the King, have evilly delivered and surrendered the same to the Enemies of our Lord the King, by your own Default, against all Appearance of Right or Reason, and against your Undertaking aforesaid; wherefore the Lords aforesaid, here in full Parliament, adjudge you to Death; and because that you are a Gentleman and a Baronet, and have served the said Grandfather in his Wars, and are no Liegeman of our Lord the King, you shall be beheaded without having other Judgment; and because also that our Lord the King is not yet informed of the manner of this Judgment, the Ex-

cution thereof shall be put in respite, until our Lord the King be informed thereof. Whereupon the aforesaid Constable was commanded safely to keep the said John until he had other Command from our Lord the King.*

Cressingham and Spikefworth's Case, 7 Ric. 2.

In the Parliament-Rolls of 7 R. 2. Num. 17. there is this Case, Item, Upon the Complaint which hath been made to the King, of Pierce de Cressingham and John de Spikefworth Esqs; concerning this, That whereas they were made in the said Voyage (to wit, of the Bishop of Norwich into Flanders with an Army) Captains and Guardians of the Castle of Drinkham in Flanders, which was gained from the Enemies, and after that well and sufficiently stored with Victuals and other Necessaries, and strong enough to be held against the Enemies, that they left and rendered the said Castle to the said Enemies, receiving of them for this Delivery and Surrender, by Treaties made with the Enemies, a Sum of Gold, and that by Covenant made with the King's Enemies, without the Will and Command of our Lord the King himself, or of his Lieutenant: for which the said Esquires were arrested by command of the King, and after put to their Answer in Parliament. And the said John Spikefworth excused himself before the King in Parliament in this manner, That he had never the Custody of the said Castle, nor anything to do therewith, save only that as he was riding into the Country, somewhat near the said Castle of Drinkham, to make his best Advantage upon the Enemy, by force of the said Enemies he was there chased to the said Castle, then being in the Custody of the said Pierce de Cressingham; and soon after he saith, That upon an Assault made to the Barbican there, by the Enemies, he was unhappily routed, and one of his Vassals slain in the Garison very near him, where he remained continually until the said Pierce rendered the same, and otherwise he had never any thing there to do, neither as a Soldier thereof, nor in any other manner whatsoever; praying, that therefore it would please our Lord the King to have him well excused. To whom it was answered on the behalf of the King, that if any Man knoweth not to say more against the said John, contrary to his said Answer now made, that the King will hold him well excused, and wills that he shall be disarmed, and suffered to go at large. And the said Pierce of Cressingham well knowing that he had the Guard of the said Castle, said, That as soon as the Enemies were come before Burburgh, in which were the Lord Beaumont, Sir William of Elingham, Sir Thomas Tryvet, Sir William Farinden, and many other Englishmen, and the Town and Castle of Burburgh being surrendered to the Enemy, of all the Soldiers which he had with him at Drinkham, none would there continue with him upon the Safeguard of the said Castle, but only five Persons in all; by reason of which great Necessity he was forced, in Safeguard of his own Person and his People, to make a Treaty with the Enemies, for to deliver up the said Fort, and thereupon he did it, and not for any other Cause, nor in any other manner, but only by constraint of the Power of the

* Geoffrey Martin, Clerk of the Crown, made this very Record, and delivered it written in this present Roll, with his own Hand.

‘ said Enemy as aforesaid. And further he saith, that he never received any thing from the said Enemies by way of Gift, or in any other manner; whereupon he conceiveth, that no Man ought to impute any manner of Blame, nor of Reproach unto his Person. But if it shall be thought that he hath done ill in any manner, he put himself most humbly into the Grace of his Liege Lord. And because that this Excuse seemed not at all to be sufficient, he was committed to Prison, there to remain until the King our Lord had otherwise declared his Pleasure concerning him.’

The Case of the Bishop of Norwich, 7 Ric. 2.

In the same Parliament of 7 Ric. 2. Num. 22. The Bishop of *Norwich*, General of the Forces sent over into *Flanders*, having four Articles exhibited against him in this Parliament, touching that Expedition, and the Surrendring of *Graveling* to the Enemy, to which he had given some former Answer, (see Num. 15, 17, 20, 21.) upon his second Arraignment had this Proceeding. ‘ At which Day the said Bishop rehearsing the four Articles surmised against him formerly in Parliament, and in presence of the King himself, gave there his Answers, such almost as before, concerning all the things aforesaid; adjoining thereunto, that the time when he heard the News that the Vanguard of the Host of *France* was entered the County of *Flanders*, and that thereupon the said Siege of *Ipre* was thereby removed, he took a Resolution to have encountered the Vanguard, for to have fought with them; which Purpose of his he could not perform by reason that the Captains of his Host would not assent thereunto, but those Captains and others of his Host contraried him, inasmuch that of Necessity, and for doubt of the Enemies they ought to depart, and betake themselves to their Fortresses; and thereupon the said Bishop returned to the Town of *Graveling*, and the same would he have held out well enough against all Men, and did hold out until the other Captains had rendered their Forts to the *French*; and after that, until that some *English* might come unto him incontinently, altho there were well-nigh about six or seven thousand *English* lying upon the Sands near *Calais*, who were made to come out of the said Forts rendered, to their great Mischief and Prejudice, because they had not wherewith to live, neither could they have Entrance into the Town of *Calais*. And forasmuch as the Truce made before that time ought to cease within two or three Days then next ensuing, the *French* had a Purpose to run upon them and slay them all, as soon as the said Truce was ended; which Slaughter, if it had been made, would principally have turned upon the said Bishop, and after on the other Captains, to far greater Villany and Mischief than any other thing could bring. The Bishop was thereupon required and charged on the behalf of the King himself, that he should render the Town to the Enemies, or else demolish it, and go his way to succour the said People, and after that towards *England*, in Salvation of himself and others of his Host; for they said, that if any thing else but Good had happen’d to the said People, lying on the Sands, they would have truly called the said Bishop to

an Account before the King himself: Whereupon it behoved him the said Bishop to abate and void the said Town of *Graveling*, as it was lawful for him to do at his Pleasure, being gained by his proper Conquest from the Enemy. And for this, and for the other Reasons formerly alledged by him, as also because that a Letter from our Lord the King came to him before, commanding him, that if there were great want of Victuals in the said Town, as in verity there was, that then in Salvation of himself, and of the said People, he should void the Town and succour the said People, and after return into *England*; it seems to him, that he ought to be well excused of whatever is surmised against him.’ To which the said Chancellor replied and said: ‘ Master Bishop, as to this your last Reason, it is true that you had sufficient Victual when this Letter came unto you; and besides this, the King sent you other Victuals in great Plenty; and also with it other good Letters, containing, how he had appointed his Uncle of *Spain* to come speedily to you for your Aid and Succour; and all this notwithstanding, you departed thence, leaving the said Town to the Enemies, against the Form of your Indenture, by the which the King hath given and granted you whatever you might conquer, not at all to render, sell or leave the same to the Enemy, but to hold and possess. And also to that which you have said in your first Answer, that by your said Voyage Truces had been agreed between the Realms, and happy Offers of Peace made by the Adversaries of *France*, which you say shall be an Introduction to a good and final Peace, which God grant, it contains no Truth at all: for true it is, that the News spread in the Army of *France* of the coming of our Lord the King, and of Monsieur of *Lancaster*, who was at the Sea-side ready to pass for your Succour, was the principal Cause of the Truce and Profers aforesaid, and of the Treaty to be commenced; for it is no probable thing at all, nor in any wise agreeable to Reason, that you who were with your People chased by Force of the Enemies out of the Field, and afterwards besieged by them within your Fortresses, should be the Cause of the said Treaty by any way. And so as to this, nor yet as to any other of the Reasons before alledged, nor for the Rebellion of your Captains or other of your Retinue, nor any other Defaults which you have or may surmise unto them, (considering that you had them all of your proper Choosing and Election, and not at all by the Nomination of our Lord the King, or of his Council) you neither can nor ought to be at all excused of the Damages, Deceits, Villanies, Contempts, and the other Losses and Misprisions surmised to you, nor in especial of the Treaty made with the Enemies upon the Deliverance of the said Fortresses, of which there are certain Indentures made and drawn between you and your Captains on the one Part, and the Enemies of the King on the other Part, sealed with their Seals, and the Seals of the other Captains, without the Authority or Consent of the said our Lord the King, as before is said. And moreover the said Chancellor said in the behalf of the King, Sir Bishop, altho the King our Lord might clearly handle and judge you as a tempo-

* See the History of this Treaty and Abatement of the Town in Wallingham Hist. Angl. p. 327 to 330. and in Holinshed, Speed, Grafton.

† Num. 27.

ral Person of his Realm, because you have behaved and carried yourself as a temporal Person; for you expressly obliged yourself to the King our Lord by your Indentures, to be a Soldier of the King, to govern the Christian People after the Term of your *Crossado* ended, and you used commonly to have your Sword carried before you; and you did many other such like things every Day publickly as a Lord Temporal, against the common Custom of the Estate of a Prelate of *England*: Notwithstanding, by reason of your Estate, the King our Lord, of his Grace, will forbear for the present to lay his Hands upon your Body. But forasmuch as he is informed, that you yourself have complained to many Lords of the Realm, that Wrong hath been lately done you on the last Day, affirming by your Words, that that which was done passed not at all by Assent or Knowledge of your Peers of the Realm, this is greatly to be marvelled of you, and of these your Words, seeing the ill Success toucheth nothing at all your Peerality, but only certain Misprisions which you have made and perpetrated as a Soldier of the King, against the form of your Indentures and Covenants which you have made with the King our Lord, to the great Damage of the King as before is said, whereof the Connivance and Punishment of common Right and antient Custom of the Realm of *England*, only and totally appertaineth to our Lord the King, and to no other. And true it is, that you have not at all by this your last Answer any whit amended your matter in Excuse of yourself, upon the things surmised against you, but as it seems have more greatly impaired the same. Wherefore by the Assent of the Earls, Barons, and other Lords temporal present in this Parliament, it is assented and accorded, that you shall be in the Mercy of the King, and put to a Fine and Ransom for your Misdoing, according to the Quality and Quantity thereof. And to do this you shall be compelled and constrained by the Seizure of the Temporalities of the Bishoprick of *Norwich*. And the King commands you, that from henceforth you shall not cause nor suffer any Sword to be carried before you, as it hath been done, under the Peril which shall follow. And it is expressly accorded in this Parliament, that whatsoever hath been expended on your Use of the said Franks of Gold, you shall make full Payment thereof in the Treasury of our Lord the King, without Delay or Difficulty.

Upon this Judgment the Temporalities of this Bishop were immediately seized into the King's Hands, and detained in them a long Time for this his Surrender of *Graveling*; as *Walsingham*, *Holinshed*, *Grafton*, *Speed*, *Trussel*, in their Histories, and *Godwin* (in the Life of this Bishop) attest.

The Earl of Northumberland's Case, 7 Ric. 2.

In the same * Parliament, 7 R. 2. News came from the Northern Parts, that the Castle of *Berwick* was taken by the *Scots*, whose Custody *Henry Percy* Earl of *Northumberland* then possessed by antient Right. The *Scots*, for Money, fraudulently getting Entrance into the said Castle by one who had the Custody of it at the second-hand, under the Earl. Hereupon, by Duke *John*'s Procurement, (as was reported) the said Earl on the fourth of *December*, for the Loss of the said Royal Castle,

by the Judgment of the Lords, and of the King then present in the said Parliament, had a Sentence of Condemnation publickly pronounced against him, notwithstanding that the said Earl had been summoned to the said Parliament by the King's Writ, and would rather have tarried at home for the Defence of his Country. But the Execution of the said Sentence was soon after released by the King, and the Earl by his Indulgence restored to his Life and Possessions, which he was adjudged to lose. Whereupon he posted into the North, and calling his Forces and Friends together, strongly besieged the said Castle, and in few Days took it by Composition, he giving the Besieged their Lives, Movables, and two thousand Marks to surrender it.

The Case of Sir William de Elmham, and others, 7 Ric. 2.

In the Parliament-Rolls of 7 Ric. 2. num. 24. there is this Record. Item, Sir William de Elmham, Sir Thomas Tryvet, Sir Henry de Ferriers, and Sir William de Farndon Knights, and Robert Fitz-Ralph Esq; who by the said Charge formerly given in Parliament, had been with the Chancellor, and acknowledged and confessed to him, How that they had received certain Sums of Franks of Gold of the *French*, in lawful and due manner, and not otherwise. To which they said, 'First of all, that is to say, the said Sir William of Elmham, Thomas Tryvet and William Farndon, in one Parcel three thousand Franks of Gold. Item, In another Parcel, &c.' Item, the said Sir William Elmham received another Parcel of the *French* for the Castle of *Burburgh*, whereof Master William de Hoo was then Captain, and for the Victuals of the said Master William de Hoo, being in the said Castle of *Burburgh*, two thousand Franks, whereof the said William de Elmham presently paid, as he said, one thousand Franks to the said Master William de Hoo, and the other thousand Franks he promised to pay at a certain Term to the same Master William de Hoo, &c. Item, There is another great Misprision that some Lieges of the King rendered and delivered to the said Enemies of the King, Castles, Fortresses, Victual, Armour and other Refreshment, without special Command and Authority of the King, or of his Lieutenant; but yet it is far worse to sell or alien to the said Enemies any Fort, Victuals, Armour or other Refreshment, by receiving Money or other Goods of the said Enemies, without Authority of the King, or of the same his Lieutenant. And, Sirs, you know well, and cannot deny, That by certain Covenants made between the said *French* Enemies, and you the said Sir William de Elmham, Thomas Tryvet, Henry de Ferriers, and William de Farndon, and others, of which there are certain Indentures made and sealed with your Seals, you lately made a Treaty with the said Enemies, without the Will or Authority of the King, or of his Lieutenant; and by this Treaty, and your Sale of the said Forts, Victuals and Arms, you received the said Sums of Gold; and by this, and by other your Affairs, and Rebellions made to your General, the said Host was spoiled and destroyed, to the grievous Damage, Villany, and Contempt of the King our Lord, and very

* *Walsing. Hist. Angl.* p. 337.

great Profit and Comfort of the said Enemies, for which you are worthy to undergo Reproach and grievous Punishment. For you Sir William de Elmham, received of the said Enemies, the said two thousand Franks, for the Sale and Surrender of the said Castle of Burburgh, and of the Victuals, Arms, and other Goods therein, then being to a great Number and Value, without the Leave and Authority of the King our Lord, and the Consent of the said Master William de Hoo, Captain of the same, altho that the said Castle was well able to have held out for a long time against all Men. And also you the said William de Elmham, Thomas Tryvet, and William de Farndon, received to your proper Use in common the said three thousand Franks of the Gift of the said Enemies, for your Consent and Aid to the said Treaty, made upon the Voydance of the English out of that Country, and the Deliverance of the Town of Graveling, and of the other Fortresses then occupied in those Parts, &c. And you the said Sir William Farndon are in another very great default, because you would not carry back to the said Enemies the five thousand Franks by you left at Graveling, against the Will and Command of the said Bishop your Chieftain, &c. And the said Sir William de Elmham saith, That altho he hath so received the Sums aforesaid, yet it was done for Victuals, Prisoners, and other Goods which he had within the Fortres of Burburgh, and elsewhere in those Parts, and which with the same Fortres he rendred by the said Treaty, as of fine Force he ought to do for the Salvation of himself and his People; for otherwise the Town of Burburgh, where the Lord Beaumont, Sir Thomas Tryvet, Sir William Tryvet, Sir William de Elmham, and a great number of the People of their Army were besieged, and assaulted by the Enemies in very great number, and the Town within set on fire, had been taken by them by force, and all those within it taken or slain: and therefore he conceiveth, that in doing this, he hath done nothing amiss. But notwithstanding if it appears to the King our Lord that he hath done any thing amiss, he puts himself upon his noble Grace, &c. And the said Chancellor, in replying to the said Sir William de Farndon, Henry, and Robert, saith, &c. And certainly as to this which you Sir William de Farndon say, That it had been better to cast the said Gold into the Sea, than to have sent it back to the said Enemies: This is not true; for it had been better that the Enemies had received their own Gold, than any Traitor of the King our Lord: and he who shall hereafter sell the Fortresses of the King to the Enemies, for Gold or other Goods, may excuse himself in such manner as you would now excuse yourself. And after these matters, thus by the same Persons alledged for their Excuse, being considered and held and adjudged insufficient for their Excuse in this behalf; the said Chancellor, in behalf of the King, spake thus, *It is accorded in Parliament, that you Sir William de Elmham, Thomas Tryvet, Henry Ferriers, William de Farndon, and Robert Fitz-Rauf, shall make Agreement and full Payment to our Lord the King of whatsoever you or any of you have so received and taken of the Enemies aforesaid; and further, that all you the said Sir William de Elmham, Thomas, Henry, and Robert, be committed to Prison, and there ransomed at the*

Will of the King for your Misdeeds aforesaid, having due Consideration of the Quality and Quantity of that Deed, which every one of you hath done. And that you, Sir William de Farndon, because that you have received of the said Enemies divers Sums of Gold, and have given them Horses to their great Refreshment, for which you had no License of the King, nor of his Lieutenant, shall be in the Mercy of the King, Body and Goods, to do with them what he pleaseth.

The Duke of Suffolk's Case, 28 Hen. 6.

In the Parliament of 28 Henry 6. Rot. 50, 51, 52. the Commons preferred divers Articles of High-Treason to the King and Lords against the Duke of Suffolk, among others these ensuing, *That he being Ambassador for the King of England to Charles, calling himself French King, promised to Reynor King of Sicily, and to Charles Dangers his Brother, Enemies to the King, the Release of Angeou, with the Deliverance of the County of Main, and the City of Mault or Mauns; which Promise, after his Return, he caused to be performed, to the King's Disinheritance and Loss irrecoverable, and to the strengthening of his Enemies, and Feeblishment of the Dutchy of Normandy. To the which Article he answered, That his Commission was, to conclude and do all things, according to his Discretion, for the obtaining of a Peace; and because without Delivery of those Countries he perceived the Truce could not be obtained, he agreed to the Release and Deliverance of them.*

Item, *The said Duke, within this your Realm, hath untruly counselled you to grant fro you, without due Consideration, the Castle of Mawlyon de Sool, and full many divers other great Lordships, Seignouries, Places, Offices, Profits, Revenues, Casualties, and Commodities within your said Dutchy of Guyen, whereby your Power there to support your Wars and Arms, and to pay the Wages of your great Counsellors, Captains and Soldiers, hath been so enfeebled, that your People of the same Dutchy, neither your Land there, might in no wise be defended.*

Item, *The said Duke of Suffolk, without Deliberation and Advice of your Council, hath caused your Highness to grant to divers Persons, many Captains, Offices, Towns, Lordships, Places, Interests, Profits and Revenues within your Realm of France, and Dutchy of Normandy, to such Persons as were not to you profitable, nor able, nor convenient to have or govern any of the Premises, nor ever had deserved to obtain of your Grace any such Grant; which hath been done by him for his great Avail and Lucre, and hath been one of the greatest Means of the Loss of the said Realm of France, and Dutchy of Normandy.*

The Duke upon these Articles was committed to the Tower for one Month's Space, to pacify the People, and then released by the Queen's Means, who entirely loved him: whereupon the Commons were so far from being pacified, that they were more enraged, openly denouncing, that it was a Shame to all the whose Realm to see such a Person, guilty of so many Misdeeds, either to rule about a Prince, or to be had in Honour, or suffered to go unpunished. Upon this the Commons rising up in divers Places of the Realm in Companies under Captain Blewbeard, the Commons in Parliament earnestly beseeched the King, that such a Person as assented to the Release of Angeou, and Deliverance of France, &c. might be extremely punished and tormented; and to be privy to this Fact, they accused as Principal the said Duke of Suffolk,

Suffolk, with John Bishop of Salisbury, Sir James Fines, Lord Say, and others. Whereupon, the King plainly seeing, that neither Glossing would save, nor Dissimulation appease the continual Clamor of the importunate Commons against the Queen's Darling and his Complices; to begin a short Pacification of so long a Broil, First, he sequestred the Lord Say, being Treasurer of England, from his Office, (who for the same Offence was after committed to the Tower, and after that beheaded by Jack Cade, and the Kentish Mutineers, at the Standard in Cheapside, who carried his Head about the Streets of London fixed on a Pole, &c.) And then by his own Authority, assembling all his Lords Spiritual and Temporal together, on the 17th Day of March, in a Chamber over the Cloysters at Westminster, he arraigned and banished the said Duke for five Years, against the Lords and Commons Consent, who would have capitally proceeded against him; meaning by this Exile, to appease the present furious Rage of the People, and that pacified, to recal him to his old Estate, as the Queen's chief Friend and Counsellor. But Fortune would not that he should so escape; for when he was shipped in Suffolk, intending to be transported into France, he was encounter'd by a Ship of War, appertaining to the Duke of Exeter, of which the Constable of the Tower of London was Captain, who entering the Duke's Ship with small Fight brought him to Dover Road, and there on the side of a Cockboat cut off his Head as a Traitor, and there left his Body and Head upon the Sands. Such was the End of these two ill Counsellors, only for advising this weak King himself thus dishonourably and cowardly to surrender up these Towns, Forts, and Territories in France, to his Enemies, to purchase an unhappy Peace, to the King's and Kingdom's irreparable great Damage, Dishonour, and Weakning, and the Enemy's extraordinary Advantage, Strengthening and Encouragement.

The Lord Wentworth's Case, 1 Eliz.

The Lord *Wentworth*, Governor of *Galais*, delivering up that Town to the *French*, (after they had taken the Castle by force, made a Breach in the Town-Walls, and slain above fourscore of the Garison at one Assault when they took the Castle, together with Sir *Anthony Ager*, Marshal of the Town, and his Son and Heir) and that upon dishonourable Terms, not without some Suspicion of

Treachery; he was thereupon indicted in Queen Mary's Days for his cowardly and treacherous Surrender of this Town, contrary to his Trust; and after that was arraigned at Westminster, in the first Year of Queen Elizabeth, the Marquis of Northampton being his Judge, and Lord chief Steward of England for that Day. But that Nobleman so nobly defended himself, that he was acquitted by his Peers.

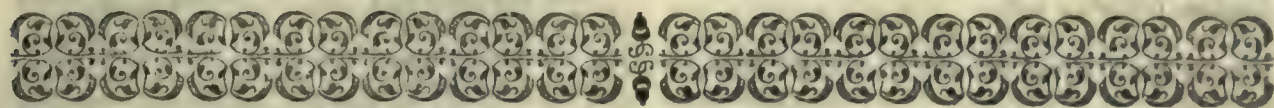
Van Hemert's Case, 29 Eliz.

*Meteranius**, *Grimstone*†, *Tbuamus*, and others, relate, Anno 1587. 'That Van Hemert, a very wise and brave young Nobleman, one of the chief Houses of the Netherlands, and Governor of the Town of Grave, together with two of his Captains, Du Banck and Korfe, were imprisoned, condemned by a Council of War, and then beheaded and executed at Bommel, by Command of Robert Dudley Earl of Leicester (Governor of the Low-Country's under Queen Elizabeth of famous Memory) for that they surrendered the said Town of Grave to the Prince of Parma, when he had besieged it above three Months space, with a puissant Army, and beaten down the Walls of it level to the Ground, with perpetual Batteries and Assaults: And altho there appeared no Treachery at all, nor any Intelligence held with the Enemy, in this Case; and that the Governor condescended to a Treaty, and surrendered the Town to the Enemy only upon the Citizens Importunity, who earnestly intreated him upon their Knees with Tears in their Eyes to embrace a Parley, for the saving of their Lives, Estates, and Liberties, which were granted them upon the Articles of Agreement; and altho the Garison Soldiers likewise marched away with their Arms (which they left behind them at Bristol) and had all the Articles punctually fulfilled; and altho himself and his potent Friends earnestly besought the Earl of Leicester, that he might serve the Queen of England either by Sea or Land at his own Charges, and by his Valour and Fidelity make Recompence of his Fault, committed only thro' want of Understanding and martial Policy, contrary to the Will and Intent of the Earl then Governor General under the Queen, yet the Earl, for upholding martial Discipline, and to prevent all future Surrenders of this kind, would on no wise dispense with the Execution; whereupon they were all three openly beheaded at Bommel, June 28. 1587.'

* Belgica Hist. Universalis, l. 13. p. 402, 403, 404.

† Pag. 827, 828.





The Trial of JOHN GERHARD, PETER VOWELL, and SOMERSET FOX, before the High Court of Justice, for High-Treason, in conspiring to Murder the Lord Protector, the 30th of June, 1654. 6 Car. II.

Friday, 30 June, 1654.



THE High Court of Justice met this day in the Painted Chamber.

Mr. Bond prayed with them about half an hour.

The Court then sat, and presently adjourned to the Court of Chancery prepared for their sitting: The Lord Commissioner Lisle was President, Mr. Phelps Clerk, Serjeant Glyn, Mr. Prideaux, and Mr. Ellis Counsel for the Commonwealth.

The Court was called (each Member by name) and the Ordinance empowering them read. The Prisoners to be tried were,

Mr. John Gerhard, Gentleman.

Mr. Peter Vowell, Schoolmaster of Islington.

And Somerset Fox.

Somerset Fox was first called to the Bar, and an Indictment of High-Treason read against him, for joyning in a traitorous Design to have murdered his Highness the Lord Protector and divers of his Council, proclaimed Charles Stuart King, seized on the present Guards and Forces, involved the Nation in a Bloody War, &c.

Somerset Fox did ingenuously confess the Charge against him upon the main, to be true, and that he is guilty.

Then Mr. John Gerhard and Mr. Peter Vowell were brought to the Bar, and an Indictment to the same purpose as that against Somerset Fox, read against them.

They pleaded Not Guilty, and denied every thing.

Vowell said that he required a Jury of Twelve of his Equals, it being a Law confirmed by *Magna Charta*; and according to the sixth Article of the Government by the Lord Protector also, that Law being not repealed, and therefore that he might be tried by his Peers.

The Lord President told him, That the Members of the Court were his Peers, not his Superiors but his Equals, and that they were present near twice twelve, as he saw, and that they are to proceed by the Power of an Ordinance before them.

It was also told him by Serjeant Glyn, that he had owned the Jurisdiction of the Court, in pleading *not Guilty*.

Vowell said, he was a Man ignorant in the Law, and desired advantage might not be taken of his weakness.

The Attorney-General Prideaux said none desired to take any advantage of any thing, wished they had not brought themselves into these troubles; that they were there in the name of

the Lord Protector and the Commonwealth of England to accuse the Prisoners at the Bar, and to bring in their proof, and the Prisoners were to defend themselves as well as they could, and when both sides were heard, it was to be left to the Court to determine, and to judge between them.

And it was declared that the Plot was to this effect:

That the Plot was to seize on the Lord Protector and murder him, and some of the Council and others, and proclaim and bring in Charles Stuart, Son of the late King, to be King, which bloody Design was to be effected thus.

That the first hatching of the Plot was in England by Mr. Hinchbaw, who was one of the chief Plotters, and others; Mr. Hinchbaw went over from England to France, to acquaint Charles Stuart (whom they called their King) with the Design, and Mr. John Gerhard about that time went over to France also, who had told Mr. Hinchbaw that he would do nothing in it until he had first had approbation from Charles Stuart. Mr. Wiseman was also then in France with them.

Address was made to Prince Rupert, and the Design made known to him, desiring him to communicate it to (him they called) the King, who accordingly did, and brought Mr. Hinchbaw to him, but Charles Stuart at the first delivered his Judgment in the thing, that he was at present unsatisfied at that time to go on in that design for three Reasons.

1. Because it would be dishonourable to him in the esteem of other Princes, in case such a thing should be known, and should not be effected, to come in in such a way.

2. Because it did not seem to him to be feasible, but unlikely to be effected.

3. Because it was not at that time seasonable.

But Prince Rupert afterwards did much encourage and perswade, That the design might be carried on, and promised all Assistance.

Mr. Hinchbaw and Mr. Wiseman returned into England, Mr. Gerhard stayed there a while longer, but some Weeks after came back also; Mr. Hinchbaw declared to his Confederates here in England what Overtures had been with Charles Stuart, and that Prince Rupert had engaged to send ten thousand Scots, English, and French, and the Duke of York to come with them to land in *Sussex*; and other places, and that there would be Forces enough ready to assist and joyn with them.

Mr. Hudson the Minister was thought on, to have Letters of Credence from Charles Stuart, who sent a Letter to him, and that which he desired

desired in Case the Plot had taken, was to be made the Master of *Sutton's Hospital*, which Mr. *Hinsbaw* promised him.

One Master *Philips* also, and others were treated with about it, and Master *Gerhard* returning from *France*, the Plot was resolved to be carried on, which was to be effected thus.

1. They were to seize on the Lord Protector, and murder him; and to do this Work, they should take the opportunity of his going to *Hampton-Court*, which he used to do every Saturday, with a small number slenderly armed; and those that were to do this were Master *Hinsbaw* and Mr. *John Gerhard*, with thirty Horse. Mr. *John Gerhard* to bring twenty five Horse, and Mr. *Hinsbaw* five, which each of them was to engage. Mr. *Gerhard* was something cautious, not to discover who they were he engaged, before an Oath of Secrecy was given, but twenty five he had undertaken for.

Mr. *Hinsbaw's* five were himself, Mr. *Tuedore* the Apothecary, Mr. *Wiseman*, Col. *Aldrige*, and another, and then to seize on the Tower of *London*, and to go on with their work.

2. If that failed, to seize on all the Guards about *Westminster*, which they thought two thousand five hundred sufficient to do, and carry on their work here about *London*; and for that purpose Mr. *Hinsbaw*, Mr. *Gerhard* and others viewed the *Mews*, and the rest, and was heard to say, What a pity it was that so slender Guards should not be seized on, and that when the Soldiers were at Nine-pins in the *Mews*, it was but shooting off a Pistol, and presently to fall on.

3. The last way to have it effected to be thus, That when the Foot Regiments that are for the Guards about *London* were Mustering in *Tuttle-Fields*, as they use several times to do, to come into *Tuttle-Fields* and meet them there as of their own Party, and when they have laid down their Arms to seize upon them, and have others to be ready at the same time every where to perfect the work. And for this purpose, if they acted this way,

Col. *Finch* with a party of two hundred was to fall into *London*, and do the work in the City.

Major *John Gerhard* to fall on *White-Hall*.

Col. *Hinsbaw* to fall on the *Mews*.

Col. *Daniel* with two hundred to fall on St. *James's*.

Another to fall in *Southwark*.

And one *Billingly*, a Butcher at *Smithfield* Bars, with a Party to fall upon *Islington*; and it was pressed that the opportunity might not be neglected.

And that the Work might be the more feasible, they considered how as many of the Soldiery as might be, might be engaged in the Business. And the Papists (who had a great hand in the Design) gave Information of two Soldiers of the Army, that used sometimes to come and hear Mass, and these two they sent a Papist Woman to, who engaged them, and their direction was, to give intelligence at Mr. *Hudson's* House, where Mr. *Hinsbaw* and others of them frequented.

Master *Vowell* was cautious being a solid Man, for his Work was not to bear Arms, but as a Privy-Counsellor to them, and he was to engage Mr. *Billingly* the Butcher with a Party to seize the Lord Protector's Horse at *Islington*,

and him Mr. *Vowell* recommended to be a very fit Man for that Work.

And they had this Art, to endeavour to make the Lord Protector odious to the People, in turning the Design upon him by a Libel, which was scattered up and down *London*, that his Highness and the Army had a Design to massacre all but their Friends in all Parts of *England*; and this Libel was written by Mr. *Fenshaw*, which was got printed by one in *Newgate-Market*, and Mr. *Vowell* had one of them.

When the Design was discovered, and Mr. *Gerhard* and some others apprehended, Mr. *Vowell* being at Mr. *Hudson's* House, it was said by him, That the Design might still go on, tho some were discovered; Mr. *Hinsbaw* and Mr. *Wiseman* came to him to *Islington* to his House, from whence they went to drink their Morning's Draught. Mr. *Vowell* said, There were enough to do the Work still; Mr. *Wiseman* said, There were many Horse to fall on; Mr. *Vowell* said, It might be easily done.

One *Wharton* in *Black-Fryars* was to proclaim *Charles Stuart* King, and Col. *Finch* was to seize on the Lord Mayor, and make him to proclaim him; *Somerjet Fox* and others were to raise Apprentices to join in the Design; but the Lord Protector going by Water disappointed them.

Mr. *Vowell* then said to the Court, That they were not his Peers because they were his Judges, and therefore desired a Jury of Twelve of his Equals.

Mr. *Prideaux* answered, that so a Jury are the Judges, tho they be the Prisoners Peers.

The Witnesses against the Prisoners at the Bar were called for.

John Wiseman was sworn, and being required to give Evidence what he had to say touching the Prisoners at the Bar, avouched the Charge against them, and said,

That he was with Mr. *Hinsbaw* in *France*, who did communicate by Prince *Rupert* to *Charles Stuart* the Design, as is before exprest.

That he saw Mr. *John Gerhard* oftentimes with Mr. *Hinsbaw* while he was in *France*, and that he told him in *England*, That there was a Plot to fall on the Lord Protector, and to bring in *Charles Stuart* to be King, and to the rest of that Design as is before exprest. And about three Weeks after he met Mr. *Hinsbaw*, and Mr. *John Gerhard*, and they went to *James's*, and the *Mews*, *White-Hall*, and other Places.

That Mr. *John Gerhard* told one Mr. *Minnors* of the Business, and how they were to fall on my Lord Protector, and so as before is exprest.

Then Mr. *Gerhard* interrupted him, saying, How should this be done with a Company of Geese?

To whom Mr. *Prideaux* answered, That he knew best how it should be done, and wish'd he had ne'er known it, nor gone about it.

Mr. *Wiseman* went on in his Evidence, and said, That Mr. *John Gerhard* being at Mr. *Hudson's* House, did there speak about the Plot to fall on the Lord Protector, &c.

That he had a Dispute with Mr. *Hinsbaw* (whom the said *Wiseman* called Brother by some Relation) That such a time, and so, and so, would be seasonable (mentioning some Particulars.)

That

That another Day he heard Mr. *John Gerhard* say, That he was to command the Party, and had a Pistol that would discharge three several times, Mr. *Hinsbaw*, and several other Persons being then by; and that he doubted not but it would be seasonable. That there were to be about Thirty Persons to fall on the Lord Protector; that his Brother *Hinsbaw* said he was to bring Five, and Mr. *Gerhard* Twenty Five to do the Work, and named the Five aforesaid that his Brother *Hinsbaw* was to bring, and that his Brother *Hinsbaw* told him that Mr. *John Gerhard* was to surprize the Lord Protector's Person.

And when the Plot was discovered, he heard his Brother *Hinsbaw* say, that they that were taken were all of *Gerhard's* Party, and none of his, and that there was a Libel printed to turn the Plot on the Lord Protector, as is before exprest; and that his Brother *Hinsbaw* and Mr. *Vowell* had some of the Papers.

That on Wednesday after it was discovered he was at Mr. *Vowell's* House at *Islington*, and his Brother *Hinsbaw* was there, and they went to the King's-Head to drink, and there his Brother *Hinsbaw* said, that the Business might go on for all it was discovered, many Regiments in several Parts being ready to rise, enough to carry on the Work.

Mr. *John Gerhard*, and Mr. *Peter Vowell*, the Prisoners at the Bar, still denied all, and said it was not true what he said.

Then Mr. *Edward Hudson* a Minister, that was blind, was sworn, who said that Mr. *Hinsbaw* desired him to write two or three Words to the Scots King, and that Mr. *Hinsbaw* related all the Business to him of the Design, and the three Objections by *Charles Stuart*, and *P. Rupert's* Answer afterwards, and the three ways to effect it; very much agreeing with the Particulars aforementioned.

When he came to Particulars touching the Prisoners at the Bar, he said that Mr. *Vowell* was his intimate Friend, one that he had been much beholden to, and might have perished had not he relieved him. That Mr. *Hinsbaw* sought to engage Mr. *Vowell*, but he answered that he thought himself to be unfit; that he said he did not relish it: What Mr. *Hinsbaw* and he did agree, he knows not. What he heard was from Mr. *Hinsbaw*, That he did meet accidentally; that he did suspect Mr. *Vowell* to act, but was not sure of it; that he did suppose they had concluded, but was not sure of any thing. That Mr. *Vowell* said he was himself unfit to engage, but he would engage a Friend if he could; that Mr. *Vowell* said there were a great many Horses at *Islington* which might be surprized; that he would try what he could do: but whether he did any thing or not, he knows not.

Mr. *Hudson* denied some things he confessed upon Oath before Col. *Goff*, Justice of the Peace.

Col. *Goff* was sworn, he testified that the Examination (which was produced in the Court) was all written from Mr. *Hudson's* own Mouth, and after it was written, it was read to him, to the end that if there had been any Mistake it might be altered, and was all by him owned upon his Oath, that it was freely testified, and nothing in it extorted from him.

Mr. *Hudson* said that he was pressed, and that he then said these Words, Do not thus afflict an

old distressed Man, that hath nothing but Afflictions upon him.

To which Col. *Goff* answered, That at first Mr. *Hudson* denied all, and would confess nothing until he heard the whole Business confessed by another, and that all that was pressed to him was to discharge his Conscience in speaking the Truth; and that when he heard another to confess the Plot so fully, he desired to be heard again, and then did freely confess according to the Examination.

In the said Examination Mr. *Hudson* declareth the whole Plot, and the Proceedings in France, *Charles Stuart's* Objections, *P. Rupert's* Encouragement, the three ways to effect it, and all the Particulars of the Design as aforesaid, &c.

And how Mr. *Vowell* spake with Mr. *Hinsbaw*, Mr. *Wiseman*, and the two Soldiers; that Mr. *Hinsbaw* said there were many Cavaliers in Town in the Plot, but would never speak to two together; that some relished it well, others doubted. And some agreed to seize on the Lord Protector and the Guards, go with Drums and Colours to *White-Hall*, and the rest of the Particulars, for bringing in *Charles Stuart*, &c.

In the said Examination he also said, that Mr. *Hinsbaw* said that they would set up Major Gen. *Brown* to be at the head of them, by a Letter which they hoped to get from *Charles Stuart*, and believed that he would accept of it, he being a Friend to the King, as they called him.

That it was propounded to Mr. *Vowell*, who did consent to do something in it, and did afterwards meet some six times at Mr. *Hudson's* House.

That Mr. *Vowell* engaged *Billingly* the Butcher aforesaid to be a considerable Man, discoursed with him of the Number of Horse, and *Billingly* said to him that the Horses at *Grass* might be easily seized.

That *Hinsbaw* told him and *Vowell* after *Gerhard* was taken, that none of his Party was taken, and that the Plot might go on; that the French, English, and Irish from *P. Rupert* were to land at *Rye* and other Places in *Sussex*.

The Lord President asked Mr. *Hudson* whether he did own it; to whom he answered, that they were together, and such and such Things were spoken, but how far Mr. *Vowell* consented, he knows not.

Then Mr. *Robert Dale* was sworn, who declared against Mr. *Vowell* the Prisoner at the Bar, that Mr. *Vowell* came to his House, and asked him what Arms he had, he told him two Pistols, he said he would buy them of him, he asked for what Use, he said that he would tell him hereafter.

That he came with Mr. *Hinsbaw* and Mr. *Wiseman* several times to his House, who did declare that they had a Design to fall on the Lord Protector (and so in all the Particulars agreeing with the rest touching the whole Business of the Design, how it should have been done, as hath been before exprest.)

And that Sir *Gilbert Pickering*, Mr. *Strickland*, and two or three more of the Council were named that should be cut off.

That they invited him to assist them, and would have engaged him to fall on in the seizing of them at *Islington*, and they said there was one to head them, which they should know afterwards, and he said that Mr. *Vowell* heard these things. And that at another time Mr. *Hinsbaw*, Mr. *Wiseman*, and Mr. *Plunket* met with Mr. *Vowell*.

And his Examination was read.

That Mr. Vowell asked him whether he had any Arms to accommodate Friends, he said two Pistols (*and the rest of the Discourse as now he had spoken before the Court;*) only the Examination mentioned a third Person of the Council, viz. Maj. Gen. Lambert also to be cut off. That they were provided of an Head, and bad him therefore be sure to rise when he had notice. Then Mr. Hinsbaw seeing two Men passing along by where he was, supposing them to be Soldiers, said they should be killed; and he said that Plunket would give notice when they should be ready upon the Design to fall on; and that he was engaged to get as many as he could to assist in the Work: That Vowell brought Hinsbaw to his House.

John Hipwel, one of the two Soldiers in the Plot, being sworn, said, that a Papist Woman brought him to Mr. Hudson's House, where he met with them, and one told him, *That he had something to discover to him, if he could join in it.*

That he was examined how strong the Guards were, and that Regiment of which he was, and said, the Regiment were 1200; He was asked what Ammunition, and other such like Questions, to all which he gave answer.

After some Discourse he told him, *That he was to fall on the Lord Protector, and on the Guards, &c. and so told him the whole Design, (which he related to the same purpose as those before.)*

That he was bid to enquire what Cavaliers were in the Regiment, and among the Soldiery, and drink with them, and do what he could to divide the Soldiery, and to make what Party he could for this Work, and that when the time should be for Action, the Word should be; **FALL ON.**

The next Morning hearing some were taken Prisoners, there was much Sorrow.

Then Col. Aldridge was sworn, who said, That Mr. Hinsbaw revealed there was a Design to have fallen on the Lord Protector, and brought in Charles Stuart to be King, and related the Particulars much to the Purpose as is before express, and that Hinsbaw asked him *if he would be one;* That he made some Queries about it, but Mr. Hinsbaw told him, *They had great hopes of accomplishing it, and that there was an Officer of their own in the Tower that should free the Prisoners, and put Swords in their Hands, and that all should be done upon an instant, and that then they should have Money enough.*

Then Mr. John Gerhard was caused to withdraw a while.

Mr. Charles Gerhard was next called for, to see what he could say touching the Plot, who declared, That Mr. Hinsbaw had been in France with Charles Stuart, and his Brother John also, and Mr. Wiseman had been there; and made a Narrative of all the Proceedings there, agreeing with the rest before; and spake also of several Meetings at Ludgate-Hill, and Covent-Garden; how he met Col. Finch at the Piazza, who told him of the Design to kill the Lord Protector, seize on the Guards, the Lord Mayor, &c. proclaim Charles Stuart King, and the rest of that Story of their Design, in which he agreed with the former. And that he declared to him, That they were lifting apace, and they had many joyned hereabouts. That Col. Deane had lifted all that Day: That he himself had lifted some:

That Col. Finch had a Party to join with him in the City. That another time he had further Discourse again with him about it; that they were to meet the next Day, and then it was also said, That Finch was to command a Party, and that his Brother John Gerhard also was to command a Party, and that his Brother John was then by, and heard this Discourse: and that it was said there was ready about London to seize on several Parts, in all about two or three thousand: That Col. Finch was to seize on the Lord-Mayor, Col. Dean on James's, Col. Hains on Col. Ingolsbie in Southwark (and so named other Particulars like what is mentioned before) told him also the Management of the Design in France (*agreeing with what is mentioned before*) and said, he had a Commission from the King (as he called him.) And he spake also of their meeting at Bell-Savage at Ludgate-Hill, where mention was made of his Brother John Gerhard; and that Somerset Fox was there, and engaged in the Design, and his was to get in all the Apprentices he could to join in it. That at another time Hinsbaw said, *they had lifted two or three thousand.*

Then Mr. John Gerhard was called to the Bar again, where he appeared with the other two. Mr. Charles Gerhard was then sworn, and upon his Oath gave in Evidence, after his Brother was brought to the Bar, That the Design was to fall on the Lord Protector, &c. (*he gave a short Narrative as before*) and further said that his Brother John Gerhard had been in France. John Gerhard Prisoner at the Bar said *he confest it, that he was in France, when they were there, and was sometimes in their Company, but denied that he knew any thing of any Plot.*

Mr. Charles Gerhard being desired to go on further, said, That Mr. Hinsbaw was several times at his Lodgings, near Essex House, and his Brother with him, and talked with him of the Design, which his Brother scrupled, but he told him that if it could be accomplished the King (as he called him) would like well of it. That his Brother met Mr. Hinsbaw at Covent-Garden, at Mr. Jones's House in Rose-Street, who had Pen and Ink before him, and talked of the Numbers and other Particulars, his Brother John then in the Room (*and he named the Particulars as before*) but his Brother did not relish it, and was pressed by them, nor did he know that he consented to act.

Mr. Prideaux told Mr. Charles Gerhard that *he did well to be as sparing as he could against a Brother, only be careful to speak the Truth, tho with the fairest Interpretation, because Conscience is nearer than a Brother.* The Lord President also said, that he was not to look upon either the Greatness of Men, or the Relation of a Brother in this thing, but to look upon his Conscience, and to look up to his God.

John Man was sworn, who declared the Design in general, (*as the rest, all agreeing*) and that Mr. John Gerhard and others had consulted about it.

That being asked if he would engage in it, he answered, Yes: That afterwards he went to Bell-Savage, but when he came there, there were Somerset Fox and others, and they said he could not have Admission, for several were apprehended about it, and they knew not what to do.

William Dod was sworn, who gave in Evidence, that on Thursday Morning in Whitsun-Week,

Week, *Somerset Fox* told him, that there was a Design (as aforesaid, giving him an account of the whole) but he told him that it was to be kept secret. And that they were to meet about Two a Clock in the Morning about it. That at *Bell-Savage* he met with *Somerset Fox*, and his Cousin *Fox* the next Day again, and had the like Discourse.

Francis Fox being sworn, gave in the like Evidence against his Cousin *Somerset Fox*, and that he was invited to join with them, but could not tell what to do.

John Wharton was sworn, who said, he keeps a Victualling-House in *Black-Fryers*, and that a Gentleman, a Stranger, came to him, and asked him if he would serve the King, and fell in Discourse about his Calling: that he told him he had marry'd a Poor Widow: And that the Gentleman told him, that if the Design went on, he might have money enough, and said that he would find him better Employment. The Gentleman's Name, he said, was *Hinsbaw*, as he heard afterward. And that he told him, he would not be long before he came again. He said that he did believe they had designed to seize on the Lord Protector, and all the Horse-Guards. But for his Part, he was, when they should give him notice of it, only to proclaim the King, that was all that he was to do.

Mr. Barnes was sworn, who spake of the Design in general, much after the same manner as those before.

Mr. Minors was the last Witness sworn, who gave evidence, that Major *Hinsbaw* told him of the Design near *Coven-Garden*, and one *Mr. Harrison*, *Tuedor*, and others, were mentioned: That he asked him if he would join in it. That afterward he met with *Hinsbaw* in the Palace-yard at *Westminster*, who told him of the Design as before: And that Major *John Gerhard* would command a Party, and that the Business was then in good Forwardness, but Major *John Gerhard* thought it could not yet be accomplished.

And that when *Mr. Hinsbaw* heard that *Mr. John Gerhard* was taken, he said that he might thank himself, for had not he delayed it, the Business might have been done two Days before.

The Prisoners at the Bar were then asked what they had to say for themselves.

Mr. John Gerhard said he was falsely accused, and that the Witnesses did not speak Truth, and denied that he had any thing to do in the Plot, or knew of it.

Mr. Vowell did require of the Court to be allowed Pen, Ink and Paper, the Copy of this Charge, and Counsel to advise him what Defence to make for himself. And pleaded *Magna Charta* again, as before, and the sixth Article of the Government of the Lord Protector.

Serjeant *Glyn* declared, that an Ordinance being declared Law until the Parliament shall repeal it, is to give the same Authority to it, which is to an Act of Parliament, every Act being a Law no longer. That the Laws of old of Treason against the King are of force (were this new Ordinance not in being) for it means the Supreme Governour: tho it names only a King, it hath been made use of for Treason against a Queen, and so is to be touching a Lord Protector, or any other Supreme Governour.

Vol. V.

Mr. Ellis, Counsel of the Commonwealth, produced in Court the Government of the Lord Protector, in which that very Article in the Conclusion of it hath a Proviso to the 30th Article.

The Attorney-General *Prideaux* declared, that the Charge having been so fully proved against them, yet they could not but take notice of the ingenuous Confession of *Somerset Fox*; but were sorry to see such Obstinacy in the other two, after such a barbarous and bloody Design; that they should shew no Signs of Repentance: And therefore in behalf of the Commonwealth prayed for Justice from the Court against them.

The Court adjourned into the Painted Chamber, and ordered that they should have Pen, Ink and Paper, and any Friend to come to them that they should desire, in the Presence of the Lieutenant of the Tower.

The Court adjourned until Thursday next in the Afternoon.

When *Mr. Gerhard*, *Vowell* and *Fox* were again brought before the Court, and were demanded what they had more to say for themselves, *Gerhard* and *Vowell* denied the Fact, notwithstanding what had been proved against them; after which the Lord President *Liste* made a short Speech to convince them of the desperate Wickedness of their Design; and how fully the Charge had been proved, and what Punishments the Law had provided in such Cases; after which the Sentence of the Court was read severally to all three to this effect, That upon mature Consideration of the Treasons and Murders plotted and contrived by them against his Highness the Lord Protector, and the Commonwealth, and raising a bloody War in the same, the Court did adjudge them to be hanged by the Neck, until they be dead.

Mr. Gerhard desired the Execution might be alter'd, and that he might be beheaded, or shot to Death; and presented a Petition to the Lord Protector for that purpose.

The Protector was pleased to reprieve *Somerset Fox*, because of his ingenuous Confession, but the other two were Executed the Monday following, July 18. *Vowell* was executed in the Morning upon a Gallows erected at *Charing Cross*; he spake little of the Crime for which he suffer'd, but his main Discourse was to proclaim his Zeal for the Old Way of Religion, and to the Cause of the late King and his Family; after half an Hour's hanging he was cut down, and conveyed away in a Coach.

About Four in the Afternoon of the same Day, *Mr. John Gerhard* was brought to the Scaffold on *Tower-Hill*; his Behaviour was sprightly, the Substance of his Discourse Cavalier-like, boasting himself of the Profession of Religion which was established by Queen *Elizabeth*, King *James*, and King *Charles*, to which Family he declared his Affection. He acknowledged himself guilty of former Sins, for which he had deserved Death heretofore, but as touching the Crime, for which he was to die, he spent not many Words, only he confess'd that he knew of the Plot. At length he submitted his Neck to the Executioner, who at one Blow sever'd his Head from his Body.

*Proceedings against ARCHIBALD Marquiss of ARGYLE,
13 Car. II. 1661. for High-Treason.*



ON January 23, 1661. there was exhibited to the Parliament of Scotland, a Charge of *High-Treason, &c.* against Archibald Marquiss of Argyle, which was as follows.

CHARLES, by the Grace of God, King of Great-Britain, France, and Ireland, Defender of the Faith, To

Heralds, Pursivants, and Messengers of Arms, *respectivly*, conjunctly and severally, specially constituted, Greeting. Forasmuch as it is humbly mean'd and complain'd to U S, by our trusty and well-beloved Counsellor, Sir John Fletcher Knight, our Advocate for our Interest, in the Action underwritten; and by Sir James Lamont of Inneryne Knight, for himself and in the behalf of his Kindred, Friends, Vassals, Tenants and Servants,

Parties grieved and damnified in manner after specified, upon Archibald Marquiss of Argyle; George Campbell his Justice and Sheriff Deputy; James Campbell of Ardkinglas, Officer under the said Marquiss his command; Colin Campbell of Straguir, Duncan Campbell of Ellangreg, Officer under the command of the said Marquiss; John Campbell Fiare of Duastafneich, Officer also under the said Marquiss's command; Dongal Campbell, alias Mackconnochie of Innerraw, Officer under the said Marquiss's command; Duncan Campbell, Uncle to the Laird of Lochnell, Officer under the said Marquiss's command; Robert Campbell of Auchinwilling, John Campbell of Ardtariche, Hew Campbell his Son; Colin Campbell of Otter, Patrick Campbell his Brother; Campbell of Derburgh, Charles Campbell of Ballachyl, Ewer Campbell of Kilbryd his Brother; Duncan Glasfell alias Campbell in Glendarowell, John Ger Campbell, there; John Mackeroes Officer to the said George Campbell; Donald Mackeroes of Glenfelloch, Andrew Macklauchlane, Uncle to Archibald Macklauchlane of Lethimoore, Angus Mackehoernock Son to Ewer Mackewernock of Obb, James Campbell of Ormsay, Dougald Mackleriche of Bralychane, Duncan Mackneish in Escog, Archibald Campbell in Evinnochane, Son-in-Law to the said Laird of Otter, Mr. Colin Macklawehlane, Minister at Lechgaylishaid; All or the most part of them, being the said Marquiss of Argyle his Friends, Followers, or Complices under his command, and such as he might have stopt or let.

That where notwithstanding by the 129 Act of the eighth Parliament of Our dearest Grandfather, King James the Sixth of Blessed Memory, His Majesty and His three Estates then Assembled in Parliament, ratified and approved the Royal Power and Authority, over all Estates,

as well Spiritual as Temporal within this Realm, in the Person of His Majesty, his Heirs and Successors; and did Statute and Ordinance, that his Highness and his Successors by themselves, and their Councils, were and should be Judges competent to all Persons, his Highness's Subjects, of whatsoever Degree, Function, Estate, or Condition they should be of, in all matters wherein they, or any of them should be apprehended, summoned or charged to answer; And that none should presume, nor take upon hand, to decline the Judgment of his Highness, his Heirs and Successors, or their Council, in the Premises under the Pain of Treason: And sick-like, by the first Act of the eighth Parliament of our said dearest Grand-father, King James the Sixth, His Majesty's Sovereign Authority, Princely Power, Royal Prerogative and Privilege of his Crown, over all Estates, Persons, and Causes whatsoever. And the whole Estates then conven'd in Parliament for them, and their Successors, faithfully promised, perpetually to acknowledge, obey, maintain, defend and advance the Life, Honour, Safety, Dignity, Sovereign Authority and Prerogative Royal of Our said dearest Grand-father, his Heirs and Successors, and Privilege of the Crown, with their Lives, Lands and Goods; and to withstand all Persons, Powers and Estates, who shall presume any ways to impugn, or prejudge the same. Which Act is ratified by the third Act of the first Parliament of King Charles the First, of Blessed Memory, our dearest Father.

Likeas, by the third and fourth Acts of King James the First, his first Parliament, and by the 37 Act of the second Parliament of King James the First, and several other Acts, his Statute, that none Rebel against the King's Person or Authority; or if they do in the contrary, or make War against his Lieges, or reset any such Traitors, or supply them in Red or Council, or do favours to Rebels, or any ways assist them, or do not rise at His Majesty's command, being required; they being convicted thereof, are punishable as Traitors. Likeas by the 134 Act Parl. 8. the 10 Act of the 10 Parl. of King James the Sixth, All Depravers of His Majesty's Laws, and Medlars in His Majesty's Affairs, or Misconstructers of his Proceedings, whereby any mistake may be moved between his Majesty and his loving Subjects, are punishable by death. Likeas by the 1 Act of King James the Fifth, his 3 Parliament, and by the 51 Act of the 11 Parl. of King James the Sixth, all Burners of Folks in their Houses, all Burners of Houses and Corns, and wilful Fire-raising; as also all Murder or Slaughter of his Majesty's Lieges, where the Party slain is under trust, credit, assurance and power

power of the Slayer, the same is declared Treason and Lase-Majesty. Likeas by the 75 Act of Queen Mary's Parliament 9, and divers other Acts, it is Statute, that no manner of Person or Persons, of whatsoever Quality, Estate, Condition or Degree they be, Lieges of this Realm, attempt to raise any bands of Men of War, on Horse, or Foot, without special Licence in Writ had and obtain'd of the Queen's Majesty for the Time, and her Successors, under the pain of death, to be executed upon the Raisers and Risers in Arms. As also, by the 50 Act of the 11 Parliament of King James the Sixth, it is Statute and Ordain'd, that in case it shall happen, any landed Man to be convicted of the Crime of common Theft, resort of Theft, or Stealth, reist in time coming, they shall incur the Crime and Pain of Treason; that is to say, Tinsell and forfeiture of Life, Lands, and Goods. Likeas, by the common Law and practice of this Nation, all Committers of Murder, Manslaughter, Robbery, Rapine, or Reif, is punishable by death; and who are Act or Part of any such Crimes. As also by the same Laws, all private Imprisoners, Keepers of private Prisons, and false Imprisoners, and all Oppression whatsoever, are punishable in the like manner.

Nevertheless the Persons above named complain'd upon, having laid aside all Fear of God, Loyalty and Obedience to their Sovereign Lord and King, natural Affection and reciprocal Duty to their Countrymen and Fellow-Subjects, have most traitorously, treacherously, perfidiously and cruelly committed the Crimes of High-Treason, and other Crimes, Murders, Oppressions, Robberies, Misdeeds and Malversations underwritten, contrary to our said Laws and Acts of Parliament; and thereby have incurred the respective Pains and Punishments therein contained. In so far as the said Persons above written, Defendants, particularly the said Marquiss of Argyle, George Campbell his Servant, and Justice, and Sheriff-Deputy; James Campbell of Ardkinglas, Colin Campbell of Straquhir, Robert Campbell of Auchinwillig, John Campbell of Ardtariche, Master Colin Macklanchane, Duncan Campbell of Elangreg, John Campbell Fiare of Dunstafniche, Dongall Campbell, alias Mackconnochie of Innerraw; Having from the beginning of the Insurrections and Troubles in the Year of God 1639, 1640, 1641, and 1642, both secretly and avowedly appeared in constant opposition to our dearest Father, his Royal Councils and Commands: And after his Majesty's most gracious Condescendencies to all the desires of his Lieges, how unreasonable soever; he having departed to his Kingdom of England, a contented Prince from a contented People. Nevertheless the aforesaid Persons continuing in their treasonable Malice against their own Sovereign, did in the Months of January, February, March, April, May, June, July, August, September, October, November, December, or one or other of them, in the Year of God 1643, most traitorously without their Sovereign's Authority or Licence, and expressly against his Will, Pleasure and Service, at their own hand and by their own power, caused call and convocate a pretended Committee and Convocation of his Majesty's Lieges; wherein they themselves, or one or other of them, did personally convene and meet; and in the said treasonable and unlawful Convocation did act and appoint treasonable

Levies of his Majesty's own Subjects, in opposition to his Majesty's Person, Authority and express Command. And thereafter did actually invade and enter within his Majesty's Kingdom of England in open Hostility, taking his Majesty's Towns, killing his Subjects, waisting and destroying their Estates and Fortunes, joining with his Rebellious Subjects in England and an Army of Sectaries there, for destruction of his Majesty's Person, Royal Family, Authority and Government of these Nations, so far as in them lay. And thereafter in the Months above written, or one or other of them, in Anno 1646, the said Archibald Marquiss of Argyle, and the remnant Persons above named Defendants, or one or other of them, in an unheard-of way of Treachery and Treason, delivered his Majesty's Sacred Person into the hands of the said Rebels, who thereafter most treacherously murdered him. For eschewing and preventing whereof, the whole Estates of this Nation finding it necessary and incumbent to them, for the relief of their Sovereign Lord from his Captivity, to raise an Army for that effect: The said Persons complained upon, or one or other of them, not only by subtile and clandestine means, by Declamations and familiar Conferences, and openly by Declarations and publick Speeches in face of Parliament, opposed the same; but also the same being past into an Act in the Month of

1648 Years, publicly entered their *Disassent* or *Protestation* against the same, most treasonably and treacherously against the Authority of the King, our dearest Father, and the Estates of Parliament. And yet their Malice not resting satisfied, they did by themselves, their Friends and Adherents, in October 1648 Years, or thereby, convocate or raise in Arms great numbers of his Majesty's Lieges; without any Warrant from the King or Parliament; and did in open Hostility march to his Majesty's Burghs Royal of Edinburgh and Sterling, prosecuting his said Army, killing his Majesty's good Subjects, waisting and destroying their Lands and Houses. And thereafter most basely and traitorously invited the late Tyrant and Usurper, Oliver Cromwell, to enter his Majesty's Kingdom of Scotland, with an Army of Strangers, Traitors and Sectaries; sustain'd him and his treasonable Army with all sorts of Provision, feasting and countenancing himself and prime Officers in the Metropolitan City of our Kingdom, and within his Majesty's Fort and Strength thereof, the Castle of Edinburgh, where the most considerable Strength of the Kingdom was for the time. By these Means casting the Secresies of his Majesty's Kingdom and Forts thereof open to the view of those Strangers and Traitors: Which, by the Laws of this and all Nations, is High-Treason; and in all Probability was the Kingdom's Bane and Ruin, and was the Act immediately preceding the cruel Regicide and Murder of their sacred Sovereign our Royal Father. At least they, or one or other of them, were either Aiders, Abettors, Assistants, Promoters, Divisers, or act and part, and particularly the said Marquiss of Argyle, of the aforesaid treasonable Crimes and others above libelled.

Secondly, The aforesaid Persons, and particularly the said Archibald Marquiss of Argyle, not having yet satisfied his Malice, treasonable Attempts and Purposes, not considering the Duty either

either he owed to God, his Prince, Country, Nobility of his Family, nor his own Honour or Reputation, after multiplicity of Honours and Offices graciously conferred upon him by our sacred Father, and the Dignity vouchsafed to him by Ourself, in allowing him the Trust and Honour of setting Our Imperial Crown upon Our Head, upon the Day of our Coronation in *Scotland*, which was the first of *January* 1651 Years, in Presence of our whole Nobility and Estates of our said ancient Kingdom, putting the Crown upon our Head, with bowed-down Knees, and up-lifted Hands in Presence of God, Angels and Men, swore as follows, *By the eternal God, who liveth and reigneth for ever, I shall support thee to my uttermost: And I swear to be a loyal and true Subject, and faithful to the Crown.* And thereafter also kneeling, and holding his Hands betwixt our Hands, did swear these Words, *By the Eternal and Almighty God, who liveth and reigneth for ever, I become your Liege, and Truth and Faith shall bear to you, and live and die with you, against all manner of Folk whatsoever in your service.* Notwithstanding of all which, after the said *Archibald* Marquiss of *Argyle* had disloyally and basely deserted our Person and Army at *Sterling*, when we were on our March to *England*, in the Year 1651, did in the Months above-written, or one or other of them, Anno 1652, at the Desire of General *Dean* and Colonel *Overton*, our known and publick Enemies, they having come to *Innervarey* with a Regiment of Soldiers, and there the said Marquiss had Conference and Consultation with them, and did swear, at least subscribed and acknowledged the Government of our Dominions, as it was then established by the said wicked Tyrant and Usurper *Oliver Cromwell*, and his said Adherents, in a Commonwealth, without King, or House of Lords; and obliged himself to live under it, and be obedient thereto. And conform thereto most perjuredly and infamously the said *Archibald* Marquiss of *Argyle*, after the said Army of Rebels and Sectaries under the Command of the said General, Major *Dean*, and *Overton*, were drawn to such a Streight in their Return from *Innervarey*, they being in the Power of certain of the said Marquiss's Friends, and divers others of his Majesty's loyal Subjects then in Arms, standing in opposition against them; and they having taken in all Passes, the said Marquiss being then our Justiciary in these Bounds, and Sheriff of *Argyle*, most traitorously and infamously against his said Oath and Duty, did interpose himself in favour of the Enemy, commanding and counselling our said faithful Subjects, who stood in opposition to the said Enemy, did suffer them safely to pass without Opposition: And by the said Marquiss's Insinuation, there was a safe Pass given to the said Enemy from the foresaid Danger. Likeas further to evince the said Marquiss's treasonable Compliance and Affection to the said wicked Tyrant and Usurper *Oliver Cromwell*, in all his wicked and treasonable Courses and Attempts, he in the Month of a thousand six hundred and fifty Years, upon a pretended Call from the said Tyrant and Usurper, to convene a pretended Parliament, without any Coaction or Necessity, did engyre himself in favour of some Shires, and dealt with them to elect him for their Commissioner; at least being elected, he voluntarily accepted thereof;

and upon their said pretended Commission, he went to the said pretended Parliament at *Westminster*, and there most perfidiously and perjuredly, treacherously, treasonably, and unworthily, contrary to his own Dignity and Degree, fate, and acted by Voting, and otherwise, in the said pretended Parliament, as a Member of the House of Commons, for establishing the said Tyrant in his usurped Authority, and abolishing of Us and Our Royal Race from Our just Right and Title to Our Crowns of *Scotland*, *England*, and *Ireland*. And also the said Marquiss, in further Prosecution of his treasonable, rebellious Course and Designs, in the Months above-written, or one or other of them, in the Year 1653, or 1654, or either of them, sold and delivered several Musquets and other Ammunition to the said Rebels, to the number of seventeen Cannon, and seven hundred Musquets, or thereabouts.

Thirdly, in the Year 1654, several of our loyal Subjects having, for Vindication of our Authority, and Revenge of our Royal Father of blessed Memory, his Murder, taken Arms under the Command of our Trusty and right well-beloved Cousins and Counsellors *William* Earl of *Glencairne*, and *John* Earl of *Middleton*, then our Commissioners for that Effect: Against whom, and our Forces under their Command, the said Enemies being about to transport eight hundred Men to the North, under the Command of Col. *Cobbet*, and being driven to the Isle of *Mule*, and ship-broken in their way, and so ready to perish, The said *Archibald* Marquiss of *Argyle*, and the remanent Persons above complain'd upon, or one or other of them, in the Months above-written, or one or other of them, in the Year 1654, or 1655, did gather together all their own Boats, and others, and therein did safely transport them to *Dunbarton*, from the said Isle of *Mule*, and to other safe Places. At least the said *Archibald* Marquiss of *Argyle*, and remanent Persons above complain'd upon, or one or other of them, were Authors, Aiders, Abettors, Assisters, Advisers, or art and part, of the foresaid Treasons, and other Crimes and Misdeeds above libelled.

Fourthly, The said Marquiss, and remanent Persons above complain'd upon, or one or other of them, in the Months above-written, or one or other of them, in the Year 1654, or 1655, most perfidiously, treacherously, and traitorously, went into the said *English* Rebels, without any Coaction or Necessity, to the Highlands in *Lochquhaber*, and several other Places; and joined with the said Rebels, for suppressing of the said Earls of *Glencairne* and *Middleton*, then our Commissioners, and our Forces under their Command; and countenanced, counselled, and conveyed the said Rebels thro' divers Places in the Highlands, in their Expedition against our Forces. At least the said Persons Defendants, and particularly the said *Archibald* Marquiss of *Argyle*, were Authors, Actors, Aiders, Abettors, Assisters, and Countenancers of the said treasonable Crimes, and others above specified.

Fifthly, When the said Arch-Traitor and Regicide died, *Richard Cromwell*, his Son, was by order of his Father's traitorous Council, sitting at *London*, proclaimed Protector of our three Kingdoms, at the Market-Cross of *Edinburgh*; which was done accordingly by a pretended Council sitting at *Edinburgh*, for the Time. At the doing whereof, the said *Archibald* Marquiss of

of *Argyle*, most traitorously, treacherously, and perfidiously, in the Months of a thousand six hundred fifty Year, went up to the said Cross of *Edinburgh*, at the time of the said Proclamation, and did countenance and assist the same; by which Our Authority was altogether abolished. And moreover, to further evidence the said Marquiss of *Argyle* his Willingness to serve the said Usurper in the accomplishing of his treasonable Designs, and to extirpate Us from Our Royal Authority and Government, he endeavour'd by all means possible, when the foresaid Tyrant and Usurper had commanded Commissioners from Shires in *Scotland* to appear at *London*, in his pretended Parliament, for Establishing his usurped Authority, and abolishing of Us and Our Royal Race from Our just Right and Title to Our Crowns of *Scotland*, *England*, and *Ireland*; and for suppressing of the Privileges, Laws and Liberties of this Our antient Kingdom of *Scotland*; the said Marquiss did, in obedience of the said traitorous Command, obtain himself to be elected Commissioner for the Sherifffdom of *Bamf*; and thereafter went up to *England*, and there sat as a Member of that traitorous Convention and Meeting at *London*, wherein Declaration was made against Us and Our Successors, debarring Us for ever from Our just and lawful Right and Title, to the Crowns of these Our three Kingdoms. Likeas thereafter the said Marquiss did embrace the Office of Sherifffship of *Argyle* from the Enemy, and exercised the same under them for his own ends; and did several times swear, at least subscribe, in their Favours against Us, Our Successors, Crown, Government and Sovereignty; and to be obedient and live peaceably under their Government of Our Kingdoms in form of a Commonwealth, as it was then established by the said Traitor and Usurper. Of the which treasonable Deeds and Acts, and others aforesaid, the said Defendants, and particularly the said *Archibald* Marquiss of *Argyle*, or one or other of them, were Authors, Aiders, Abettors, Assisters, Contrivers, Promoters and Countenancers.

Sixthly, To further manifest the said Marquiss of *Argyle* his treasonable Deeds, Acts and Intentions against Us, contrary to his Oath and Duty, the same evidently appears by his treasonable Speeches following; in so far as he being present in a Provincial Assembly at *Inveraray* in the Month of or one or other of the Months above-written, in the Year 1652, or 1653, or one or other of them, some Ministers being then present, praying for His Majesty's Happiness and Welfare, the said Marquiss did openly say and declare before them, *That they were but Fools to pray for that wicked, false, malignant King, whom God had casten off, and would never restore again*; and certain other Words to this Purpose and Meaning; the said Marquiss having uttered the like treasonable Speeches at *London*, and elsewhere. And also in one or other of the said two Years above-written, in the Month of or one or other of the said Months, the said Marquiss being within a Chamber of his Mansion-House at *Lochhead* in *Kentire*, stamping with his Foot, did vaunt himself, saying, *That he was the only Man that plotted the rising of the Forces in the West, terming the same the Whig-vode*, which proved the main Cause of Our Ruin. Moreover his Correspondence, joining, acting

and consulting with the Enemy for Our Ruin is more manifest, in so far as he did receive Precepts from the said Tyrant and Usurper, *Oliver Cromwell*, directed to his Council at *Edinburgh*, for Payment of the Sum of twelve thousand Pounds Sterling, for good and thankful Service done by the said Marquiss. Likeas he did keep correspondence with the Usurper *Richard Cromwell*, and *Charles Fleetwood* in the Year 1658, and 1659, by missive Letters and other ways. As also with Sir *Archibald Johnston* of *Wariston*, his Fellow-Traitor, in the said Year 1659, when he sat in that traitorous Meeting or Council of the Rebels at *London*, called the Committee of Safety, wherein the said *Wariston* sat as President; and did of new emit Declarations for abolishing of Us and Our Successors, from Our just Right and Title to the Crowns of these Our said Kingdoms. Of all which treasonable Acts and Deeds aforesaid, intended or committed in one or other of the Months of the respective Years above-written, contrary to Our said Laws and Acts of Parliament, and several other Laws, the said Defendants, and particularly the said *Archibald* Marquiss of *Argyle*, at least they, or one or other of them, were Authors, Aiders, Abettors, Assisters, Promoters, Countenancers, Contrivers, or Act and Part.

Seventhly, Our said deceas'd Sovereign Lord and dearest Father, having granted Commission upon the Day of *March*, 1643 Years, under His said Majesty's Hand, authorizing and giving expresse Order to the said Sir *James Lamond* to prosecute a War, and levy Forces in His Majesty's Name, against those in Rebellion, and particularly against the said Marquiss of *Argyle*, and to invade his Bounds and Lands, as he was the principal Promoter of these odious and rebellious Practices against His Majesty's Authority, as the said Commission by way of a missive Letter directed to the said Sir *James* at more length bears. In obedience whereunto the said Sir *James*, according to his Allegiance and bound Duty, levied all his Friends and Followers, and accordingly acted as became a good Subject in His Majesty's Service, for promoting whereof, till the Year 1646. That after His Majesty's coming to *Newcastle*, and casting himself upon the Trust of his Army lying there, the said Sir *James* did then lay down Arms, and with his Friends retreated in a peaceable manner, to his own Houses of *Towart* and *Escog*, there being no other Houses for the Shelter of his Friends, the Country having been formerly wasted and burnt. After which, in the Month of or thereabout, in the same Year, the said Defendants, or one or other of them, being commanded by the said *James Campbell* of *Ardringlas*, *Dougall Campbell* of *Inverraw*, and others their Officers, and others under the said Marquiss's Command, did in a hostile manner lay siege to the said two Houses, using all manner of Violence. And the said Sir *James*, after all legal means used for his own Defence, did bring them to a Treaty, wherein by Articles of Capitulation they did grant to him, and his said Friends and Followers, Indemnity in their Persons and Fortunes, with Power to pass freely where they pleased; as the said Articles, subscribed by the Hands of the said *James Campbell* of *Ardringlas*, *Colin Campbell* of *Stragubir*, *John Campbell* Fiare of *Dunstaffneich*, *Duncan Campbell* of *Ellangreg*, *Dou-*

*gall Campbell of Innerraw, Duncan Campbell Uncle to the Laird of Lochinell, and John Macklan-chlane Fiare of Craigintareiff, of the Date the third Day of June, at more length bear: Nevertheless the aforesaid Persons complain'd upon, or one or other of them, did most perfidiously, treacherously, and treasonably, shortly after the said Capitulation, plunder the said Houses of their whole Furniture and Goods therein; and did rob and take away from the Persons within the same, their whole Money and Clothes, did drive their whole Cattle of all sorts, which together with the Wastations formerly done by them, to the said Sir James, his Friends, Vassals and Tenants, did exceed the Sum of Fifty thousand Pound Sterling. And in a most cruel and barbarous way, whilst some of his poor Friends were rescuing their own Goods, they barbarously murdered and massacred a number of innocent Women, as namely, *Marie Gilaspie, Marione Mackleish, a young Maid, Caleoch Breidmachfoyne, Margaret Crawfurde, and certain others; and inhumanly left their Bodies, as a Prey to ravenous Beasts and Fowls. At the least, the said Persons, or one or other of them, and particularly the said Marquis of Argyle, were Authors, Actors, Aiders, Abettors, Assisters, Contrivers, and Art and Part, of the said cruel bloody Murders, Robberies, Oppressions, and other Deeds and Malversations above libelled.**

Eighthly, The said Persons Defendants, shortly after the said Capitulation, and contrary to the same, or one or other of them, and especially the said *James Campbell of Ardkinglas, Dougall Campbell of Innerraw, Colin Campbell of Stragubir, Duncan Campbell of Ellangreg, Duncan Campbell Uncle to the Laird of Lochnell, John Campbell Fiare of Dunstaffneiche, did most treacherously, perfidiously, and traitorously felter, and bind the Hands of near two hundred Persons of the said Sir James's Friends and Followers, who were comprehended within the said Capitulation; detaining them Prisoners with a Guard, their Hands being bound behind their Backs like Thieves, within the said Sir James's House and Yards of Towart, for the space of several Days, in great Torment and Misery, they being His Majesty's free Lieges and People. Likeas most traitorously and perfidiously, contrary to the said Capitulation, they did carry the said Sir James Lamond Prisoner to the said House and Castle of Escog, and by that means, and for fear of the said Sir James's Life, the Keepers of the said Castle being the said Sir James's Friends and Vassals, they did surrender the said House, upon Capitulation of Life, Fortune and Goods; which Capitulation was most traitorously and perfidiously broken. And in pursuance of their further Villany, after plundering and robbing of all that was within and about the said House, they most barbarously, cruelly and inhumanly murdered several, Young and Old, yea sucking Children, some of them not one Month old. And further, the said Defendants, or one or other of them, and particularly the aforesaid Subscribers of the said Capitulations, in the Month of 1646 Years, did most traitorously and perfidiously carry the whole People that was within the said House of Escog Prisoners, with a Guard, to the said Sir James's House of Towart, and shortly after their Removal from the said House of Escog, the said Defendants, or one or other of*

them, caused burn the same, destroying the whole Orchards and Plantings about the said House of Escog. And not being content with their former Cruelties, they shortly thereafter carried all the said Persons who were Prisoners in both the said Houses of Escog and Towart, bound Prisoners (being His Majesty's free Lieges) to several Boats, sending the said Sir James Lamond, his two Brethren, *Robert Lamond of Escog, Patrick Lamond his only Son, Duncan Lamond his Brother, and John Lamond of Auchingylle, Prisoners to the said George Campbell Sheriff-Deputy to the said Marquis's House of Innerrarey, at which time the said Persons, or one or other of them, most villainously, contrary to the said Capitulation, Laws, and Acts of Parliament aforesaid, burnt the said Sir James Lamond's Mansion-House of Towart: Of the which cruel Crimes of Treason, Murders, Fire-raising, Burnings, Oppressions, Robberies, and other Crimes abovementioned, committed contrary to our said Laws and Acts of Parliament, and the Capitulation above-written, the said Defendants, and particularly the said Marquis of Argyle, at least one or other of them, were Aiders, Abettors, Assisters, Countenancers, Contrivers, Promoters, and Counsellors of the same.*

Ninthly, The said Persons Defendants, or one or other of them, contrary to the aforesaid Capitulations, Our Laws and Acts of Parliament, upon the Day of June 1646, most traitorously and perfidiously did carry the whole People, who were in the said Houses of Escog and Towart, in the said Boats, to the Village of Denoon, and there most cruelly, traitorously, and perfidiously cause hang upon one Tree near the number of Thirty Six Persons, most of them being special Gentlemen of the Name of Lamond, and Vassals to the said Sir James, viz. *Neill Mackpatrick alias Lamond, Archibald Lamond Son to Baron Mackpatrick of Cowstoun, Robert Lamond his Brother, Duncan Lamond Brother to the said Robert, and Hugh Lamond their other Brother, Duncan Gerlamond in Kilmarnock, Gocie and John Lamonds his Sons, Ewen Lamond in Midtowart, Gilbert Lamond, Duncan Lamond, John Mackquein alias Lamond, Archibald Mackquein alias Lamond his Brother, Donald Mackquein alias Lamond, Duncan and John Lamonds Son to Walter Lamond Brother Germain to the Laird of Escog, Hugh Lamond in Corro of the Carrie, Robert Lamond in the Carrie, Duncan Lamond there, Angus Lamond there, Donald Lamond there, Walter Lamond there, Duncan Lamond called Mackwalter there, Alexander Lamond in Ardyne of Nethercowall, William Lamond, John Mackquein younger alias Lamond, Patrick Boigle Son to the deceased Mr. John Boigle Minister at Rothfay, Dougall Harper alias Mackalaster, Servant to the said Sir James Lamond, John Lamond, Son to Gilbert Lamond of Knockow, Gilbert Macklay in Glendarowall, James Lamond in Ardyne, Donald Lamond, James Mackquein alias Lamond in Nethercowall, James Lamond his Son, and John Mackpatrick alias Lamond in Ardyne. And also the said Persons Defendants, or one or other of them, upon the fore-said day of June 1646, most cruelly, barbarously, inhumanely and unchristianly murdered with Durks, and cut down with Swords and Pistols the Persons following, viz. *John Lamond in Auchinsballech, who being about the Age of fourscore Years, having a Flux upon him, and being**

being also pin'd away with Hunger and Thirst, they most cruelly and barbarously stabb'd him with Durks and Skanes at the Ladder-foot: and did also most barbarously murder, stab and cut down the Persons following, viz. *Thomas Brown, Neill Mackneill, Meldonich Mackmaw, John Mackmaw* his Brother, *Archibald Hamilton, Meldonich Mackilmichael, Robert Michael, John Mackinlay, John Hendry, Alexander Hendry, Patrick Hendry, John Lamund, Angus Mackilmune, John Mackynnes, John Macekdougall, John Henry, William Mackwilliam* alias *Wilson, Hew Mackcrow, John Mackcrow* his Brother, *John Mackperson, Donald Mackperson, Duncan Mackperson, Donald Mackilbreid Lamond, Duncan Lamond, Duncan Mackalaster, Thomas Menchryd, John Michaelson, John Moodie*, and *John Jamison* then Provost of *Rothsay*, who being shot thrice thro' the Body, finding some Life in him, did thrust several Durks and Skanes in him, and at last did cut his Throat with a long Durk; the said *John Jamison* not only representing His Majesty's Authority, as a prime Magistrate of his Burgh Royal, was so cruelly murdered in Contempt thereof, and of the Statutes made in that behalf. And to manifest their further Cruelty, they did cast some of the aforesaid Persons into Holes made for them, who were spurning and wrestling, whilst they were suffocated with Earth; having denied to them any time to recommend themselves to God; albeit earnestly desired and begg'd by the said murdered Persons. Insomuch that the Lord from Heaven did declare his Wrath and Displeasure against the foresaid inhuman Cruelty, by striking the Tree whereon they were hanged, in the said Month of *June*, being a lively fresh growing Ash-tree, at the Kirk-yard of *Denoone*, amongst many other fresh Trees with Leaves, the Lord struck the said Tree immediately thereafter; so that the whole Leaves fell from it, and the Tree withered, never bearing Leaf thereafter, remaining so for the space of two years: Which being cut down, there sprang out of the very heart of the Root thereof a Spring like unto Blood popling up, running in several streams, all over the Root, and that for several Years thereafter: Till the said Murderers or their Favourers, perceiving that it was remarked by Persons of all Ranks (resorting there to see the Miracle) they did cause hock out the Root, covering the whole with Earth, which was full of the said Matterlike Blood. Of the which cruel Murthers, the said Persons, and especially the said Marquiss of *Argyle*, or one or other of them, were Authors, Actors, Aiders, Abettors, Assisters, Contrivers, Countenancers and Promoters, many of the said Persons Defendants being Officers under the Command of the said Marquiss of *Argyle*.

Tenthly, Upon the Month of 1646, the said Sir *James Lamond*, his said Brethren and Friends, being detained Prisoners at the said Marquiss's House of *Inverary*, the said *George Campbell* Sheriff, and Justice-deputy to the said Marquiss, *James Campbell*, of *Ardkinglas* Col. under the Command of the said Marquiss, *Dougall Campbell* alias *Mackonnochie* of *Ennerraw* Major under the Command of the said Marquiss, and certain other Persons being met in a kind of Conventicle, who did enquire of the said Sir *James*, whether he would submit his Life and Fortune to them, or not? who answer'd, That

he would not, pleading upon his Majesty's Commission, the Capitulation given to him, and that he being the King's Baron could not be judged by them, none of them being such. Whereunto the said *George Campbell* replied, that the said Sir *James* was a false Knave, and that he would judge him whether he would or not, and hang him as Justice-deputy of the said Marquiss of *Argyle*; at which time the said *George Campbell* did rob and seize upon the Sum of 1000 l. belonging to *Archibald Lamond*, Brother to the said Sir *James*, and having within a little time hereafter searched the said Sir *James* for the said Capitulation, finding that he had it not, and they considering the Prejudice that might follow to them thereby, they caused the said Sir *James* to subscribe a Paper penn'd by the said *George*, declaring therein that his Quarrel was unjust, and that he repented thereof, as also that he did pass from the Capitulation; which Paper with certain other Articles therein was subscribed by the said Sir *James*, he being compelled thereto for fear of Death, having gotten notice at that very same time that his said Friends and Followers were cruelly murdered by them at *Denoone*, as is above mentioned; after subscribing of the which Paper, two Days after the said Sir *James*, his two Brethren, and four Friends aforesaid, were committed Prisoners, in several Houses, appertaining to the said Marquiss of *Argyle*, the said Sir *James* remaining Prisoner in the House of *Dunstaffnach* for the space of four Years, thereafter being carried to the Castle of *Inchconnell*, where he remained Prisoner for the space of two Years or thereabout, until he was carried from thence to *Sterling*, by virtue of an Order from Us and Our Estates of Parliament, they having not time to take Trial of the matter at that time, by reason of Our marching into *England*, sending the said Sir *James* up to the Castle of *Sterling*, for fear of the said Marquiss's Cruelty; in regard he often threatned, that if ever the said Sir *James* came in his Power, the World should not save his Life, and that he repented nothing more, than that he took not that bloody Knave's Life, whilst he had him in his Power; saying likewise, that all was but one fault: the which cruel Crimes of Oppression and others above specified, the said Defendants, particularly the Marquiss of *Argyle*, one or other of them, were Actors, Aiders, Abettors, Contrivers, Countenancers or Promoters.

Eleventhly, The said Persons Defendants, their Cruelty against the said Sir *James* is manifest, in so far as the said Month of 1651, *Donald Campbell* sent *John Campbell* of *Ardarich* of the special causing, hounding out, and or under their Command or Direction, came accompanied with 30 Men, all armed with Guns, Swords, Pistols, and other Weapons, invasive to the Coast-side of the Sherifdoms of *Ayre* and *Renfrew*, where they heard that the said Sir *James* had his Residence, and did search the House of *Southanon* belonging to my Lord *Sempell*, and the House of *Corsby* belonging to the Laird of *Auchnanes*, where the said Persons did make search for the said Sir *James*, two of them coming early in the Morning to the said House of *Auchnanes*, the said *Donald* running up Stairs, with a drawn Durk and benden Pistol in either Hand, making search thro' the whole House and Beds, to have murdered the said Sir *James*, who by

Providence was in the Wood, not knowing any thing of the intended Murder. And the said Persons being disappointed of their Intentions, did retire to their Boats, the said Sir James flying at that time to the Isle of Arron to shelter himself under the Protection of the now Dutchess of Hamilton, who did reside there for the time. Likeas immediately thereafter the said Marquiss of Argyle and his Accomplices, failing of their said intended Murder, the said Marquiss did desire a Warrant from the Committee of Parliament, in the said Year 1651, for apprehending the said Sir James Lamond, intending thereby to prosecute the aforesaid Murder; which Warrant was then refused to be granted to him; at least the said Defendants, and particularly the said Marquiss of Argyle, or one or other of them, were Authors, Actors, Aiders, Abettors, Assistants, Contrivers, Countenancers, of the aforesaid Crimes of Murder and Oppression, and others aforesaid.

Twelfthly, And further to evidence the aforesaid Persons Defendants, and particularly the said Marquiss of Argyle, their Cruelty and Oppression against the said Sir James, the said Marquiss in the Month of 1647, or thereabouts, came to Our House of Dunstaffneiche, where the said Sir James had been kept most unjustly and unwarrantably Prisoner several Years before, and sending to him the late deceased Archibald Campbell Keeper of Our said Castle under the said Marquiss, Colin Campbell of Lochmell, and Dougall Campbell alias Mackconnachie of Inneraw, as Commissioners, with certain Proposals following, viz. First, that the said Sir James should renounce and for ever overgive all Right, Title, and Interest, he had to his own Property, and his Vassals Superiority; And upon condition also, that the said Sir James should under his own Hand abjure Scotland, and never to be seen therein: which being done the said Marquiss said he would give to Sir James a considerable Sum, threatening also that if the said Sir James would refuse the said Offer, so long as the said Marquiss had an House in the World, the said Sir James should be Prisoner therein, and should torment him with Pain and Misery, till the Marrow should rot within his Bones. The said Marquiss declaring also, that he hath already possess'd himself of the said Sir James and his Vassals Estates, which he said he and his should possess, in despite of those who would or would not. Whereupon the said Sir James considering with himself, within some few Months thereafter, that what a Prisoner did was null in Law, and being most desirous of his Liberty, from so miserable and so long Imprisonment, profess'd to be willing to grant some of the former desires; the said Marquiss hearing thereof, caused carry the said Sir James with a Guard to the Town of Innerarey, where the said Sir James did write some few Lines, the substance whereof contained the most part of the said Marquiss's Desires. Notwithstanding whereof, and the said Paper was delivered to the said Marquiss, he persisting in his former Cruelty and Oppression, did send back the said Sir James to Prison, where he remain'd at Our said House of Dunstaffneich, so that the said Papers so subscribed and delivered to the said Marquiss and George Campbell his Justice and Sheriff-Deputy (for which they and their Accomplices ought to

be punished as Oppressors and as Actors and art and part of the aforesaid Crimes) and all following upon the said Writings and Papers ought to be declared void and null.

Thirteenthly, The said Persons Defendants, particularly the said Archibald Marquiss of Argyle his Friends and Accomplices, persevering in their further Oppression, in the Month of 1649 years, caused the said deceased Archibald Campbell, then Keeper of Our said Castle of Dunstaffneich, under Command of the said Marquiss, compel the said Sir James to grant a Band to the said Archibald, his Heirs, Executors, and Assignes, for payment of the Sum of four thousand four hundred Marks or thereabouts, for alledging 4 Years Entertainment in our said Castle, where the said Sir James Lamond was violently, traitorously, and illegally detained Prisoner: Unto the which Band the said Marquiss be assign'd, he did intend Action thereupon before the English Judges, and for that and certain other pretended Debts, which were paid, the said Marquiss took forth Caption against the said Sir James, intending thereby to prosecute his forethought Cruelties and Oppressions, and to incarcerat him, for obtaining his former Designs. And so the said Marquiss by Acceptation of the said Assignment, pursued thereupon his Imprisonments, Threatnings and others above and after specified.

Fourteenthly, The said George Campbell Justice under the said Marquiss, still continuing in his former Cruelties and Oppression, in the Month of 1647 Years, or thereabouts, not only contrary to his said Majesty's Commission, but also contrary to the Articles of Capitulation, Our Laws and Acts of Parliament, having taken Patrick Lamond Fiare of Escog, and John Lamond of Auchingylle out of the said Castle of Escog, after they had rendred the said Castle upon the Capitulation above-mentioned, having detain'd them Prisoners, the one in the Castle of Carnick, and the other in the Castle of Inchconeill, for the space of a Year and three Quarters, till the day of January 1648 Years. At the which time the said Marquiss, and the said George his Deputy, caused call a pretended Court of Justice at the said Town of Innerrarey; where having conven'd the said Patrick Lamond Fiare of Escog, and John Lamond of Auchingylle, at the said Town did call an Assize, consisting of Highland-men, under Power of the said Marquiss, and his Deputy their Justiciary, being also their dependants and followers, and of the said George his making use of, for the most part, for Murders and Oppressions. Which Assize having convicted the said Patrick Lamond Fiare of Escog, and having absolved the said John Lamond, in respect of some favours done to them, the said George Campbell nevertheless caused the said pretended Inquest thereafter to meet, contrary to the express Law and Act of Parliament; the said George saying, that it was not fit that one Young Man should die alone: Conform to the which unjust and illegal Command and Direction, the aforesaid Persons of the Assize did meet again, and did convict the said John Lamond also, who by Virtue of the said George his unjust and unlawful Sentence, the said two Gentlemen were hanged to Death at Innerarey. Likeas the said Marquiss of Argyle his concurrence, countenancing and promoting of the said cruel Murders and Oppressions,

Oppressions, the said Marquifs by himself, *James Campbell of Ardkinglas*, and their Complices, have still possess'd the Lands of *Escog* and *Auchingylle*, belonging to the said two murdered Gentlemen; whereof they are yet still in Possession to this same very Hour: the said *John Lamond* leaving two Children behind him, the eldest of them not two Years old, to whom the said Marquifs refused to give any Supply or Entertainment; they living still as yet upon the Charity of the People. Likeas the said Marquifs of *Argyle* doth most violently, illegally and unjustly, possess the Lands belonging to *John Lamond of Auchinbelloch*, who for Age and Infirmary, as said is, was cruelly murdered at the Ladder-foot in manner above-written. At least the said Persons Defendants, and particularly the said Marquifs of *Argyle*, *George Campbell* his Justice and Sheriff-Deputy, *James Campbell of Ardkinglas*, or one or other of them, were Authors, Aiders, Abettors, Assisters, Promoters, Counsellors, Contrivers and Art and Part of the said wicked Murders, Oppressions, Burnings, Robbery, and other Deeds, and malvers Actions above-written. And further, to manifest the said Marquifs of *Argyle*, *George Campbell* his said Justice and Sheriff-Deputy, and their Complices, their Cruelty and Oppression, they or one or other of them in the Month of

1648 Years, having at that time murdered the said *Patrick Lamond* younger of *Escog* as aforesaid, they caused immediately thereafter bring before them *Duncan Lamond of Stronabanoch* his Uncle and Old-Man, being then Prisoner at *Castle Lanchlane*, to the Town of *Inverrery*; threatening him, that if he would not renounce and dispose his Right of the whole Lands of *Keames*, which he held of the Laird of *Lamond*, then they would cause hang him, as his Nephew was immediately before. Likeas for safety of his Life, the said *Duncan Lamond* did grant a Disposition of his said Lands of *Keames*, to the said Marquifs of *Argyle*, and did deliver to him the whole Writings thereof, conform whereunto the said Marquifs remains still in Possession.

And in like manner the said Marquifs of *Argyle*, *George Campbell* his Justice and Sheriff-Deputy, and their said Complices, by their Power and Warrant have possess'd and do possess the Lands belonging to the said *James Lamond*, viz. The Lands called *Archibald Roy-Stewart*, the Sixt-mark Land of *Ochrechewne*, the Lands of *Craignifroche*; on which Lands of *Craignifroche* the said Marquifs had his own Bowmen and Heards, keeping thereon a number of his own proper Goods several Years: The said Marquifs possessing also several other Lands both in Property and Superiority belonging the said Sir *James*, the Marquifs having no right thereto, but possessing the same by meer opposition. Of the which crimes of Oppression and others above specified, the said Marquifs of *Argyle*, *George Campbell* Justice and Sheriff-Deputy to the said Marquifs, *James Campbell of Ardkinglas*, Officer under the said Marquifs's command, and remanent Defendants, were Authors, Actors, Aiders, Abettors, Assisters, Contrivers, Promoters, and Art and Part. And further, the said Marquifs of *Argyle*, *George Campbell* his Justice and Sheriff-Deputy, and their Complices and remanent Defendants above-named, or one or other of them, in the Month of

1648 Years, or thereabout, did seize and apprehend the Person of *Don-*

gall Mackdougall of Downaach, after he had surrendered the House of *Downolick*, upon a subscribed Capitulation under the Hands of Lieutenant-General *David Lesley*, for his Life, Liberty and Estate. Notwithstanding whereof the said Marquifs and his said Servant, or either of them and their Complices, caused incarcerate the said *Dougall Mackdougall* in the House of *Inchconeill*, laying Irons upon him; who being in miserable Torment for the space of a Year and a half and above, was enforced at the said Marquifs's desire, to be free of the woful Imprisonment and Torture, to grant to him a Disposition and Renunciation of the said *Dougall's* Lands of *Barninggarr*; whereof the said Marquifs is still in Possession since the said Year 1648. Of the which cruel Acts of Oppression, particularly the said Marquifs of *Argyle* and *George Campbell* his Servant, or one or other of them, were Authors, Aiders, Abettors, Assisters, Countenancers, Promoters, and Art and Part. And in like manner, *Duncan Campbell of Elangreg* most treacherously, traitorously and perfidiously, after subscribing of the Capitulation by him granted to the said Sir *James*, his friends and followers, being a Member of the Conventicle, and meeting at the aforesaid cruel and wicked Murders committed at *Denoone*, was a main Author, Actor, Abettor, Assister, Contriver, and Promoter of the said wicked Murder committed there. Likeas thereafter the said *Duncan Campbell* did take unlawful Possession of *Leymont Lamond of Cowston's* Lands of *Stroan* and *Cowston*, and also the Lands of *Trowstonne* and *Ardbeg*, belonging to the said Sir *James* and *Leymount*. And also the said *Duncan Campbell* with certain of his Complices, in the Month of *March* 1646 Years, came from his own House to the said Lands of *Cowston*, and *Stroan*, and there murdered early in the Morning of Men and Children to the number of forty Persons, viz. *Archibald Lamond* in *Auchinfour*, *John Lamond* there, *Lamond* Son to *Ewen Lamond* there a Child, *Archibald Lamond* of *Rive*, *Coll Lamond* his only Son a Child, *Ewen Lamond* in *Midtewart*, *Duncan Lamond* his Brother, *Donald Mackneill* Servant to the said Sir *James Lamond*, *Donald Macklanchlane* in *Kilmichael*, *Finlay Mackilbreid*, *Donald Mackilbreid* his Brother, two of the Name of *Mackalasters* Sons to *Archibald Mackalaster* in *Killennane*; *Macklelland* in *Knockmillie*, *Robert Moodie* in *Castle Towart*, *John Mackiller* Servant to the said Sir *James*, *Harry Lamond*, *Archibald Mackperson*, *John Mitchelson*, *John Leith*, *Dougall Leith*, and several others. As also the said *Duncan Campbell* most traitorously, treacherously, and perfidiously, with the said Defendants his Complices, were main Actors, Abettors, Assisters, and art and part of the burning of the said Sir *James* his House of *Towart*, taking away the Goods and plenishing therein, destroying of the said Sir *James* his own Men, Tenants, Vassals and Servants; robbing and taking away of their Goods the foresaid Years 1645, and 1646, in one or other of the Months thereof. Of the which treasonable Deeds, Murders, Fire-raifings, Oppressions, Robberies, and other cruel Acts and Malversations above-mentioned, the said Persons Defendants, and particularly the said Marquifs of *Argyle*, the said *Duncan Campbell* an Officer under the said Marquifs's command, *George Campbell* Sheriff and Justice-Deputy, or one of them,

them, were Authors, Actors, Aiders, Abettors, Assistors, Contrivers and Promoters of the same. And in like manner *Robert Campbell* of *Auchinwilling*, and remanent Defendants aforesaid, or one or other of them, most basely and perfidiously, after the said Capitulation, and contrary thereto, and Our said Laws and Acts of Parliament above-written, in Month of _____ or one or other of the Months above-specified, in the Year of God, 1646, 1647, 1648, 1649, 1650, 1651, 1652, 1653, 1654, or one or other of the said Years, did violently reave and carry away several of the said Sir *James's* Household Plenishing, and did destroy and cut down the whole Plantings in and about the said Sir *James's* House of *Towart*, Orchards, Parks and Walks thereof; and did sell, use and dispoise thereupon, burning spailles and branches of the said Trees, socutted upon the Roots of the same, that they might never grow thereafter; demolishing the Walls of the said House, taking away the great hewed Stones thereof, and building therewith Houses to himself. And also being present at the said bloody and cruel Murders committed at *Denoone*, and a main Actor, Aider, Abettor, Assister, Counsellor and Promoter thereof; as also was a main Actor, Aider, Abettor, Assister, and art and part of the great burnings, hairships, and ryffs committed by the said Defendants, or one or other of them, of the said Sir *James's* own Men, Tenants, Vassals and Servants Houses, in the Year of God 1645, and 1646, in one or other of the Months thereof. Of the which cruel Crimes, Deeds and Malversations above written the said *Robert Campbell* of *Auchinwilling*, and the said Defendants, or one other of them, were main Actors, Aiders, &c. And also the said *John Campbell* of *Ardrariche* and remanent Defendants above-written, or one or other of them, in the said Month of *June* 1646 Years, most villanously, contrary to the said Capitulation, was accessory to the burning of the said Sir *James's* House of *Towart*, and in the said Month was present at the meeting, and a main Counsellor, Aider, Abettor or Assister of the said cruel and bloody Murders, committed at the Village of *Denoone*. And to make the Premises manifestly appear, the said *John Campbell*, by mere Oppression having posselt the Lands belonging to the deceas'd *Duncan Lamond* a murdered Person, particularly the Lands of *Knockdarw*, *Innerchellane*, the Lands of *Lettinggall* and *Towart Fleeming*; and in like manner having by Oppression also posselt himself of the Lands of *Gortamlesk*, *Kilmarnock* and *Brackleys*, pertaining to the said Sir *James*; taking away also, before the burning of his said House, several of the Household-stuff and Plenishing therein. Of the which Deeds and other Crimes above-written, the said *John Campbell* of *Ardrariche*, and remanent Defendants aforesaid, or one or other of them, were Authors, Aiders, &c.

And further *Mr. Colin Macklanachlane*, Minister at *Lochgolisbeed*, being present at the meeting in the said Village of *Denoone*, in the said Month of *June* 1646, most villanously and treacherously, contrary to the said Capitulation, was a main Counsellor, Actor, Author, Aider, Assister, Abettor, Promoter, and Art and Part of the foresaid cruel Murders, committed at the said Village of *Denoone*. And further the said *James Campbell* of *Ardkinglas* Officer under the said

Marquiss's command, accompanied with his Regiment in the Low-lands, at the Village of the *Largis*, in the Month of _____ 1645, adding to his former Cruelties, one

Lamond a Beggar coming to the said *James Campbell*, and craving his Charity, the said *James* caused apprehend the said Beggar, and most cruelly caused Murder and Hang him, without any Ground or Warrant. Of the which cruel Crime of Murder the said *James Campbell* of *Ardkinglas*, and the said Defendants, or one or other of them, were Authors, Actors, Abettors, &c. And moreover the said *James Campbell*, of *Ardkinglas*, Officer under the said *Marquiss's* his command and remanent Persons Defendants aforesaid, intending never to put a Period to their Cruelty, so long as any of the Name of *Lamond* and their Friends and Followers were left, in the Month of _____ 1646, the said *James Campbell* being accompanied with his said Regiment in the

Lowlands, their being brought to him by *Angus Mackilvernock*, *Dermount Campbell*, and the Deceas'd *Francis Campbell* his Brother, one *John Machpatrick* alias *Lamond*, the said *James Campbell* of *Ardkinglas*, and remanent Defendants aforesaid, or one or other of them, caused cruelly Murder and Hang the said *John Machpatrick* alias *Lamond*, and that without any ground or Warrant. Of the which crime of Murder, the said Defendants, or one or other of them, and particularly the said *James Campbell* of *Ardkinglas*, were Authors, Actors, Aiders, Abettors, Assistors, or Art and Part.

And also, *Alexander Campbell* of *Pennymoir*, with certain of his Followers and Complices, upon the Month of _____ 1645 Years, did cease and apprehend, in the Isle of *Comeraw*, one *Robert Lamond* Merchant residenter in *Ireland*, from whence having come about his lawful Occasions, to the said Isle of *Comeraw*, the said Persons did most cruelly and villainously murder and shoot the said *Robert Lamond* to death, at the said Isle: of the which cruel Murder the said Defendants, or one or other of them, and particularly the said *Alexander Campbell* of *Pennymoir*, were Authors, Actors, Aiders, Abettors, Assistors, or Art and Part. And likewise the said *George Campbell*, Justice and Sheriff Deputy to the said *Marquiss* of *Argyle*, still persisting in his wonted Cruelties and Murders, in the Month of _____ 1645 Years, caused murder and hang one *John Dow Maclauchlan* of *Ardnadanne*, at the said Town of *Inverary*, and that without any Ground or Warrant. Of the which cruel Murder, the said Defendants, or one or other of them, and particularly the said *George Campbell*, were Authors, Actors, Aiders, Abettors, Assistors, or Art and Part.

And further, the said *Archibald Marquiss* of *Argyle*, and *George Campbell* his Justice and Sheriff-Deputy, likely never to make an End of their Cruelty, in the Month of _____ 1647

Years, or thereby, did most barbarously, cruelly, and unchristianly murder and cut off *Hector Maccallaster* of _____ and his two Sons, at *Lochhead* in *Kintyre*, they being his Majesty's free Lieges, having received Capitulation from the said Lieutenant-General *David Lesley*, for Life, Lands, Estate and Goods; who according to the said Capitulation did go home to their dwelling House, living peaceably: Notwithstanding whereof the said *Archibald Marquiss* of *Argyle*

Argyle and the said *George Campbell* his said Justice and Sheriff-Deputy, sending for the said *Hector Maccallaster*, and his said two Sons, coming and fearing nothing, they most traitorously and villainously, contrary to the said Capitulation, caused to murder and hang the said Persons at *Lochhead* in *Kintyre*. Of the which cruel Murders the said Defendants, or one or other of them, and particularly the said *Archibald Marquifs of Argyle* and *George Campbell* his Justice and Sheriff-Deputy were Authors, Actors, Aiders, Abettors, Contrivers, Assisters, and Promoters, or Art and Part thereof. As also *Archibald Campbell Evinnochan*, Son-in-Law to the Laird of *Otter*, in the Month of _____ or one or other of the Months respective above-written, in the Year 1646, was Accessory, Art and Part, and Aider, Abettor, and Assister of the foresaid cruel and wicked Murders, committed at the Lands of *Stroane*, and at the foresaid Village of *Denoone*, being accessory also to the robbing and taking away of the Household-stuff and Plenishing of the said Sir *James* his said House of *Towart*, and of the Burning of the same. Of the which cruel Acts of Murders, Robberies, and Fire-raising, the said *Archibald Campbell* was Actor, Author, Abettor, Assister, Contriver, Counsellor, Promoter, and Art and Part thereof.

And likewise the said Marquifs of *Argyle* and *George Campbell* his Justice and Sheriff-Deputy, or one or other of them in the Month of _____ or one or other of the said Months above-written, in the Year of God 1639, or thereby, caused seize upon and apprehend Col. *Mac Gillespy*, alias *Mac Donald*, he being then His Majesty's free Liege, incarcerate him in our said House of *Dunstaffneich*, where he remained Prisoner till the Year 1645, at which time being excambent after the Battel of *Inverlochie* he was taken Prisoner in *Ila* in the Year 1647, being then in his Majesty's Service, and within few Days or Weeks thereafter, the said Marquifs and the said *George* caused most cruelly hang the said Col. *Mac Gillespy*, at our said House of *Dunstaffneich*. And further, the said *Archibald Marquifs of Argyle* and *George Campbell* his Sheriff and Justice-Deputy, or one or other of them, upon the Month of _____ or one or other of the Months above-written, in the Year 1647, or 1648, caused cruelly murder and hang *Ronald Macdonald* Son to the said Col. at *Inverary*.

And also the said Marquifs of *Argyle* and *George Campbell* his Justice and Sheriff-Deputy, most treacherously, traitorously, and perfidiously caused cruelly murder and hang, in the Month of _____ or one or other of the Months above-written, in the Year of God 1647, *Alexander M'coll Vickrounald* alias *Mackallaster* in *Kilmichell* of *Largy*, notwithstanding of a Capitulation granted by the said Marquifs of *Argyle* and Lieutenant-General *Lesley*, or one or other of them: Of the which three cruel Murders immediately preceding, committed at *Inverary* and *Dunstaffneich* the said Defendants, or one or other of them, and particularly the said *Archibald Marquifs of Argyle*, and *George Campbell* his Justice and Sheriff-Deputy, were Authors, Actors, Aiders, Abettors, Assisters, Advisers, Countenancers, and Promoters, or Art and Part.

Of the which treasonable Crimes, Murders, Robberies, Oppressions, and all other Crimes, Misdeeds, and Malversations above mentioned,

or one or other of them, the forenamed Persons above complained upon, and every one of them, at least one or other of them, were Actors, Authors, Abettors, Assisters, Contrivers, Devisers, Consulters, Advisers, or Art and Part. And thereby they and each one of them, at least one or other of them, have incurred the respective Pains and Punishments prescribed by our said Laws, and Acts of Parliament, viz. The Forfeiture of Life, Lands, Dignity, Estates, and Good, the benefit thereof to be applied to Our Use, or such Use as we and our said Estates of Parliament, or those impowered by Us for that effect, shall appoint; at the least have incurred such other Censure and Punishment, in their Bodies, Names, Fames, Estate, and Goods, as we and our said Estates of Parliament, or those impowered or authorized by us for that effect, shall think fit, to be applied, as said is, according to the nature and quality of their several Crimes, Misdeeds and Malversations, done and committed by them, which ought and should be inflicted upon them with all rigour, in example of others.

Our Will is herefore, and we charge you that you lawfully Summon, Warn, and Charge, the whole forenamed Persons, Defendants, above-named as followeth, viz. so many of them as are within this our Realm of *Scotland*, personally, if they can be apprehended, and failing thereof, at their Dwelling-Places, and by open Proclamation at the Market-Crosses of the Head Boroughs of our Sheriffdoms, or other Jurisdictions within the which they dwell; and so many of them as are without the same, by open Proclamation at the Market-Cross of our Burgh of *Edinburgh*, *Peir* and Shore of *Leith*, upon three-score Days Warning, to appear personally before us and our Estates of Parliament, or those impowered or authorized by us for that Effect, at *Edinburgh*, or where it shall happen them to be for the time, the _____ Day of _____ with Continuation of Days to answer at the Instance of our said Advocate, for our Interest, and at the Instance of the said Sir *James Lamont*, for himself, and in Name and Behalf aforesaid, for his Interest above-written. That is to say, the said Defendants, to hear and see it found and declared, verified and proved, in Presence of our said Estates of Parliament, or such as shall be authorized by us and them, that the said Defendants, and every one of them, at least one or other of them, have committed, and are guilty of, the Crimes of *High-Treason*, and other Crimes, *Murders*, *Robberies*, *Oppressions*, *Misdeeds*, and *Malversations*, respective above specified, or one or other of them; at least they, and every one of them, or one or other of them were Authors, Abettors, Contrivers, Devisers, or Art and Part thereof: And the same being so verified and proved, to hear and see it found and declared, by us and our said Estates of Parliament, or those impowered or Authorized by us for that Effect, that the forenamed Persons, and every one of them, have thereby incurred the respective Pains and Punishments, prescribed by our said Laws and Acts of Parliament; and to hear and see the Sentence and Doom of Forfeiture pronounced against them for the same, viz. the Forfeiture and Loss of *Life*, *Lands*, *Dignities*, *Estates* and *Goods*, and the Benefit thereof to be apply to our Use, or such as we or our said Estates

states of Parliament, or those authorized by us for that effect shall appoint; at least to hear and see themselves adjudged to be censured in their *Persons, Names, Fames, Estates and Goods*, as we and our said Estates of Parliament, or those empowered or authorized by us for that Effect, shall think fit, according to the Nature and Quality of their several Crimes, Misdeeds and Malversations, committed and done by them; and to hear and see the foresaid Pains and Punishments decreed to be executed, and inflicted upon them, with all Rigour, in example of others, at the Arbitrement and Determination of us and our said Estates of Parliament, or those empowered and authorized by us for that Effect: With Certification to the Disobeyers, if they be contumacious and appear not, we and our said Estates of Parliament, or those empowered and authorized by us, for that Effect, will then instantly proceed against the said Defendants, and every one of them, who does not appear, as *Rebels and Traitors*, and guilty of *High-Treason* against Us and our Crown, and the Estates of this our antient Kingdom; to the forfeiting of their *Lives, Lands, Estates and Goods*, to be applied as said is; and that their Absence and Contumacy shall be holden, as a manifest Probation of their Guiltiness, without Necessity of any further Probation. But if they appear and remain present at the whole Diets of the Procedure, that then we and our said Estates of Parliament, or those empowered and authorized by us for that effect, will proceed against the said Defenders upon lawful Probation, to the forfeiting of their said *Lives, Lands, Estates, and Goods*, to be applied as said is; or otherwise by punishing and censuring of them, according to the Nature and Quality of their Crimes, Misdeeds, and Malversations, in their Persons, Estates, Goods, Name and Fame, or some other manner of way, as we and our said Estates of Parliament, or those empowered or authorized by us for that Effect, shall think fit and appoint, conform to our Sentence, Decree, and Determination to be given and pronounced by us against the said Defenders therein, according to Justice, to be called summarily without Diet, Table or Continuation of other Summons; because the aforesaid Action is for Crimes of *High-Treason*, and other Acts, Misdeeds and Malversations, committed and done by the forenamed Persons against us, and the Estates of this our antient Kingdom, and the publick Good and Peace of the same; at least, whereof the forenamed Persons Defendants were Aiders, Abettors, Assisters, Consulters, Devisers, Advisers, or Art and Part. And therefore merits summary Process, conform to daily Practick, used in the like Cases, and a Deliverance granted by our Committee of Estates thereanent. Moreover, that you lawfully Summon, Warn, and Charge to appear before Us, and Our Estates of Parliament, or those empowered or authorized by us, for that Effect, the said Day and Place, with Continuation of Days to bear leill and soothfast Witnessing in so far as they know, or shall be asked at them, in the said Matter, under all highest Pain and Charge that after may follow: As you will answer to us thereupon. The which to do we commit to you, conjunctly and severally, our full Power by these our Letters, delivering them by you duly executed, and indorsed again to the Bearer.

Given under Our Signet at *Edinburgh*, the Twenty Eighth Day of *December*, and of Our Reign the Twelfth Year, 1660.

Edinburgh, Jan. 23, 1661. *Ex deliberatione commissionis Parliamenti sic subscribitur.*

Jo. Cunynghame.

Signed by Warrant from the Parliament.

Sic Subscribitur,
W. Sharp.

To which Charge the *Marquiss* put in the following Answer.

I. **T**HIS Libel may appear to any to be framed meerly out of Malice, because it takes in all things (either alledged, spoken, or done) since the Year of God 1638, notwithstanding his Majesty's Royal Father's and his own Acts of Oblivion and Approbation.

II. Because it does not so much as alledge any Reason or Motive for any thing hath been done, nor any End why, or to which any did drive, and so making any Man who was ingaged more malicious than the Devil, and more unreasonable than brute Beasts.

III. It repeats all that hath been done by Kirk or Kingdom, to be the *Marquiss of Argyle's* Deeds, tho he neither was at the beginning of the Business, nor very many of the Particulars mentioned, as the Narration of his Carriage can shew; he shews both the Reasons and Ends of his doing all he did, being meerly for Religion, King and Kingdom, according to the Covenant, never pressing any thing earnestly, but for the Covenant, nor opposing, but when it was refused.

1. Mr. *John Stewart's* Process will clear much of the Falshood of this Point; for tho such a Discourse had been, it was but narratively of a Debate, which was before the sitting of the Parliament, 1640. Wherein Mr. *Alexander Henderson* used those very Words, tho nothing to His Majesty's Disadvantage; and whether I related that Debate, no Man's Memory can be charged with such a thing, after so long a time, and a clear Act of Oblivion of his Majesty's Royal Father, 1641.

2. This is a great Mistake, when the Defender came to the House of *Airly*, *Montross* had put a Garison in it for the Use of the Country, and when I came there with the Country's Order, *Sibbald*, who was in it, upon sight of my Commission did presently leave it; and the Earl of *Airlies* own Friends knows, except what Bushes were cut for Hutting to Soldiers, I had no Use to cut the Planting; and my Stay there a few Days was, expecting the Lord *Ogilby*, whose Friends were gone to him for that Purpose, and the slighting of the House was then a Favour, his Order being more strict, and I believe his Friends or Tenants had no Loss to my Knowledge: As for burning the House further in *Glenyla*, the Defender knew nothing of it at all, until some Days after it was done; and howsoever, it was included in the Act of Oblivion, 1641.

3. Some

3. Some Men indeed, named under my Command, lay at *Dumbarton*, by order of Committee and Parliament, whereby that Garison was loth to come abroad, and so many of them fell sick; whereupon Sir *John Henderson* sent for me, that I might come to the Castle and receive it from him upon honourable Terms, which I did, and suffered him to make his own Articles, for Matter of Honour: And I transported none of the Cannon, but when his Majesty was in *Scotland*, 1641, the Duke of *Richmond* did give the Defender two Cannon, this is known to many; this Business is likewise before the Act of Oblivion, 1641.

4. This is answered formerly, there is added a Promise of mine, which needed not been mentioned, for I acknowledge my many Obligations to his Majesty, as strong as that Promise could make it: And it were to wrong his Majesty, to say he desired any Promise to take away that, which his Majesty commends so much in the large Treaty, *Scotland's* Desire of Unity in Religion, and Uniformity in Church-Government, as a special Means for conserving of Peace betwixt the two Kingdoms; neither did *Scotland* at all joyn with any Army in *England*, in League and Covenant, but with the two Houses of Parliament.

5. I neither did burn, nor give Order to burn the House of *Menstre*, tho I had great Provocations to it, the Day before *Menstre* was burnt, the whole Houses of two Parishes, whereof I was only Superior, was burnt, and many poor Families put to extreme Necessity by it: And a Son of the Earl of *Stirling*, who had *Menstre* in possession, by comprising, did concur with the Actors of so cruel a Fact, to poor People, that were not wronging them at all; himself, and his Father before him, not only holding the same of me, but in effect without Money; I and my Father gave them the Land; and when many Years few Duties had run on, I myself discharged that Lady of the same, amounting to a considerable Sum; so far do I abhor to be ungrate, tho I have often met with such Dealing; howsoever the 30th Act, 1647, for liberating the good Subjects from the Pursuit and Actions of the Rebels, Civil or Criminal, would suffice.

6. This is answered formerly, and it is a most unjust Calumny.

7. There are three or four things in this Article: 1. Concerning the Men in Loathhead and *Dunavarty*. 2. An old Man begging his Son's Life denied. 3. Sending 200 Men from *Yla*, to starve in *Jura*. 4. The carrying of Col. *Mac Gillepie* from *Leith Road*, being brought there by order of Committee of Parliament. To these, I desire it may be known that in May or June, 1646, his Majesty sent Orders to *Alexander Mac Donald*, and all under him, to lay down Arms; of the which Number these Men in *Kintyre* were a part, who continued in Arms contrary to his Majesty's Order. Next, I desire it may be known, they were lying under Engagements not to have joined with *Alexander Mac Donald*, notwithstanding all which they were in Arms, fighting against *David Lesly* and his Party; yea, after *Alexander* was beaten, they refused to come to him, when other Countrymen did; and went to the House of *Lochhead* and *Dunabarty*, out of which *David Lesly* took them, without any Capitulation, and disposed of them as the Council of War thought

fit, which the Defendare cannot be charged with. For the Second, of the old Man's Request for his Son, he never heard of any such thing before he saw this Libel, so he conceives it to be a Fiction; and just so of the third, for the Defendare was never in *Yla* nor *Jura*, but with *David Lesly*, and he does not remember any Colour for such a Discourse. For the 4th, of Col. *Kittack's* bringing to *Leith Road* by order of either Committee or Parliament, is a meer Fiction, he was taken Prisoner in *Yla*, by the Party under *David Lesly*, and delivered to me; and I put him aboard of Captain *Brown's* Ship, who undertook to deliver him at *Dunstaffage*, but Captain *Brown* not being willing to lose the Opportunity of a fair Wind, did not go to *Dunstaffage*; but went streight to *Leith Road*, and immediately gave me Notice he had my Prisoner aboard, whom I received from him, and sent to *Dunstaffage*; Captain *Brown*, I think, lives at *Weymes*, who can declare this. One thing I shall add in general, that I thank the Lord, by his Grace helping me, I never took any Man's Life, but what was done in Conflict, or by Order of Law, for notorious Crimes, according to standing Acts of Parliament.

8. It is well known I was in *Ireland* by Commission for the getting Assistance of the *Scots* Army against those in Arms in *Scotland* when his Majesty came to the Army before *Newark*, so that his Majesty's Declarations anent his Majesty's gracious Intention and Resolution in coming to the *Scots* Army, was sent both to the Committee of Estates of *Scotland*, and to the two Houses of the Parliament of *England*, before I came to *Newcastle*; his Majesty's Declarations were all recorded in the Committee Books, and printed, that his Majesty came not with any Intention to continue that unnatural War any longer, or to make any Division betwixt the Kingdoms, but to comply with his Parliaments, and those intrusted by him, in every thing for settling Truth and Peace; and that he would apply himself totally to the Counsels and Advices of his Parliaments: Upon which the Committee of the Parliament of *Scotland*, and the General Officers of the *Scots* Army, declared to his Majesty himself, and the two Houses of the Parliament of *England*, their receiving his Majesty was upon these terms: All this was done before the Defender come to *Newcastle*, after his Majestys's coming there to the *Scots* Army: In this Article these, whom his Royal Majesty who then was, and his gracious Majesty who now is, calls his Parliaments, are called a Factious Party, and the Defender the Ring-leader. It is said in this Article, that I went to *London*, but omits to tell, by his Majesty's and Commissioners Order at *Newcastle* as one of the Commissioners; and only carried Instructions to the rest of the Commissioners at *London*, for hastning the Propositions: And likewise from his Majesty was commanded to take the Advice of the Duke of *Richmond* and Marquiss of *Hartford*, anent what might concern his Majesty; and particularly, if it was adviseable that the *Scots* Army should declare for his Majesty, wherein they told me, and conjured me to tell it to his Majesty, That it was the only way at present inevitably to ruin his Majesty, and desired me to shew it to his Majesty in these Terms, that himself knew, neither the Nobility nor Gentry of *England*, who attended his Ma-
jesty

jeſty at *Oxford*, deſired him altogether to prevail over his Parliament by his Sword, much leſs would they indure the *Scots* Army to do it, that would make all *England* as one Man againſt his Maſteſty; therefore deſired his Maſteſty might by any means give way to the Propoſitions, no other being left, which could be of Advantage to his Maſteſty. This very Advice he delivered to his Maſteſty at *Newcaſtle*, and told the ſame to his Maſteſty, who now is, when he was in *Scotland*, and intreated the Lieutenant of the Tower of *London* to propoſe for me that the Marquiſs of *Hartford* then living, might be examined in this, but he put it off from time to time, becauſe of other great Affairs in hand. It muſt likewiſe here be remembred, that at that time the two Houſes of the Parliament of *England* was ſitting fully and freely, and neither Independent nor Sectaries were able to carry one Vote in the Houſes: And that the Houſes declared fully their Reſolution for Maintenance of his Maſteſty's Perſon and Authority; and ſuch of them who attended his Maſteſty moſt, were moſt for the diſbanding of the *Scots* Army, and his Maſteſty's ſtaying in *England*. Next obſerve this Article, that it is a great miſtake that any thing done at *London*, concerning leaving the King in *England*, when the Defendare was at *London*, that Alledgeance of a Diſcourſe of mine in the Committee of both Kingdoms muſt be likewiſe forged; for as is ſaid there was nothing moved at that time concerning his Maſteſty's Perſon, but meerly for the Army, and what concerned their Satisfaction; ſo that I think the Army, at leaſt to my Knowledge, emitted no ſuch Declaration. And tho they had done it, I may ſay, I was never at any of their Conſultations; let them answer for their own Deeds. And to what the Parliament did, no Man was ever yet made answer for ſuch things, eſpecially where the lawful King hath approved the Parliament as a lawful Parliament: No ſucceeding King will ever queſtion his Predeceſſor's Acts, much leſs can a King in Honour queſtion any Man for acting in a Parliament, which himſelf hath approved. And of ſuch nature are the moſt part in this Libel; yea all of them except Words before 1651. So I may ſay without offence, it were more for his Maſteſty's Honour and this Kingdom, to think on a Declaration vindicating the Parliament of *Scotland* from ſuch Acts, than ſo unjuſtly to lay ſuch foul things on them, and call them a factious Party.

9. It is to be obſerved, that the meeting of Parliament, 1648, is called the Eſtates of Parliament met by his Maſteſty's ſpecial Authority, and it was ſo indeed, being one of the Sessions of Parliament, 1644. And in the firſt place there is a great Miſtake; for no Propoſition was made after the Vote of Parliament, the Proteſtation itſelf will clear this, as is ſaid in the former Libel. I did not come to wait upon the Committee of Eſtates after *Preſton*, but being called, and of neceſſity conſidering the times; neither went I unſent to *Mordington*, neither did the Invader *Cromwell* bring his Army into *Scotland*, only that he reſolving to propoſe ſome things to the Committee, which the Books will clear, he brought a ſmall Party with him to *Lothian*, and the ſtopping him from bringing in his Army, and that he did not require Pledges and the Strengths of the Kingdom, was thought a Mercy at that time

both to thoſe who returned out of *England*, and all the Nation: the Margine doubtleſs in one branch is miſtaken, at leaſt as to me, no Man can ſay he heard me; and neither his ſayings nor doings was juſtifiable; for the Truth, is he declared always he would not remove until he had *Berwick*; and the Informers may imagine that was in my Power, and he did remove: and when that was done, what Inſtructions were ſent to, or with Sir *John Cheeſly* were neither of my Dyting or Writing.

10. Being well known how active and inſtrumental the Defendare was in every thing concerning his Maſteſty's Reſtitution to his Crowns and Royal Authority, this Clause or Article is purpoſely for ſoyling his faithful Service, but his Maſteſty both knows and hath aknowledged the contrary of this by Word and Write. And for what concerns the Marquiſs of *Montroſs's* Death, I neither conſulted nor voted in the manner nor matter of it, tho it was done in Parliament. The next Point in this Article is correſponding with *Cromwell* after his Maſteſty came to *Scotland*, which is moſt falſe; the like was ſaid and recanted by *Hamilton*, who was a Spy, and ſo was hanged at *Sterling*.

For any Declaration at the *West-Kirk*, I had no hand in it by Word, Writ nor Meſſage, but on the contrary I did deal with ſome Miniſters who came from the Commiſſion of the Kirk, to forbear preſſing of his Maſteſty; and where ſome of his Maſteſty's Bed-chamber deſired that I might deal with his Maſteſty to ſign it, I told them I could not well preſs the King to a thing he ſaid was ſo contrary to his Conſcience, ſeeing it reflected as he thought on his Royal Father; but to ſpeak to the King I would not reſuſe, and if the King had done for a Deſire, I know no crime in it.

11. There are ſome things in this Note in the former Libel, as joining with Colonel *Twiſſeton* in his March up *Lochlomount*; he knows, and I hope will not deny, that before I went with him, he told me that one *Wakmſha* was with him, whether from the Earl of *Glencairn* himſelf, or from General *Monk*, concerning him, I do not remember; but he ſaid the Earl of *Glencairn's* Buſineſs was as good as ended, and except I went with him, I could not but miſs General *Monk*, who had ſent for me, who was upon March, but that he was to meet with him, or hear certainly from him the Day he was going, and all things did fall out accordingly, and being under a Capitulation, I did not know why I might not be in their Company, being reſolved never to join with them in any Action.

As for having a Company of Foot under their Pay, it is a Miſtake; the Shire of *Argyle*, truſted me with a Watch for the Shire of *Argyle*, which is moſt ordinarily in all Places of the *High-Lands*, in broken Times; I made it known to General *Monk*, the poor Country not being yet well planted after the burning, could not be able to pay Cefs and entertain the Watch: he was pleaſed to promiſe once Help for a hundred Men, but I hope his Grace will not ſay that ever he required any Engagment of them as Soldiers, nor ever employed he them at all; but becauſe they did not oppoſe my Son, he would not continue his Aſſiſtance to the Shire any longer, and ſpoke againſt me what his Grace pleaſed for my Diſſatisfaction to the *Engliſh*.

And

And for exchanging Prisoners, it is a Mistake; two Men, who had been in *Roseneth*, whereof I have Charge, come from thence, shortly after my Boat, in the Twi-light; going up *Clyd* to see General *Monk*, whom I had never seen before, I staid for them, thinking it had been some poor Men flying from Abuses, but coming aboard, they alledged they were Men belonging to the Earl *Glencairn*, which I doubted; however, I chid them for coming that way, and for abusing the Country where they came; I told them I would only leave them at *Dumbarton* until I returned from *Kilfyth*, where General *Monk* was, and in the mean time, that they might not suffer any thing, desired they might deliver any Arms or Moneys they had to a Servant of mine, and all should be safely returned, as it was done at my return; and that they might not go as by way of any Exchange, I would not suffer them to be enrolled by Captain *Thompson*, who was exchanging some Prisoners at my Return, but got them from him, and sent them back, without any Capitulation or Exchange, tho some Men, I have forgotten who it was, about that time, took out of *Dumbarton* some of my Boat-Men, and returned them to me, without any Treaty or Capitulation for that Effect. Because it's said the Earl of *Glencairn*, and *Middleton* were commissioned by his Majesty; I can say truly I never knew it, neither did any of their Honours so much as by Word, Writ, or Message, intimate so much to me; if they had, I am confident I had satisfied them concerning my Carriage: And because of this, tho there was some Hazard in it to me, I did desire to meet with his Grace the Earl of *Middleton*, in the Hills, but I got no Answer; whether the Messenger dealt faithfully I know not, but I believe his Grace knew so much, and the necessary Reasons I gave for the unreasonableness of that stirring, all which I am ready yet to declare, which doubtless will satisfy any.

As for my taking upon me to bring off any, it is certain a Mistake, for the Person mentioned, *John Mac-Dowgal* of *Downolleith* was not at all engaged in that Service, when the Earl of *Glencairn* and *Middleton* was in the Fields.

A Short Answer to the Libel and Dittay given in upon the 28th Day of January.

BEfore I say any thing particularly, I must difference all can be said against me, first in these Heads, and that is before his Majesty's going out of *Scotland*, 1651, and since the *Cromwell* killed and took possession, until his Majesty's Happy Return, in *Anno* 1660.

These again, which were acted before His Majesty left *Scotland*, in *Anno* 1651, of Publick Concernment. 2. Of Private, relating to particular Persons: Nor for these things wherein I was an Actor, in relation to the Publick Concernments, I never acted without the Approbation of Parliament and General Assemblies, ratified by his Majesty's Royal Father and Himself.

And so the Second, relating to particular Persons, I never had Accession to any thing but what is warranted by Act of Parliament appro-

ven by his Majesty and his Royal Predecessors, for my Acting, after his Majesty left *Scotland*, 1651, until his Majesty's Happy Return, 1660, I was still a Prisoner on Demand, and had no Agreement nor Capitulation with the *English*, after his Majesty went, until *August* 1652, being long after the Deputies had taken the Tander, and were gone to *London*; and all others in Arms had capitulate, and that all the rest in *Scotland* were living peaceably at their own Houses, except my Kinsmen and Vassals in *Argyle-Shire*, and the Invaders in full Possession of the Power and Government, and never did then capitulate but out of Necessity.

An Answer to the particular Articles of the Libel.

1. The Commissioners for Conservation of the Peace, established by his Majesty in the Parliament, 1641, were to look to the keeping of the Articles of the large Treaty, whereof the Endeavours to procure an Uniformity in Religion was One; and that *Montrose*, and others, censured by Parliament, should not have Access to his Majesty: And when these Commissioners found these Things slighted, and themselves unequal for such a Burden, they met with the Privy-Council, and they both, with the Committee of Common Burdens, and all of them together, invited a Convention of Estates, and what they did anent their Application to his Majesty, and their Desire of settling Differences betwixt Him and his People, and the League and Covenant, is set down particularly in the Ratification of Parliament, 1644, which Parliament was called and convened by his Majesty's special Authority, and which the said Parliament was never disclaimed, but owned by his late Royal Majesty and is the Foundation of all that followed, even of the Parliament 1649, which is not only approved by his Majesty, but by it his Majesty was called home and crowned, and from it the last Committee which met (before this Parliament) had then Power; so all that was done 1643, is fully ratified by his Majesty in Parliament.

2. For this it was done in publick Parliament, where all the same Members who sat in 1648 were present, and it is likewise ratify'd by his Majesty; and it was conceived inevitable and best for his Majesty, as matters stood for the time being, the least of two evils: and no Man then imagined his Majesty's Person nor Government in any hazard.

3. No Protestation 1648, against any Act of Parliament, the Protestation itself will witness, and it was before the Vote in Parliament, the difference then may be mentioned, for it was not as it is reported commonly.

4. The Defender was pursuing no Forces, but coming to meet with the Committee 1648, after the defeat at *Preston*, being to consult what was best, fearing no harm (being at *Sterling*) was invaded by *George Monro* and others, and some of his Friends who were with him were killed, and others taken Prisoners.

5. There was no Invitation, so far as the Defender knows, at all to *Oliver Cromwell* to come into *Scotland*, but on the contrary, an earnest endeavour was to keep him out by fairness, which could not be done by force, as the Acts of Com-

mittee and Treaty at *Sterling* can shew : And for *Cromwell's* visiting of *Edinburgh* and *Edinburgh Castle*, and of visiting of him in it, the Defender was no Keeper of the said Castle.

6. The Defender acknowledges his Oath, and he did not desert either his Majesty or his Army, but his stay behind his Majesty in *Sterling* was by his Majesty's own Allowance, because of his Wife's dangerous Sicknefs.

7. The Defender's Capitulation is not as Libelled, for he agreed not to the Government, tho he agreed to live peaceably under the Parliament of the Common-wealth of *England*, and mention not without King and House of Lords, which he particularly refused, as the Paper which he was prest to sign, yet extant, can shew ; and never yielded to the same Articles which he signed, while he was a Prisoner in the Hand, and at such a time when he could not make any Escape, being heavily diseased, as *Dr. Cunningham* and many others know, who were with him the same time, it being, as in the Preface, in *August 1652*.

8. He was hardly able to come out of his Chamber, when the Forces went out of *Argyleshire*, so he was not present ; but I think hardly could 200 or 300 Men stop the passing of two strong Regiments of Foot, *Overton* and *Read*, and about 300 Horse commanded by *Blackmore*, when that Year all his Hills and Bogs were as passable as the best Highways in that Country : and tho the Defender had done it, it was but according to his Articles, which he could not then alter ; and sure no Man can think it a Crime.

9. The Defender did not accept any Commission at that time, but refused to be in the Parliament ; and was resolved to forbear still, if Necessity had not compelled him afterward.

10. Did sell some Cannon to *Dean*, when he told him he would not suffer him to keep them.

11. There is a Mistake, or call it what you will, in this Article, for Col. *Cobbet* had ended his Expedition when some of his Ships were broken in *Mull*, one Company went by Land and was not so much as challenged ; and if the Defender had not given some way to go thro' the Country, it would have been accounted a breach of Articles, or if he had staid upon free Quarter in the Country, until he had sent to *Air* for new Provision, it would have ruined that part of the Country, for it was not so much want of Shipping, as Provision, made him go the Land-way ; and if I had betrayed him, I know no Man could like a Traitor, howbeit they had liked the Treachery : neither was *Glencairn* in the Fields, nor the Earl of *Middleton* in *Scotland* at that time, nor had any Man Commission from his Majesty, for any thing he knows.

12. It is a General only, so it cannot but have a general Answer, that is, most false.

13. This Article is mistaken, it was at proclaiming *Oliver* that I was as present ; being occasionally in Town, I was commanded by General *Monk* to wait on the Council, before I knew any intention of such a Proclamation.

14. This Article is mistaken also. I was desired by *Aberdeenshire* to go for them to *London* in *Richard's* time. I had refused likewise to go then, as I had in *Oliver's* time, if I had not been

driven by Necessity to it out of respect to Religion, my native Country, and to preserve myself from utter ruin, not without hopes but something might have been thought upon for his Majesty, because of the freedom of Elections in *England* : and as nothing was so much as mentioned at that time to his Majesty's disadvantage ; so the Breach was there made, by which his Majesty entered by the Lord's Blessing thereafter ; this I told to several was most probable. When I came back to *Scotland*, my endeavour to stop the Act of Union, until three things were first or jointly done, shews my Resolution for my Religion and Country. The Three things were, That our Laws and Judicatories might stand until they should be altered by common Consent. 2. That our Religion in Doctrine, Worship, and Discipline, might stand according to the Covenant. 3. That the Asses of *Scotland* might be made proportionable with *England*. I did to several declare, the Union could not be without these, and I was told likewise, that these would never be granted. My own necessity was to get off a most unjust decreat of great Sums laid upon me, by that called the *Exchequer* in *Scotland*, which was impossible for me to pay ; this I shall make clearly to appear : And beside all this, my going was not until the Invaders had been past seven Years in Possession by consent, and that all the Lawyers did plead their Authority and Ordinances as Laws.

15. It was well known I was hard prest to accept that, and did it never, until the poor People in whom I was nearly concern'd, were in great Difficulties for want of Justice ; and I would not then embrace it, but with a Protestation, tho it was long after the Invaders possession, and that there was no other visible Power nor Authority.

16. I can say nothing to this, but it is a most false Calumny say it who will ; and I hope when it comes to be particular in the Circumstances it will appear to be so : for ever when the *English* were at *Inverary*, the Parish Minister Mr. *Alexander Gordon*, my own Chaplain, in his Family prayed constantly for his Majesty, and myself in Company did always pray for such whom we were engaged to, by either Natural, Civil, or Christian Bonds.

17. I can say to this as to the former, and that it cannot be true, because that brake out only upon the Earl of *Calender's* marching to the West, whereof it is not said he was privy ; and tho it were true, all that Business is approved in Parliament, ratified by his Majesty.

18. This is a great Mistake, I had no such Precept, but I had by Act of Parliament of *Scotland*, the half of Excise of Wines and Strong-waters in *Scotland*, for Payment to me, for a great Sum laid out by me for the *Irish* Army, and by my Articles I was to enjoy my Liberty, and these Debts due to me : and when I craved performance of my Articles, 1657, the Protector would not let me have the Excise, but only so much yearly out of it, until I were satisfied ; wherein I had not what I ought, so far was it from favour.

19. I did never correspond with *Richard Cromwell*, nor *Fleetwood*, except in order to my own Affairs, nor with Sir *Archibald Johnston*, either to the prejudice of King or Country, or to my Memory at all after the Committee of Safety met.

20, 21, 22, 23, 24, 25. To all these answers, *Ardkinglas* had his Commission as Colonel from the Parliament, or Committee, and not from him, and if he pursued *Lamond* doubtless it was as a Rebel at that time to the Estate of the Kingdom, according to Act and Declaration of Parliament, approved of by his Majesty, and his Royal Father, and Predecessors; so what *Ardkinglas* or any other did to *Lamond*, let them answer for what they did unwarrantably, it cannot reflect on him, but he hopes they will clear themselves.

26. The Defender was in *England* when *Lamond* was brought out of his House, and knew nothing of the Business, until he received Letters shewing what had past, and that *Lamond* had refused to return *Alexander Mac-Donald*, according to his Capitulation, chusing rather to remain a Prisoner with the Defender. The Paper itself may be found if he deny, whereupon he was detained Prisoner, having no Security to give; and having so often sworn and promised and after failed, which will be shewn under his Hand, and having murdered so many People, Men, Women and Children, several of them after quarter given, beside the Burning of many Gentlemen his Neighbours Houses, and destroying their Goods and their Lands, and going in to *Alexander Mac-Donald*, notwithstanding he was in service against him with the Defender, not having fairly exonerated himself. This can be all clearly instructed, and if this was not Cause to keep him a Prisoner, let any judge.

27. He knew not nor remembers not any such things, so it is but forged against him.

28. He caused no such thing, it was a thing done for his own entertainment; and the Defender being to secure *Lamond* for some just Debts due to himself, the Captain of *Dunstaffage* desired his Bond likewise to be pursued in the Defender's Name, which the Gentleman himself can shew.

29. The Marquiss is in Possession of none of their Lands to his knowledge, if he were, it is a legal civil process.

30. He never knew any such thing.

31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44. To all these let every Man answer as he is concerned, as he hopes they will clear so; but this he must say for himself and his Depute, That it cannot be said they murdered any of these Men with their own Hands, neither did they judge any Man to die by the Hand of Justice, but such who were notoriously guilty according to standing Laws; and no Man can justly say any Man was ever processsed before them who had received any Articles, tho it was never conceived by any Judicatory in *Scotland*, that any Man taking a Rebel could pardon him, except the Person doer of it had particular Warrant for that effect: otherwise the Committee after *Philliphauge* had been much to blame for ordaining so many to be processsed, at which Committee were the sentencing of such who died at *Glasgow* shortly thereafter, at which the Defender was not present.

The Proceedings hereupon are thus related by Bishop Burnet in his History of his Own Times, Vol. I. p. 122, &c.
VOL. V.

He had Counsel assigned him, who performed their part very well; the Marquiss made a long Speech himself, wherein he chiefly insisted, That during the late Wars he was but one among a great many more: He had always acted by Authority of Parliament, and according to the Instructions that were given him, as oft as he was sent on any Expedition or Negotiation. As to all things done before the year 1641, the late King had buried them in an Act of Oblivion then passed, as the present King had also done in the Year 1651: So he did not think he was bound to answer to any Particular before that time. For the second head, he was at *London* when most of the Barbarities set out in it were committed: Nor did it appear that he gave any orders about them. It was well known that great Outrages had been committed by the *Macdonalds*; and he believed his People, when they had the better of them, had taken cruel Revenges: This was to be imputed to the heat of the time, and to the tempers of the People, who had been much provoked by the burning of his whole Country, and by much Blood that was shed. And as to many Stories laid to the charge of his Men, he knew some of them were mere Forgeries, and others were aggravated much beyond the truth: But what truth soever might be in them, he could not be answerable but for what was done by himself, or by his Orders. As to the third Head of his Compliance with the Usurpation, he had stood out till the Nation was quite conquered: And in that case it was the received Opinion both of Divines and Lawyers, that Men might lawfully submit to an Usurpation, when forced to it by an inevitable necessity. It was the epidemical Sin of the Nation. His Circumstances were such, that more than a bare Compliance was required of him. What he did that way was only to preserve himself and his Family, and was not done on design to oppose the King's Interest. Nor did his Service suffer by any thing he did. This was the substance of his Defence in a long Speech, which he made with so good a grace and so skilfully, that his Character was as much raised as his Family suffered by the Prosecution. In one Speech, excusing his Compliance with *Cromwell*, he said, What could he think of that matter, after a Man so eminent in the Law as his Majesty's Advocate had taken the Engagement? This inflamed the other so much, that he called him an impudent Villain; and was not so much as chid for that barbarous Treatment. Lord *Argyle* gravely said, he had learned in his Affliction to bear Reproaches; but if the Parliament saw no Cause to condemn him, he was less concerned at the King's Advocate's railing. The King's Advocate put in an additional Article, of charging him with accession to the King's Death, for which all the proof he offered lay in a presumption: *Cromwell* had come down to *Scotland* with his Army in September 1648, and at that time he had many and long Conferences with *Argyle*; and immediately upon his return to *London* the Treaty with the King was broken off, and the King was brought to his Trial: The Advocate from thence inferred, that it was to be presumed that *Cromwell* and *Argyle* had concerted that matter between them. While this Process was carried on, which was the solemnest

lemnest that ever was in *Scotland*, the Lord *Lorn* continued at Court soliciting for his Father; and obtained a Letter to be writ by the King to the Earl of *Middletoun*, requiring him to order his Advocate not to insist on any publick Proceedings before the Indemnity he himself had pass'd in the Year 1651. He also required him, when the Trial was ended, to send up the whole Process, and lay it before the King, before the Parliament should give Sentence. The Earl of *Middletoun* submitted to the first part of this: So all farther Inquiry into those Matters was superseded. But as to the second part of the Letter, it looked so like a distrust of the Justice of the Parliament, that he said, he durst not let it be known, till he had a second and more positive Order, which he earnestly desired might not be sent; for it would very much discourage this Loyal and Affectionate Parliament: And he begged earnestly to have that Order recalled; which was done. For some time there was a stop to the Proceedings, in which Lord *Argyle* was contriving an escape out of the Castle. He kept his Bed for some Days: And his Lady being of the same Stature with himself, and coming to him in a Chair, he had put on her Clothes, and was going into the Chair: But he apprehended he should be discovered, and his Execution hastened; and so his Heart failed him. The Earl of *Middletoun* resolved, if possible, to have the King's Death fastened on him. By this means, as he would die with the more Infamy, so he reckoned this would put an end to the Family, since no Body durst move in favour of the Son of one judged guilty of that Crime. And he, as was believed, hoped to obtain a Grant of his Estate. Search was made into all the Precedents of Men who had been at any time condemned upon Presumption. And the Earl of *Middletoun* resolved to argue the Matter himself, hoping that the weight of his Authority would bear down all Opposition. He managed it indeed with more force than decency: He was too vehement, and maintained the Argument with a strength that did more honour to his Parts than to his Justice or his Character. But *Gilmore*, tho' newly made President of the Session, which is the supreme Court of Justice in that Kingdom, abhorred the Precedent of attainting a Man upon so remote a Presumption; and looked upon it as less justifiable than the much decried Attainder of the Earl of *Strafford*. So he undertook the Argument against *Middletoun*: They replied upon one another thirteen or fourteen times in a Debate that lasted many Hours. *Gilmore* had so clearly the better of the Argument, that, tho' the Parliament was so set against *Argyle* that every thing was like to pass that might blacken him, yet, when it was put to the Vote, he was acquitted as to that by a great Majority: At which he expressed so much Joy, that he seemed little concerned at any thing that could happen to him after that. All that remained was to make his compliance with the Usurpers appear to be Treason. The Debate was like to have lasted long. The Earl of *Lowdun*, who had been Lord Chancellor, and was counted the eloquentest Man of that time, for he had a copiousness in speaking that was never exhausted, (he was come of his Family and was his particular Friend,) had prepared a long and learned Argument on that Head. He had gathered the

Opinions both of Divines and Lawyers, and had laid together a great deal out of History, more particularly out of the *Scottish* History, to shew that it had never been censured as a Crime: But that on the contrary in all their Confusions the Men who had merited the most of the Crown in all its shakings, were Persons who had got credit by compliance with the side that prevailed, and by that means had brought things about again. But, while it was doubtful how it would have gone, *Monk* by an inexcusable Baseness had searched among his Letters, and found some that were writ by *Argyle* to himself, that were hearty and zealous on their side. These he sent down to *Scotland*. And after they were read in Parliament, it could not be pretended that his Compliance was feigned, or extorted from him. Every body blamed *Monk* for sending these down, since it was a betraying the Confidence that they then lived in. They were sent by an Express, and came to the Earl of *Middletoun* after the Parliament was engaged in the Debate. So he ordered the Letters to be read. This was much blamed, as contrary to the Forms of Justice, since Probation was closed on both sides. But the reading of them silenced all farther Debate. All his Friends went out: And he was condemned as guilty of Treason. The Marquis of *Montrose* only refused to vote. He owned he had too much Resentment to judge in that matter. It was designed he should be hanged, as the Marquis of *Montrose* had been: But it was carried that he should be beheaded, and that his Head should be set up where Lord *Montrose's* had been set. He received his Sentence decently, and composed himself to suffer.

The Day before his Death he wrote to the King, justifying his Intentions in all he had acted in the Matter of the Covenant: He protested his Innocence, as to the Death of the late King: He submitted patiently to his Sentence, and wished the King a long and happy Reign: He cast his Family and Children upon his Mercy; and prayed that they might not suffer for their Father's Fault.

On the 27th of *May*, the Day appointed for his Execution, he came to the Scaffold in a very solemn but undaunted manner, accompanied with many of the Nobility and some Ministers, when he spake as follows.

MANY will expect that I speak many things, and according to their several opinions and dispositions, so will their expectations be from me, and constructions of me: But I resolve to disappoint many, for I come not hither to justify myself but the Lord, *Who is Holy in all his Ways and Righteous in all his Works, holy and blessed is his Name*: Neither come I to condemn others. I know many will expect that I will speak against the hardness of the Sentence pronounced against me; but I will say nothing to it. I bless the Lord, I pardon all Men, as I desire to be pardoned of the Lord myself: Let the Will of the Lord be done; that is all that I desire.

I hope ye will have more Charity to me now, than ye would have had at another time, seeing I speak before the Lord, to whom I must give an account very shortly. I know very well that my Words have had but very little weight with many: And that many have mistaken my Words

and

and Aðings both: Many have thought me to be a great Enemy to these great Works, that have of late been brought to pass. But do not mistake me, good People: I speak it in the presence of the Lord, I entered not upon the Work of Reformation with any design of advantage to my self, or prejudice to the King and his Government; as my latter Will which was written 1655, and thereafter delivered to a Friend (in whose hands it still remaineth) can show. As for these Calumnies, that have gone abroad of me, I bless God, I know them to be no more: And as I go to make a reckoning to my God, I am free as to any of these, concerning the King's Person and Government. I was Real and Cordial in my desires to bring the King home, and in my Endeavours for Him when he was at home, and I had no Correspondence with the Adversaries Army, nor any of them, in the time when his Majesty was in *Scotland*: Nor had I any Accession to his late Majesty's horrid and execrable Murder, by Counsel or Knowledge of it, or any other manner of way; This is a Truth, as I shall answer to my Judge. And all the time his Majesty was in *Scotland*, I was still endeavouring his advantage; my Conscience beareth me witness in it. So much to that Particular. And (*turning about he said*) I hope, Gentlemen, you will all remember these.

I confess, many look on my Condition as a *Suffering* Condition: But I bless the Lord, that he that hath gone before me, hath trod the Wine-press of the Father's Wrath, by whose Sufferings I hope that my Sufferings shall not be eternal. I bless Him that hath taken away the sting of my Sufferings: I may say that my Charter was sealed to-day; for the Lord hath said to me, Son, be of good cheer, thy Sins are freely forgiven thee: And so I hope my Sufferings shall be very easy. And ye know the Scripture saith, the Captain of our Salvation was made perfect by Sufferings.

I shall not speak much to these things for which I am condemned, lest I seem to condemn others: It is well known, it is only for *Compliance*, which was the Epidemical Fault of the Nation. I wish the Lord to pardon them: I say no more.

There was an Expression in these Papers presented by me to the Parliament, of the *Contagion of these Times*; which may by some be misconstrued, as if I intended to lay an Imputation upon the Work of Reformation: But I declare that I intended no such thing; but only related to the corruptions and failings of Men, occasioned by the Prevailing of the Usurping Powers. *At this he turned and took them all Witnesses.*

Now, Gentlemen, concerning the Nation, I think there are three sorts of People that take up much of the World and of this Nation. There is, 1. The openly Profane. And truly I may say, tho I have been a Prisoner, I have not had mine Ears shut; I hear assuredly, that Drinking, Swearing, Whoring were never more common, never more countenanced than now they are. Truly, if Magistrates were here I would say to them, if they lay forth their power for glorifying of God, by restraining this, they should fare the better; if they continue in not restraining, they shall fare the worse. I say no more, but either let People shun Profanity and Magistrates restrain it, or assuredly the

Wrath of God shall follow on it. 2. Others are not openly profane (every one will not allow that) but yet they are *Gallies* in the matter: If matters go well as to their Private Interest, they care not whether the Church of God sink or swim. But whatever they think, God hath laid Engagements upon *Scotland*: We are tied by Covenants to Religion and Reformation: these that were then Unborn are yet engaged; and in our Baptism we are engaged to it. And it passeth the Power of all the Magistrates under Heaven to absolve them from the Oath of God: They deceive themselves, and it may be would deceive others that think otherwise. But I would caveat this, People will be ready to think this a kind of Instigation to Rebellion in me; But they are very far wrong that think *Religion* and *Loyalty* are not well consistent. Whoever they be that separate them, Religion is not to be blamed, but They. It's true, it is the Duty of every Christian to be Loyal, yet I think the Orders of things are to be observed as well as their Natures; the Order of Religion as well as the Nature of it. Religion must not be the Cockboat, it must be the Ship. God must have what is his, as well as *Cesar* what is his: And those are the best Subjects that are the best Christians. And that I am looked on as a Friend to Reformation, is my Glory.

3. There is another sort that are truly godly: And to them I must say what I fear, and every one hath reason to fear (it's good to fear evil.) It's true the Lord may prevent it; but if he do not (and truly I cannot foresee any Probability of it) Times are like either to be very *Sinning* or very *suffering* Times: And let Christians make their choice: There is a sad *Dilemma* in the business, Sin or Suffer; and surely, he that would chuse the better part would chuse to suffer. Others that will chuse to Sin, shall not escape Suffering; they shall Suffer, but it may be, not as I do (*turning about and pointing to the Maiden*) but worse: Mine is but Temporal, theirs shall be Eternal; when I shall be Singing, they shall be Howling. Beware therefore of Sin whatever you are aware of, especially in such times.

Yet I cannot say of my own Condition, but that the Lord in his Providence hath mind of Mercy to me, even in this World: For if I had been more favourably dealt with, I fear I might have been overcome with Temptations, as many others are, and many more I fear will be; and so should have gone out of the World with a more polluted Conscience, than thro' the Mercy of God now I have. And hence my Condition is such now, as when I am gone, will be seen not to have been such as many imagined. It is fit God take me away, before I fall into these Temptations that I see others are falling into, and many others I fear will fall: I wish the Lord may prevent it. Yet blessed be his Name, that I am kept both from present evils and evils to come. *Here he turned about a little and spoke some words to Mr. Hutchison, when turning again to the People, he spoke as followeth.* Some may expect I will regrave my own condition: But truly I neither grudge nor repine, nor desire any revenge. And I declare I do not repent my last going up to *London*; for I had always rather have suffered any thing, than lie under Reproaches as I did. I desire not that the Lord should judge any Man; nor do I judge any but myself: I wish,

wish, as the Lord hath pardoned me, so he may pardon them for this and other things; and what they have done to me, may never meet them in their Accounts. I have no more to say, but to beg the Lord, that when I go away, he would bless every one that stayeth behind.

His last Words, immediately before he laid his Head on the Block, after his Doublet was off, were these. I desire you, Gentlemen, all that hear me this day to take notice (and I wish that all who see me might hear me) that now when I am entering into Eternity, and am to appear before my Judge, and as I desire Salvation, and do expect eternal Salvation and Happiness from him, from my Birth to my Scaffold, I am free from any Accession by my Knowledge, concerning Coun-

sel or any other way to his late Majesty's Death: And I pray the Lord to preserve his present Majesty, and to pour his best Blessings on his Person and Government; and the Lord give him good and faithful Counsellors. *Turning about to his Friends, he said,* Many Christians may stumble at this, and my Friends may be discontented; but when things are rightly considered, my Friends have no Discredit of Me, nor Christians no Stumbling-block, rather an Engagement.

When he had done speaking he took his leave of his Friends very decently; and after some time spent in his private Devotions, he was beheaded.



The Trial of JOHN CROOK, ISAAC GREY and JOHN BOLTON, Quakers, at the Old Baily, for refusing to take the Oaths of Allegiance and Supremacy, June 25, 1662. 14 Car. II. Related by John Crook.



BEING in John's Street, London, about the 13th day of the 3d Month called May, with some others of the People of God to wait upon him, as we were sat together, there came in a rude Man called Miller, with a long Cane in his Hand, who laid violent hands upon me, with some others; who having no Warrant were not willing to meddle, but as his Threatnings prevailed, they being afraid of him, joined with him to carry us before Justice Powell, who the next Day sent us to the Sessions at Hicks's-Hall, where after some discourse several times with them, manifesting to them the Illegality both of our Commitment and their Proceedings thereupon, yet notwithstanding they committed me, together with Isaac Grey and John Bolton, to New-Prison, where we continued for some Days, and were then removed to Newgate, where we remained until the Sessions at the Old Baily; when I was brought to the Bar.

* Sir Robert Forster.

* Chief Judge. John Crook, when did you take the Oath of Allegiance?

J. Crook. I desire to be heard.

Chief Judge. Answer to the Question, and you shall be heard.

J. Crook. I have been about six Weeks in Prison, and am I now called to accuse myself? For the answering to this Question in the Negative is to accuse myself, which you ought not to put me upon; for, *nemo debet seipsum prodeve*. I am an Englishman, and by the Law of England I ought not to be taken nor imprisoned, nor disseized of my Freehold, nor called in question, nor put to answer, but according to the Law of the Land; which I challenge as my Birth-right, on my own behalf, and all that hear me

this day (or Words to this purpose.) I stand here at this Bar as a Delinquent, and do desire that my Accuser may be brought forth to accuse me for my Delinquency, and then I shall answer to my Charge (if any I be guilty of.)

Chief Judge. You are here demanded to take the Oath of Allegiance, and when you have done that, then you shall be heard about the other; for we have power to tender it to any Man.

J. Crook. Not to me upon this occasion, in this place; for I am brought hither as an Offender already, and not to be made an Offender here, or to accuse myself; for I am an Englishman, as I have said to you, and challenge the benefit of the Laws of England; for by them, is a better Inheritance derived to me as an Englishman, than that which I receive from my Parents; for by the former the latter is preserved: and this the 29th Chapter of Magna Charta, and the Petition of Right, mention'd in the 3d of Car. I. and in other good Laws of England; and therefore I desire the Benefit and Observance of them: And you that are Judges upon the Bench ought to be my Counsel, and not my Accusers, but to inform me of the benefit of those Laws; and wherein I am ignorant you ought to inform me, that I may not suffer thro' my own Ignorance of those Advantages which the Laws of England afford me as an Englishman.

Chief Judge. We sit here to do Justice, and are upon our Oaths, and we are to tell you what is Law, and not you us: Therefore, Sirrah, you are too bold.

J. Crook. Sirrah is not a Word becoming a Judge; for I am no Felon; neither ought you to menace the Prisoner at the Bar: for I stand here arraigned as for my Life and Liberty, and the

the Preservation of my Wife and Children, and outward Estate, (they being now at the stake;) therefore you ought to hear me to the full what I can say in my own Defence, according to Law, and that in its season, as it is given me to speak: Therefore I hope the Court will bear with me, if I am bold to assert my Liberty as an *Englishman* and as a *Christian*; and if I speak loud, it is my Zeal for the Truth, and for the Name of the Lord; and mine Innocency makes me bold—

Judge. It is an evil Zeal. [Interrupting John Crook.]

J. Crook. No, I am bold in the Name of the Lord God Almighty, the everlasting Jehovah, to assert the Truth, and stand as a Witness for it: Let my Accuser be brought forth, and I am ready to answer any Court of Justice—

Then the Judge interrupted me, saying, *Sirrah*, with some other Words I do not remember: But I answered, *You are not to threaten me, neither are those Menaces fit for the mouth of a Judge: for the Safety of a Prisoner stands in the Indifferency of the Court; and you ought not to behave your selves as Parties; seeking all advantages against the Prisoner, but not heeding any thing that may make for his clearing or advantage—*The Judge again interrupted me, saying,

Judge. *Sirrah*, you are to take the Oath, and here we tender it you [bidding me to read it.]

J. Crook. Let me see mine Accuser, that I may know for what Cause I have been six weeks imprisoned, and do not put me to accuse my self by asking me Questions; but either let my Accuser come forth, or otherwise let me be discharged by Proclamation, as you ought to do—*Here I was interrupted again.*

Judge Twisden. We take no notice of your being here otherwise than of a Straggler, or as any other Person, or of the People that are here this day; for we may tender the Oath to any Man. And another Judge spake to the like purpose.

J. Crook. I am here at your Bar as a Prisoner restrained of my Liberty, and do question whether you ought in Justice to tender me the Oath on the account I am now brought before you, because I am supposed to be an Offender, or else why have I been six Weeks in Prison already? Let me be cleared of my Imprisonment, and then I shall answer to what is charged against me, and to the Question now propounded; for I am a Lover of Justice with all my Soul, and am well known by my Neighbours where I have lived, to keep a Conscience void of Offence both towards God, and towards Man.

Judge. *Sirrah*, leave your Canting.

J. Crook. Is this Canting, to speak the Words of the Scripture?

Judge. It's Canting in your Mouth, tho they are St. Paul's Words.

J. Crook. I speak but the Words of the Scripture, and it is not Canting tho I speak them, but they are Words of Truth and Soberness in my Mouth, they being witnessed by me, and fulfilled in me.

Judge. We do ask you again, whether you will take the Oath of Allegiance? it is but a short Question, you may answer it if you will.

J. Crook. By what Law have you Power to tender it? Then, after some Consultation together by whispering, they called for the Statute-Book and turning over the leaves, they answered,

Judge. By the 3d of King James.

J. Crook. I desire that Statute may be read: for I have consulted it, and do not understand that you have Power by that Statute to tender me the Oath, being here before you in this place upon this Occasion, as a Delinquent already; and therefore I desire the Judgment of the Court in this Case, and that the Statute may be read.

Then they took the Statute-Book and consulted together upon it, and one said; We are the Judges of this Land, and do better understand our Power than you do, and we do judge we may lawfully do it.

J. Crook. Is this the Judgment of the Court?

Judge. Yes.

J. Crook. I desire the Statute to be read that impowers you to tender the Oath to me upon this Occasion in this Place; for, *Vox audita perit, sed litera scripta manet*, therefore let me hear it read.

Judge. Hear me.

J. Crook. I am as willing to hear as to speak.

Judge. Then hear me: You are here required to take the Oath by the Court, and I will inform you what the Penalty will be in case you refuse: for, your first Denial shall be recorded, and then it shall be tendered to you again at the end of the Sessions, and upon the second Refusal you run a *Premunire*, which is the Forfeiture of all your Estate (if you have any) and Imprisonment during Life.

J. Crook. It is Justice I stand for; let me have Justice, in bringing my Accuser face to face, as by Law you ought to do, I standing at your Bar as a Delinquent; and when that is done, I will answer to what can be charged against me, as also to the Question; until then I shall give no other Answer than I have already done, (at least at present.)

Then there was a Cry in the Court *Take him away*, which occasioned a great interruption, and J. Crook spake to this purpose, saying, Mind the Fear of the Lord God, that you may come to the Knowledge of his Will, and do Justice; and take heed of oppressing the Innocent, for the Lord God of Heaven and Earth will assuredly plead their Cause: and for my part, I desire not the hurt of one of the Hairs of your Heads, but let God's Wisdom guide you. *These words he spake at the Bar, and as he was carrying away.*

On the sixth Day of the Week in the forenoon, the Court being sate, John Crook was called to the Bar.

Chief Judge. Friend Crook, We have given you time to consider of what was said yesterday to you by the Court, hoping you may have better considered of it by this time: therefore, without any more Words, will you take the Oath? and called to the Clerk, and bid him read it.

J. Crook. I did not, neither do I deny Allegiance, but do desire to know the Cause of my so long Imprisonment; for, as I said, I stand at your Bar as a Delinquent, and am brought hither by Force, contrary to the Law; therefore let me see my Accuser, or else free me by Proclamation, as I ought to be, if none can accuse me: For the Law is grounded upon right Reason, and whatsoever is contrary to right Reason, is contrary to Law; and therefore if no Accuser appear

appear, you ought to acquit me first, and then I shall answer, as I have said, if any new Matter appear, otherwise it is of force, and that our Law abhors, and you ought not to take Notice of my so being before you; for what is not legally so, is not so; and therefore I am in the condition, as if I were not before you: and therefore it cannot be supposed in right Reason, that you have now Power at this time, and in this place, legally to tender me the Oath.

Judge. Read the Oath to him. [*And so the Clerk began to read.*]

J. Crook. I desire Justice according to the Laws of England: for you ought first to convict me concerning the Cause of my so long Imprisonment: for you are to proceed according to Laws already made, and not to make Laws; for you ought to be Ministers of the Law.

Judge. You are a saucy and an impudent Fellow; will you tell us what is Law in our duties? *Then said he to the Clerk, Read on; and when the Clerk had done reading,*

J. Crook said, Read the Preface to the Act; I say again, read the Title and Preamble to the Act; for Titles to Laws are *Claves Legum*, as Keys to open the Law; for by their Titles Laws are understood and known, as Men by their Faces. *Then the Judges would have interrupted me, but I said as followeth,* If you will not hear me, nor do me Justice, I must appeal to the Lord God of Heaven and Earth, who is Judge of quick and dead, before whom we shall all appear to give an account for the deeds done in the Body; for he will judge between you and me this day, whether you have done me Justice or not.

These Words following (or the like) I spake as going from the Bar, being pulled away, *viz.* Mind the Fear of the Lord God, that you may do Justice, lest you perish in his Wrath: For sometimes the Court cryed, *Pull him away*, and then said, *Bring him again*; and thus they did several times, like Men in confusion and disorder.

The same day in the Afternoon, Silence being made, *John Crook* was called to the Bar before the Judges and Justices aforesaid: the Indictment, being read, the Judge said,

Mr. Crook, You have heard your Indictment, what say you, are you Guilty or Not Guilty?

J. Crook. I desire to speak a few Words in Humility and Soberness, in regard my Estate and Liberty lies at stake, and am like to be a Precedent for many more; therefore I hope the Court will not deny me the Right and Benefit of the Law, as being an *Englishman*; I have some Reason, before I speak any thing to the Indictment, to demand and tell you, that I desire to know mine Accusers: I have been kept this six Weeks in Prison, and know not, nor have seen the Faces of them.

Judge. We shall afford you the Right of the Law as an *Englishman*, God forbid you should be denied it; but you must answer first, Guilty or not Guilty, that so in your Trial you may have a fair Hearing and Pleading; but if you go on as you do (and will not answer Guilty or Not Guilty) you will run yourself into a *Premunire*, and then you lose the Benefit of the Law, and expose yourself, Body and Estate, to great Hazards; and whatever Violence is offered to your Person or Estate, you are out of the

King's Protection, and lose the Benefit of the Law, and all this by your not answering Guilty or Not Guilty: if you plead Not Guilty, you may be heard.

J. Crook. It is recorded in the Statutes of the 28 *Edw.* 3 and 3. and 42 *Edw.* 3 and 3. in these Words, *No Man is to be taken or imprisoned, or be put to answer without Presentment before Justices, or matter of Record, or by due Process, or Writ original, according to the old Law of the Land; and if any thing from henceforth be done to the contrary, it shall be void in Law, and holden for Error: and also in the 25 of Edw. 1. 2. and the 3 Car. 1. and the 29 cap. Mag. Chart. No Freeman shall be taken and imprisoned but by the Law of the Land: These words [The Law of the Land] are explained by the Statute of 37 *Edw.* 3. 8. to be without due process of Law: and if any Judgments be given contrary to *Mag. Chart.* they are void, 25 *Edw.* 1. 2.*

Judge. *Mr. Crook,* you are out of the way, and do not understand the Law; tho you adore the Statute-Law so much, yet you do not understand it.

J. Crook. I would have you tell me the right way.

Judge. *Mr. Crook,* hear me. You must say, Guilty or Not Guilty: If you plead Not Guilty, you shall be heard, and know how far the Law favours you. And the next thing is, there is no Circumstance whatsoever that is the Cause of your Imprisonment that you question, but you have, as a Subject, your Remedies, if you will go this way, and waive other Things, and answer Guilty or Not Guilty; and what the Law affords you, you shall have, if you do what the Law requires you, or else you will lose the Benefit of the Law, and be out of the King's Protection.

J. Crook. Observe how the Judge would draw me into a Snare, *viz.* by first pleading Guilty or Not Guilty; and when I have done so, he and his Brethren intend suddenly to put me (as an out-law'd Person) out of the King's Protection; and how then can I have remedy for my false Imprisonment? Therefore first clear me, or condemn me for my false Imprisonment, while I am in a capacity to have the Benefit of the Law, and not to out-law me for an Offence created by yourselves; and then to stop my Mouth, you tell me, that if I have been wronged or false imprisoned, I may have my Remedy afterwards; this is to trapan me, and contrary to both Law and Justice, &c.

Judge. You must plead Guilty or Not Guilty.

J. Crook. I do desire in Humility and Meekness to say, I shall not, I dare not betray the Honesty of my Cause, and the honest Ones of this Nation, whose Liberty I stand for as well as my own, as I have cause to think I shall, if I plead to the present Indictment before I see the Faces of my Accusers: for truly, I am not satisfied in my Judgment and Conscience that I ought to plead to a created Offence by you, before I be first acquitted of the Cause of my being brought Prisoner to your Bar, and therefore it sticks with me to urge this further, *viz.* That I may see my Accusers.—*Interruption.*

Judge. The errantest Thief may say he is not satisfied in his Conscience.

J. Crook. My Case is not theirs, yet they have their Accusers; and may not I call for mine? and therefore

therefore call for them, for you ought to do so, as Christ said to the Woman, (*Woman, where are thine Accusers?*) so you ought to say to me, (*Man, where are thine Accusers?*) — *Interrupted.*

Judge. Your Indictment is your Accuser, and the Grand Jury hath found you Guilty, because you did not Swear; what say you, Mr. Crook, are you Guilty or Not Guilty? If you will not answer, or what you have said be taken for your Answer, as I told you before, you lose the Benefit of the Law; and what I tell you is for your Good.

J. Crook. What is for Good I hope I shall take it to.

Judge. If you will not answer, you run yourself into a *Premunire*, and you will lose the Benefit of the Law, and of the King's Protection, unless you plead Guilty or Not Guilty.

J. Crook. I stand as brought forcibly and violently hither, neither had I been here but by a violent Action; and that you should take no Notice of it, seems strange to me: and not only so, but that you should hasten me so fast into a course that I should not be able any ways to help myself, by reason of your so hasty and fast Proceedings against me, to put me out of the King's Protection, and the Benefit of all Law; was ever the like known or heard of in a Court of Justice!

Judge. Friend, this is not here in question whether you are unjustly brought here, or not: Do you question that by Law, but not disable yourself to take Advantage by the Law. If brought by a wrong Hand, you have a Plea against them, but you must first answer Guilty or Not Guilty.

J. Crook. How can I help myself when you have out-law'd me? Therefore let Proclamation be made in the Court, that I was brought by Force hither, and let me stand cleared by Proclamation, as you ought to do; for you are *discernere per Legem, quid sit justum*, and not to do what seems good in your own Eyes. [Here I was interrupted again, but might have spoken Justice Crook's Words in *Hampden's Case*, who said, *That we who are Judges speak upon our Oaths, and therefore must deliver our Judgments according to our Consciences; and the fault will lie upon us if it be illegal, and we deliver it for Law: and further said, We that are Judges must not give our Judgments according to Policy or Rules of State, nor Conveniences, but only according to Law.* These were his Words, which I might have spoken; but was interrupted.]

Judge. What tho' no Man tendred the Oath to you when you were committed (as you say) it is now tendred to you? From the time you refused it, being tendred to you by a lawful Authority, you refusing, are Indicted: We look not upon what you are here for, but here finding you, we tender you the Oath, and you refusing it, your Imprisonment is now just and according to Law.

J. Crook. How came I here, if you know not? I have told you it is by Force and Violence, which our Law altogether condemns; and therefore I not being legally before you, am not before you: for what is not legally so, is not so; and I not being legally brought to your Bar, you ought not to take Notice of my being here.

Judge. No, no, you are mistaken: so you may say of all the People gazing here, they not being legally here, are not here. I tell you a Man being brought by Force hither, we may tender him the Oath; and if he take it not, he may be committed to Prison: Authority hath given us the Power,

and the Statute-Law hath given us Authority to tender the Oath to any Person; and so have we tendred it you, and for your not taking of it, you are Indicted by the Grand Jury: Answer the Accusation, or confute the Indictment, you must do the one or the other; answer Guilty or Not Guilty.

[*J. Crook.* Here I was interrupted, but might have said, that the People that were Spectators, beholding and hearing the Trials, are not to be called Gazers, as the Judge terms them, because it is their Liberty and Privilege as they are *Englishmen*, and the Law of *England* allows the same; so that they are not to be termed Gazers upon this account, but are legally in that place, to hear Trials and see Justice done, and might have spoken (if occasion had been) any thing in the Prisoner's Defence, tending to clear up the Matter in difference, and the Court must have heard them or him, and this as a *Stander-by*, or *Amicus curiæ*, so saith *Coke*.]

J. Crook. The Law is built upon right Reason, or right Reason is the Law; and whatever is contrary to right Reason, is contrary to Law, the Reason of the Law being the Law itself. I am no Lawyer, and my Knowledge of it is but little; yet I have had a Love to it, for that Reason I have found in it, and have spent some leisurable hours in the reading thereof; and the Law is that which I honour, and is good in its Place; many Laws being just and good (not all) but I say a great part of it, or much of it, and that is not my Intention in the least to disparage or derogate from.

Judge. Mr. Crook, You have been told you must plead Guilty or Not Guilty, or else you will run yourself into a *Premunire*; be not your own Enemy, nor be not so obstinate.

J. Crook. I would not stand obstinately before you, neither am I so; if you understand it otherwise, it is a Mistake indeed.

Judge. Will you speak to the Indictment? and then you may plead: if you will not answer Guilty or Not Guilty, we will Record it, and Judgment shall go against you. Clerk, enter him.

Recorder. Mr. Crook, If you will answer you may plead for yourself, or will you take the Oath? The Court takes no Notice how you came hither; What say you, will you answer? For a Man may be brought out of *Smithfield* by head and shoulders, and the Oath tendred to him, and may be committed, without taking Notice how he came here.

J. Crook. That kind of Proceeding is not only unjust but unreasonable also—(here was some *Interruption*) and against the Laws aforesaid, which say, *No Man shall be taken, or imprisoned, but by Warrant, or due Process of Law*; so that this Speech of the Recorder's favours more of Passion than Justice, and Cruelty than due Observance of Law: for every forcible Restraint of a Man's Liberty is an Imprisonment in Law. Besides, this kind of practice, to take Men by Force and imprison them, and then ask them Questions, the answering of which makes them Guilty, is not only unrighteous in itself, but against Law, and makes one evil Act the Ground of another, and one Injury offered to one the Foundation of another; and this is my Case this day—*Interruption.*

Judge. Mr. Crook, you must not be your own Judge, we are your Judges; but for our parts we will not wrong you: will you answer Guilty, or Not Guilty? if not, you will run yourself into

a *Premunire* unavoidable, and then you know what I told you would follow; for we take no Notice how you came hither, but finding you here we tender you the Oath.

J. Crook. Then it seems you make the Law a Trapan to ensnare me, or as a Nose of Wax, or what you please: Well! I shall leave my Cause with the Lord God, who will plead for me in Righteousness. But suppose I do take the Oath [now] at this time, you may call me again [to-morrow] and make a new Tender; or others may call me before them.

Judge. Yes, if there be new matter; or if there fall out any emergent occasion, whereby you minister on your part new occasion: Mr. Crook, will you swear?

J. Crook. If I do take it to-day, it may be tendred me again to-morrow, and so next Day, *ad infinitum*; whereby a great part of my time may be spent and taken up in taking the Oath and Swearing.

Chief Judge. When you have [once] sworn, you may not be put upon it again, except you minister occasion on your part.

J. Crook. Is this the Judgment of the Court, that the Oath [once] taken by me is sufficient, and ought not to be tendred a second time, without new Matter ministred on my part?

Judge. Yes, you making it appear you have [once] taken it.

J. Crook. Is this the Judgment of the whole Court? for I would not do any thing rashly.

Judges. Yes, it is the Judgment of the Court; to which they all standing up, said, Yes.

J. Crook. Then it seems there must be some new occasion ministred by me after I have [once] taken it, or it ought not to be tendred to me the second time?

Judges. Yes.

J. Crook. Then by the Judgment of this Court, if I make it appear that I have taken the Oath [once] and I have ministred no new Matter on my part, whereby I can be justly charged with the Breach of it, then it ought not to be tendred me the second time; but I am the Man that have taken it [once] being a Freeman of the City of London, when I was made free, witness the Records in *Guild-Hall*, which I may produce, and no new Matter appearing to you on my part, if there do, let me know it; if not, you ought not by your own Judgment to tender me it the second time; for *de non apparentibus, & non existentibus eadem Ratio est*—Interrupted by the shout of the Court, when these last words might have been spoken.

Judge. Mr. Crook, you are mistaken, you must not think to surprise the Court with Criticisms, nor draw false Conclusions from our Judgments.

J. Crook. If this be not a natural Conclusion from the Judgment of the Court, let right Reason judge; and if you recede from your own Judgments in the same Breath (as it were) given even now, what Justice can I expect from you? for, if you will not be just to yourselves and your own Judgments, how can I expect you should be just to me?

Judge. Mr. Crook, if you have taken it, if there be a new Emergency, you are to take it again: as for Instance, the King hath been out of England, and now is come in again; there be many have taken it twenty, thirty, or forty Years since, yet this new Emergency requires it again; and altho you have taken it, yet you

must not make it appear before you answer Guilty or Not Guilty; therefore do not wrong yourself, and prejudice yourself and Family: Do you think that every Fellow that comes hither shall argue as you do? We have no more to do but to know of you whether you will answer (Guilty or not Guilty) or take the Oath, and then you shall be freed from the Indictment; if you will not plead, Clerk record it: What say you? are you Guilty or Not Guilty?

J. Crook. Will you not stand to your own Judgments? did you not say even now, that if I had [once] taken the Oath, it ought not to be tendred to me the second time, except I administred new Matter on my part that I have not kept it, &c. but no such Matter appearing, you ought not to tender it to me the second time by your own Confession, much less to Indict me for Refusal.

Judge. If you will not plead, we will record it, and Judgment shall be given against you; therefore say, Guilty or Not Guilty, or else we will record it. (*The Clerk beginning to record it.*)

J. Crook. Before I answer, I demand a Copy of my Indictment; for I have heard it affirmed by Counsel learned in the Law, that if I plead before I have a Copy, or have made my Exceptions, my Exceptions afterwards against the Indictment will be made void: Therefore I desire a Copy of the Indictment.

Judge. He that said so, deserves not the name of a Counsel: for the Law is, You must first answer, and then you shall have a Copy. Will you plead Guilty or not Guilty?

J. Crook. If my pleading Guilty or Not Guilty, will not deprive me of the Benefit of quashing the Indictment for Insufficiency, or other Exceptions that I may make against it, I shall speak to it.

Judge. No, it will not. Will you answer, Guilty or Not Guilty? If you plead not, the Indictment will be found against you: Will you answer? we will stay no longer.

J. Crook. I am upon the point: Will not my pleading deprive me of the Benefit of the Law? for I am tender in that respect, because it is not my own Case [only] but may be the Case of [thousands] more; therefore I would do nothing that might prejudice others or myself, as a Christian, or as an *Englishman*.

Judge. Understand yourself, (but we will not make a bargain with you, said another Judge) you shall have the Right done you as an *Englishman*, the way is to answer, Guilty or Not Guilty: If you plead, and find the Indictment not good, you may have your Remedy; answer, Guilty or Not Guilty.

J. Crook. As to the Indictment it is very large, and seems to be confused, and made up of some things true, and some things false; my Answer therefore is, what is true in the Indictment I will not deny, because I make Conscience of what I say, and therefore, of what is true, I confess myself Guilty, but what is false I am Not Guilty of that.

Judge. That is not sufficient: either answer Guilty or Not Guilty, or Judgment will be given against you.

J. Crook. I will speak the Truth as before the Lord, as all along I have endeavour'd to do, I am Not Guilty of that which is false contained in the Indictment, which is the Substance thereof.

Judge. No more ado, the Form is nothing, Guilty, or Not?

J. Crook.

J. Crook. I must not wrong my Conscience, I am Not Guilty of what is false, as I said before, what is true I am Guilty of; what is not true, I am Not Guilty of that, which is the Substance thereof, as I said before.

Recorder. It is enough, and shall serve turn. Enter that Clerk.

Isaac Grey being call'd to the Bar.

Judge. Will you take the Oath of Allegiance?

Grey. I have been near five Weeks in Prison, I desire to know for what.

Judge. We take no notice of your Imprisonment, nor how you came here: Will you take the Oath?

Grey. I desire to know for what I am imprison'd, and then I am ready to answer; for no Man (in this Particular) hath received so much wrong as myself, having received a Wound, whereby I was in Jeopardy of my Life.

Judge. If any have wronged you, take your Course in Law. Will you swear?

Grey. I am a Man of a tender Conscience, and do desire time to consider.

Judge. Take him away. Which was accordingly done.

The next Day *Isaac Grey* was called to the Bar, and asked by the Judge, if he would yet take the Oath? *Recorder* speaking unto him on this wise; Mr. *Grey*, you are a wise understanding Man, and a Scholar: be advis'd what you do, and do not ruin yourself, but take the Oath.

Grey. I desire time to consider, and to do nothing rashly.

Then in the Afternoon were all three again called to the Bar, and the Indictment read.

Judge. Mr. *Grey*, will you take the Oath? *Cryer*, hold him the Book.

Grey. I desire to know the Cause of my first Imprisonment, and to discharge me of the same before I give my Answer to the Oath; for I do not know myself guilty of any Crime.

Judge. The Law supposeth you to be disaffected to the present Government, and therefore the Oath is tendred to you.

Grey. I understand that the fundamental Law of England alloweth no Man to be accused or condemned upon Suppositions: I do further affirm, and that in the Sight of God, that I am not an Enemy to the King, nor to any Man living upon the Face of the Earth.

Judge. Will you answer, Guilty, or not Guilty?

Grey. I desire Time to consider of the Truth of this Matter; the Indictment being large, and having much contained in it which indeed I do not well understand.

Judge. Will you yet swear, or plead to the Indictment?

Grey. I have told you, and that for Conscience sake, I dare do nothing rashly.

Judge. What do you talk to us of Conscience! every Fellow may plead Conscience.

Grey. Do you use to swear such as make no Conscience?

Judge. Guilty, or Not Guilty? When you have answer'd to this, you may plead what you can in your own Defence; but first answer, Guilty, or Not Guilty: The Rule of the Law is, you must first answer.

Grey. Would you have Men swear whether they will or nay, especially when against their Conscience?

VOL. V.

Judge. We have Consciences as well as you: If there be any thing as to Matter of Conscience, it is nothing. You must plead Guilty, or Not Guilty, that we may not spend time any longer.

Grey. Truly, I desire not that the time should be taken up in any thing that may not advantage the good of the People; therefore before I plead, give me a Copy of the Indictment, and then I shall plead.

Judge. Sirrah, Guilty, or Not Guilty?

Grey. I desire first to be heard as a Christian, and then as an *Englishman*.

Judge. Do not I tell you (Sirrah) if you will plead, Not Guilty, you shall be heard; but if you will not, you will run yourself into a *Pre-munire*?

Grey. I appeal then to God Almighty, for I shall not wrong my Conscience.

Judge. It is no Matter of Conscience: Guilty, or Not Guilty?

Grey. Not Guilty.

John Bolton having made the same Objections, was at last oblig'd to plead Not Guilty.

The seventh Day of the Week, called *Saturday*.

Silence being made, *Isaac Grey*, *John Bolton* and myself, were brought to the Bar.

The Clerk of the Sessions read something concerning the Jury, which was empanell'd on purpose (as was said) the Jury being discharged, who were Eye-witnesses of what passed between us and the Court: And this Jury being divers of them Soldiers, some of whom did by Violence and Force pull and hale Friends out of their Meetings, and some of us out of our Houses; and these were of the Jury by whom we were to be tried. The Clerk reading the Indictment (as I remember.)

J. Crook. I desire to be heard a few Words, which are these, That we may have Liberty till the next Quarter-Sessions to traverse the Indictment, it being long, and in *Latin*, and like to be a Precedent; and I hope I need not press it, because I understood that you promised, (and especially the Recorder, who answered, when it was desired, *You shall*) that we should have Counsel also, the which we cannot be expected to have had the Benefit of as yet, the time being so short, and we kept Prisoners, that we could not go forth to advise with Counsel, neither could we tell how to get them to us: We having no Copy of the Indictment before this Morning, and because so suddenly hurried down to the Sessions, we cannot reasonably be supposed to be provided (as to Matter of Law) to make our Defence.

C. Judge. We have given you time enough, and you shall have no more; for we will try you at this time, therefore swear the Jury.

J. Crook. I desire we may have Justice, and that we may not be surprized in our Trial, but that we may have time till the next Quarter-Sessions, our Indictment being in *Latin*, and so large as it is; and this is but that which is reasonable, and is the Practice of other Courts: for, if it be but an Action above Forty Shillings, it is not ordinarily ended under two or three Terms. And in the Quarter-Sessions, if one be Indicted for a Trespass, if it be but to the Value of Five Shillings, he shall have Liberty to enter his Traverse, and, upon Security given to prosecute, he shall have Liberty till the next Sessions, which

is the ordinary Practice; which Liberty we desire, and we hope it is so reasonable it will not be denied, especially upon this Occasion, we being like to be made a Precedent; and Courts of Justice have used to be especially careful in making of Precedents, for we are not provided according to Law to make our Defence at this time; and therefore if we be put upon it, it will be a surprizal.

Judge. There is no great matter of Law in the Case, it is only matter of Fact, whether you have refused to take the Oath or not; that is the Point in issue: And what Law can arise here?

Record. Mr. Crook, the Keeper of the Prison was spoken to, to tell you that we intended to try you this Day, and therefore ordered him that Counsel might come to you if you would, and also that the Clerk should give you a Copy of your Indictment: This is fair, therefore we will go on to swear the Jury; for the Matter is, whether you refuse the Oath or not? And that is the single Point, and there needs neither Law nor Counsel in the Case: and therefore we considered of it last night, when we sent you word and did determine to try you; and therefore it is in vain to say any thing, for the Court is resolved to try you now, therefore swear the Jury, Cryer.

J. Crook. I hope you will not surprize us: Then the other Prisoners (who also were indicted) cried out (having spoke something before) Let us have Justice, and let not the Jury be sworn till we be first heard; so there was a great Noise, the Court being in a Confusion, some crying, Take them away; others, Stay, let them alone; others saying, Go on to swear the Jury, which the Cryer in this Uproar and Confusion, did do something, as if he had done it. Then we all cried out for Justice, and Liberty till the next Sessions. The Court being in a Confusion, some crying one thing, and some another, which now cannot be called to Mind, by reason of the great distraction that was in the Court, neither what we said to them, nor they to us, the Noise was so great, and the Commands of the Court so various to the Officers, some commanding them to take us away, others to let us alone, others, to bring us nearer, others cried, put them into the Bail-Dock, others, to put them within the furthest Bar where the Felons used to stand, where we were forced into accordingly; and in this Hurliburly and Confusion that was among them, some Men were sworn to testify that we refused to take the Oath, which we never positively did; other Officers of the Court, whom they would have sworn, refused to swear, tho pressed to it by the Chief Justice, they desiring to be excused. Then spake one of the Prisoners again pretty much, but could hardly be understood by reason of the Noise in the Court; but the People, to whom he spake with a loud Voice by way of Exhortation, might hear the Substance of what he said, which cannot now particularly be called to Mind; but it was to express the Presence and Love of God to himself, and to exhort others to mind his Fear, that they also might be acquainted with God, &c.

Judge. Stop his Mouth, Executioner; which was accordingly done.

Prisoners. Then we cried out, Will you not give us leave to speak for ourselves? We except

against some of the Jury, as being our Enemies, and some of them who by force commanded us to be pulled out of our Meetings, contrary to Law, and carried us to Prison without Warrant, or other due Process of Law; and shall these be our Judges? We except against them.

Judge. It is too late now, you should have done it before they had been sworn Jury-men. Jury, go together, that which you have to find, is, whether they have refused to take the Oath or no, which hath been sworn before you that they did refuse: you need not go from the Bar; and like Words said the Recorder and others, there being a Confusion and Noise in the Court, many speaking together.

Prisoners. Then we cried for Justice, and that we might be heard, to make our Defence before the Jury gave their Verdict: but the Judge and Recorder said, we should not be heard, (making good by their Practice what the Chief Judge had said the Day before, *viz.* That if we had liberty to speak, we would make ourselves famous and them odious) crying again, Stop their Mouths, Executioner; which was done accordingly with a dirty Cloth, and he also endeavoured to have gagged * me, * *J. Crook.* striving to get hold of my Tongue, having a Gag ready in his Hand for that Purpose, and so we were served several Times; then I called out with a loud Voice, Will you condemn us without hearing? This is to deal worse with us than *Pilate* did with *Christ*, who tho he condemned him without a Cause, yet not without hearing him speak for himself; but you deny us both.

Grey. I desire to know whether according to Law and the Practice of this Court, myself, and my Fellow-Prisoners, may have Liberty to put in Bail to prosecute our Traverse at the next Sessions?

Court. No, we will try you presently.

Judge. Stop their Mouths, Executioner: And this was the Cry of many upon the Bench, they being still in a continued Confusion, some crying to the Jury, Give in your Verdict, for we will not hear them; with other Words which could not be heard for the Noise, the Court being in Confusion.

J. Crook. You might as well have caused us to have been murder'd before we came hither, as to bring us hither under Pretence to try us, and not give us leave to make our Defence; you had as good take away our Lives at the Bar, as to command us thus to be abused, and to have our Mouths stopt: Was ever the like known? Let the righteous God judge between us. Will you hear me? You have often promised that you would.

Judge. Hear me, and we will hear you; then he began to speak, and some others of the Bench interrupted him, sometimes they speaking two or three at a time, and a Noise amongst the Officers of the Court: but the Judge said, we may give you Liberty till the next Sessions, but we may chuse; and therefore we will try you now.

J. Crook. I bade the People take notice of their Promise, that I should have Liberty to speak, saying, see now you be as good as your Words.

Judge.

Judge. The Law of England is not only just but merciful, and therefore you shall not be surprized, but shall have what Justice the Law allows—*Interruption.*

J. Crook. I remember what the Judge said even now, that the Law of England was a merciful Law, that the Court had said before, they might, if they would, give us liberty till the next Sessions, but they would not; and the Maxim of the Law also is, *Summum Jus est summa Injuria*: therefore I hope your Practice will make it good, that it is a merciful Law, and not to execute *Summum jus*, &c. upon me, and thereby condemn yourselves out of your own Mouths.

Judge. Jury, give in your Verdict.

J. Crook. Let me have liberty first to speak, it is but few Words, and I hope I shall do it with what brevity and pertinency my Understanding will give me leave, and the Occasion requires; it is to the point in these two Heads, viz. Matter of Law, and Matter of Conscience: to Matter of Law I have this to say, first, as to the Statute itself, it was made against the Papists, occasioned by the Gunpowder-Plot; and is entitled, *For the better discovery and suppressing of Popish Recusants*: but they have Liberty, and we are Destroyed, what in you lies—*(Interrupted by the Judges and disturbance of the Court)* As to Conscience, I have something to say, and that is,

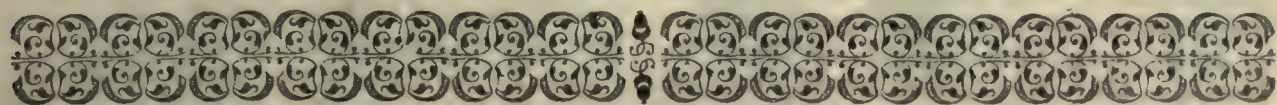
It is a tender thing, and we have known what it is to offend it, and therefore we dare not break Christ's Commands, who hath said, *Swear not at all*; and the Apostle James said, *Above all things, my Brethren, swear not*—*(interrupted)* the Court calling again to the Executioner to stop my Mouth, which he did accordingly with his dirty Cloth as aforesaid, and his Gag in his Hand.

Judge. Hear the Jury, who said something to him, which was supposed to give in the Verdict according to his Order, for they were fit for his Purpose, as it seems, they beginning to lay their Heads together before we had spoke any thing to them, only upon his Words.

Judge. Cryer, make Silence in the Court; then the Recorder taking a Paper into his Hand, read to this purpose, viz. *The Jury for the King do find that John Crook, John Bolton and Isaac Grey, are Guilty of Refusing to take the Oath of Allegiance, for which you do incur a Premunire, which is the Forfeiture of all your Real Estates during Life, and your Personal Estates for ever, and you to be out of the King's Protection, and to be Imprisoned during his Pleasure: and this is your Sentence.*

J. Crook. But we are still under God's Protection.

Recorder. Adjourn the Court; which was done accordingly, and we remanded to Newgate, where we remain Prisoners.



The Trial of Mr. SAMUEL ATKINS at the King's-Bench, for being accessory to the Murder of Sir EDMUNDBURY GODFREY, Feb. 8, 10, and 11, 167⁸/₉. Hil. 31 Car. II.

ON Saturday the eighth of February, 1678, Mr. Samuel Atkins was brought from Newgate to the Bar of the Court of King's-Bench at Westminster, to be arraigned, as Accessary to the Murder of Sir Edmundbury Godfrey, which was done in this Manner.

Cl. of the Cr. Samuel Atkins, hold up thy Hand, *(which he did.)* Thou standest indicted by the Name of Samuel Atkins, late of the Parish of St. Mary le Strand in the County of Middlesex, Gent. for that whereas on the Morrow of the Purification of the Blessed Virgin Mary, before our Sovereign Lord the King at Westminster, by the Oath of twelve Jurors, good and lawful Men of the said County, tried, sworn, and charged to enquire for our Sovereign Lord the King, and the Body of the said County, Robert Green, late of the Parish aforesaid, in the County aforesaid, Labourer; Henry Berry, late of the same Parish and County, Labourer; Lawrence Hill, late of the same Parish and County, Labourer; — Giraldd, late of the same Parish and County, Clerk; Dominick Kelly, late of the same Parish and County, Clerk; and Philibert Vernatt, late of the same Parish and County, Labourer, are indicted, for that they not having the Fear of God before their Eyes, but being moved and seduced

by the Instigation of the Devil, the twelfth Day of October, in the thirtieth Year of the Reign of our Sovereign Lord Charles II. by the Grace of God of England, Scotland, France and Ireland King, Defender of the Faith, &c. at the Parish of St. Mary le Strand aforesaid, in the County of Middlesex aforesaid, in and upon Sir Edmundbury Godfrey Knt. in the Peace of God and of our said Sovereign Lord the King, then and there being, feloniously, voluntarily, and of their Malice aforethought, did make an Assault; and that he the aforesaid Robert Green, a certain Linen Handkerchief, of the Value of Six-pence, about the Neck of the said Sir Edmundbury Godfrey, then and there, feloniously, voluntarily, and of his Malice aforethought, did fold and fasten; and that he the said Robert Green, with the Handkerchief aforesaid, by him the said Robert Green on and about the Neck of the said Sir Edmundbury Godfrey, in Manner and Form aforesaid folded and fastened, then and there him the said Sir Edmundbury Godfrey did choak and strangle, of which said choaking and strangling of him, the said Sir Edmundbury Godfrey, in Manner and Form aforesaid, he the said Sir Edmundbury Godfrey then and there instantly died; and that the said Henry Berry, Lawrence Hill, — Giraldd, Dominick Kelly, and Philibert Vernatt, then and there

there feloniously, voluntarily, and of their Malice aforethought, were present, aiding, abetting, comforting and maintaining the aforesaid *Robert Green*, the aforesaid *Sir Edmundbury Godfrey*, in Manner and Form aforesaid, feloniously, voluntarily, and of his Malice aforethought, to kill and murder: and so they the said *Robert Green*, *Henry Berry*, *Lawrence Hill*, — *Girald*, *Dominick Kelly*, and *Philibert Vernatt*, in Manner and Form aforesaid, the aforesaid *Sir Edmundbury Godfrey*, feloniously, wilfully, and of their Malice aforethought, did kill and murder, against the Peace of our Sovereign Lord the King, his Crown and Dignity. And that thou the said *Samuel Atkins*, at or upon the said twelfth Day of *October*, and divers Days and Times before, the said *Robert Green*, *Henry Berry*, *Lawrence Hill*, — *Girald*, *Dominick Kelly*, and *Philibert Vernatt*, the Felony and Murder aforesaid, at the Parish aforesaid, in the County aforesaid, to commit feloniously, wilfully, and of thy Malice aforethought, didst command, counsel and abet, and knowing the said *Robert Green*, *Henry Berry*, *Lawrence Hill*, — *Girald*, *Dominick Kelly*, and *Philibert Vernatt*, the Felony and Murder aforesaid, in Manner and Form aforesaid, feloniously to have done and committed, at or upon the said twelfth Day of *October*, and divers Days and Times after, at the Parish aforesaid, in the County aforesaid, feloniously the said *Robert Green*, *Henry Berry*, *Lawrence Hill*, — *Girald*, *Dominick Kelly*, and *Philibert Vernatt*, didst harbour, comfort and maintain, against the Peace of our Sovereign Lord the King, his Crown and Dignity. How sayest thou, *Samuel Atkins*, art thou guilty as Accessary to the said Felony and Murder, whereof thou standest indicted, and hast been now arraigned, or not guilty?

Sam. Atkins. Not guilty.

Cl. of the Cr. Culprit, How wilt thou be tried?

Sam. Atkins. By God and my Country.

Cl. of the Cr. God send thee a good Deliverance.

Sam. Atkins. My Lord, I do humbly desire, that the several Examinations taken concerning this Business, may at my Trial be brought into the Court.

L. C. J. This is to be left to Mr. *Sir William Attorney* to do in it as he pleaseth; for he is to take Care of the King's Evidence.

Sam. Atkins. I only desire, my Lord, that they may be brought in. Mr. Recorder had some of them taken before him.

Mr. Recorder. To satisfy this Gentleman, my Lord, whatever Examinations were taken before me shall be brought.

L. C. J. Why, Mr. *Atkins*, do you know nothing of this Business, that you are so willing to have all the Evidence brought in against you?

Sam. Atkins. My Lord, I know nothing of it at all.

L. C. J. Are you a Papist, Mr. *Atkins*?

Sam. Atkins. No, my Lord, I am not.

L. C. J. Were you never one?

Sam. Atkins. No. I never was one, nor I hope never shall be. When is it, that your Lordship pleaseth to have me tried? for I have lain these sixteen Weeks in Prison, and do earnestly desire my Trial.

L. C. J. You shall be tried as soon as we can, when Mr. Attorney thinketh fit. We must try the others on *Monday*, and if there be Time afterwards, you may be tried then: However, Captain *Richardson* shall have a Rule to bring you up then.

Sam. Atkins. I humbly thank your Lordship.

Then he was carried back by the Keeper, and accordingly on Monday following he was brought up; and after the Trials of Green, Berry, and Hill were over, he was sent for to the Bar.

Luna 10 Februarii, 1678.

L. C. J. Mr. *Atkins*, have you any Bail ready?

Sam. Atkins. No, my Lord, I am prepared for my Trial, if your Lordship pleaseth, but not with Bail.

L. C. J. Ay, but Mr. *Atkins*, 'tis the latter End of the Term, and many Peoples Livelyhoods lie at Stake. We can't lay aside all Business for yours.

Sam. Atkins. My Lord, my Life lies at Stake, and I have been under severe Imprisonment a long Time. I humbly pray I may be tried; besides I have many Witnesses, who have remained in Town on purpose to give Evidence for me ever since the last Term. I hope my Trial will not take up much Time.

Mr. Just. Dolben. If you have so many Witnesses, it cannot be soon over.

Sam. Atkins. I have many ready, but hope I shall have Occasion to use only a few.

L. C. J. Mr. *Atkins*, we cannot do it, you must be content; you shall be tried at the Sessions. Pray how long is it to it?

Mr. Recorder. It is about three Weeks, my Lord.

L. C. J. That indeed will be too long, but in the mean time you shall be bailed.

Sam. Atkins. I must submit, my Lord; I think I have Bail here. [*Mr. Atkins was here calling his Bail.*]

L. C. J. Come then, name them.

Capt. Lloyd. My Lord, I am a Witness on Behalf of this Gentleman, and cannot possibly be in *England* a Fortnight hence.

Sam. Atkins. My Lord, this is a Captain of one of the King's Ships, and his Occasions will indispenfibly call him away, and this is the Case of several others of my Witnesses.

L. C. J. Well, I don't know; if it be so, you shall be tried to-morrow; and so bring him up very early. [*Speaking to Captain Richardson.*]

And so Mr. Atkins went from the Bar, and was brought up thither again on the Morrow, being Tuesday, when his Trial proceeded thus.

Martis 11 Februarii 1678.

Cl. of the Cr. Cryer, make Proclamation.

Cryer. O yes! If any one can inform our Sovereign Lord the King, the King's Serjeant at Law, the King's Attorney General, or this Inquest, now to be taken of *Samuel Atkins* the Prisoner at the Bar, his being Accessary to the Felony and Murder whereof *Robert Green*, *Henry Berry*, *Lawrence Hill*, and others, stand indicted, and as Accessary of which said Felony and Murder the said *Samuel Atkins* stands indicted, and hath

hath been arraigned, let them come forth and they shall be heard, for now the Prisoner stands at the Bar upon his Deliverance.

Sir William Jones. *Mr. Att. Gen.* My Lord, I must inform your Lordship, that there is another Indictment against Mr. *Atkins* as Principal, which was preferr'd heretofore, but we have since thought fit to prefer another as Accessary. Now to discharge him of the first, I desire he may be arraigned on that before his Trial.

Cl. of the Cr. I did so intend to do, Mr. Attorney. *Samuel Atkins*, hold up thy Hand, (which he did) thou standest indicted by the Name of *Samuel Atkins*, late of the Parish of St. Clements Dane, in the County of Middlesex, Gentleman, for that thou, together with — *Welch*, and — *Lefaire*, of the said Parish and County, Gentlemen, not having the Fear of God before your Eyes, but being moved and seduced by the Instigation of the Devil, the twelfth Day of October, in the thirtieth Year of the Reign of our Sovereign Lord Charles II. by the Grace of God of England, Scotland, France and Ireland King, Defender of the Faith, &c. with Force and Arms at the Parish aforesaid, in the County aforesaid, in and upon Sir Edmundbury Godfrey Knight, in the Peace of God and of our said Sovereign Lord the King, then and there being, feloniously, wilfully, and of your Malice aforethought, did make an Assault, and that thou the said *Samuel Atkins*, a certain Linen Cravat, of the Value of one Penny, about the Neck of the said Sir Edmundbury Godfrey, then and there feloniously, wilfully, and of thy Malice aforethought, didst fold and fasten, and that thou the said *Samuel Atkins*, with the said Cravat, so by thee the said *Samuel Atkins*, about the Neck of the said Sir Edmundbury Godfrey fastened and folded as aforesaid, then and there the said Sir Edmundbury Godfrey, feloniously, wilfully, and of thy Malice aforethought, didst choak and strangle, of which said choaking and strangling of the said Sir Edmundbury Godfrey by thee the said *Samuel Atkins*, in Manner and Form aforesaid done and committed, the said Sir Edmundbury Godfrey, in the Parish aforesaid, in the County aforesaid, instantly died; and that the aforesaid — *Welch*, — *Lefaire*, feloniously, wilfully, of their Malice aforethought, were then and there present, aiding, assisting, abetting, comforting and maintaining thee the said *Samuel Atkins*, the Felony and Murder aforesaid, in Manner and Form aforesaid, to do and commit. And that so thou the said *Samuel Atkins*, with the aforesaid — *Welch* and — *Lefaire*, the said twelfth Day of October, at the Parish aforesaid, in the County aforesaid, the said Sir Edmundbury Godfrey, feloniously, wilfully, and of your Malice aforethought, didst kill and murder, against the Peace of our Sovereign Lord the King, his Crown and Dignity. How say'st thou *Samuel Atkins*, art thou guilty of the Felony and Murder whereof thou standest indicted, and hast been now arraigned, or not Guilty?

Sam. Atkins. Not guilty.

Cl. of the Cr. Culprit, how wilt thou be tried?

Sam. Atkins. By God and my Country.

Cl. of the Cr. God send thee a good Deliverance. *Samuel Atkins*, hold up thy Hand, (which he did) those Men that you shall hear called and

shall personally appear are to pass between our Sovereign Lord the King, and you, upon the Trial of your Life and your Death. If therefore you will challenge them, or any of them, your time is to speak unto them as they come to the Book to be sworn, and before they be sworn. Call the Jury, Cryer, and make an Oyes.

Cryer. O yes! you good Men that are impanelled to enquire between our Sovereign Lord the King, and *Samuel Atkins* the Prisoner at the Bar, answer to your Names.

Cl. of the Cr. Sir John Cutler.

Cryer. Vous avez. Sir John Cutler, look upon the Prisoner. You shall well and truly try, and true Deliverance make between our Sovereign Lord the King, and the Prisoner at the Bar, whom you shall have in your Charge, and a true Verdict give according to your Evidence. So help you God. And so the rest were sworn. The Names of the twelve were these,

<i>Sir John Cutler,</i>	<i>Ambrose Arnold,</i>
<i>Michael Arnold,</i>	<i>Rainsford Waterhouse,</i>
<i>James Partridge,</i>	<i>John Searle,</i>
<i>Thomas Cassee,</i>	<i>Richard Pagett,</i>
<i>Thomas Gostwick,</i>	<i>William Waite,</i>
<i>John Wells,</i>	<i>Arthur Blyth.</i>

Cl. of the Cr. Cryer, count these. Sir John Cutler.

Cryer. One, &c.

Cl. of the Cr. Arthur Blyth.

Cryer. Twelve good Men and true, stand together and hear your Evidence; you that are sworn hearken to the Record, you that are not sworn stand down.

Cl. of the Cr. *Samuel Atkins*, hold up thy hand, (which he did.) You that are sworn, look upon the Prisoner and hearken to his Cause. You shall understand that he stands indicted by the Name of *Samuel Atkins*, late of the Parish of St. Clements Dane in the County of Middlesex, Gentleman; for that he together with *Welsh*,

Lefaire, &c. (prout in the Second Indictment *mutatis mutandis*) against the Peace of our Sovereign Lord the King, his Crown and Dignity. Upon this Indictment he hath been arraigned, and thereunto hath pleaded Not Guilty, and for his Trial hath put himself upon God and the Country, which Country are you. Your Charge is to enquire whether he be guilty of this Felony and Murder whereof he stands indicted, or not guilty. If you find him guilty, you are to enquire what Goods and Chattels, Lands or Tenements he had at the time of the Felony and Murder committed, or at any time since. If you find him not guilty, you are to enquire whether he did fly for the same; and if you find that he fled for it, you are to enquire of his Goods and Chattels, as if you had found him guilty; if you find him not guilty, nor that he did fly for it, say so and no more, and hear your Evidence.

Mr. Att. Gen. My Lord, I am informed by Mr. Ward of the Crown Office, the Prosecutor's Clerk, that they have not sued forth a *Venue facias* upon this Indictment as Principal; and therefore the Jury cannot enquire of that at all, but must be discharged of it. Our Writ is only for the Indictment for being Accessary.

Cl. of the Cr. If you make the Writ *de quibusdum felonis & accessariis*, and seal it a-new (which may be done presently, the Seal being in the Hall) it will do for both.

L. C. J. Do so then, *Mr. Ward*, that both may be dispatched. [*Which was done accordingly.*]

Cl. of the Cr. *Samuel Atkins*, hold up thy Hand again (*which he did.*) You of the Jury, look upon the Prisoner and hearken to his Cause. You shall further understand, that he stands indicted by the Name of *Samuel Atkins*, late of the Parish of *St. Mary le Strand*, &c. (prout in the first Indictment *mutatis mutandis*) against the Peace of our Sovereign Lord the King, his Crown and Dignity. Upon this Indictment he hath been arraigned, and thereupon pleaded Not guilty, and for his Trial hath put himself upon God and his Country, which Country you are. Your Charge is to enquire whether he be guilty of this Felony as Accessary to the said *Robert Green*, &c. or not guilty. If you find him guilty, &c. (*sicut antea.*) Cryer, make Proclamation.

Cryer. O yes! if any Man will give Evidence on the behalf of our Sovereign Lord the King against *Samuel Atkins*, the Prisoner at the Bar, let them come forth; and they shall be heard, for the Prisoner stands at the Bar upon his Deliverance; and all others that are bound by Recognizance to give Evidence against the Prisoner at the Bar, let them come forth and give their Evidence, or else they forfeit their Recognizance.

Mr. Serj. Stringer. May it please your Lordship, and you Gentlemen of the Jury, *Samuel Atkins* the Prisoner at the Bar stands indicted here of two Facts by two Indictments; the one as Principal in this Murder, the other as Accessary. The first of which we shall lay aside, and of his being the Murderer give no Evidence; and so, Gentlemen, you must find him not guilty of that. But as to the Indictment as Accessary, that sets forth, that whereas *Robert Green*, *Henry Berry*, *Lawrence Hill*, and others, on the 12th of October last, at the Parish of *St. Mary le Strand* in your County, did make an Assault upon the Person of *Sir Edmundbury Godfrey*, and that *Robert Green* did throw about the Neck of *Sir Edmundbury* a Linen Handkerchief, and twisted and folded it about his Neck, by which twisting and folding the said *Green* did strangle the said *Sir Edmundbury*, of which strangling he instantly died: and we say, Gentlemen, that the Prisoner at the Bar is indicted as one that was privy, knowing, consulting, and abetting to the Commission of this Murder, and that after the Murder committed (for the Acts are connected) he did receive, harbour, comfort, and maintain the Murderers. To this he hath pleaded Not guilty; if we prove him Guilty, we doubt not you will find him so.

Mr. Att. Gen. May it please your Lordship, and you Gentlemen of this Jury, *Mr. Atkins* the Prisoner is indicted upon two Indictments, the one is for being a Principal in this Murder, but upon that we can give no Evidence; for that was preferred before we had that full and plain Evidence, which now we have of this Fact by the Testimony of *Mr. Praunce*. And I must say thus much to *Mr. Atkins*, that he hath Cause to bless God, that ever *Mr. Praunce* made this Discovery; for I assure you, without that, there are those Circumstances, Probabilities, and Presumptions, that

he might have gone in great danger of being accounted a Principal in the Murder. But now, my Lord, that matter being fully and plainly discovered by *Mr. Praunce's* Testimony, that no Man may bear a greater Burden than he deserves, we acquit him as to that Indictment, and now charge him only as Accessary. And in that you will find the Evidence to be such, as might give us just Cause to prefer the first Indictment.

For, my Lord, we shall make it out, that *Mr. Samuel Atkins* did come to a Gentleman of his own Sir-name, one *Mr. Charles Atkins* (who I think was of kin to him, but whether he was or not, is not material) and to him he did complain of the Proceedings of *Sir Edmundbury Godfrey*, that he was a Man too active, and that he was in no sort to be permitted to live; for if he were, he would be very prejudicial to some he was concerned for. And at the same time he did enquire after some bold Man, I think one *Child* particularly, who had been with that *Charles Atkins* aboard the Fleet, whether he had behaved himself stoutly there; and finding him to be a resolute Person, he desired *Mr. Charles Atkins* to send for him, and send him to him, and he would employ him; and afterwards *Child* owned to *Mr. Atkins*, that he had been there.

L. C. J. To which *Mr. Atkins*? to the Prisoner?

Mr. Att. Gen. To *Mr. Charles Atkins*, who is the Witness. *Samuel Atkins* is the Prisoner. It was *Samuel* that complained to *Charles* of *Sir Edmundbury Godfrey*; enquired after the Courage and Resolution of *Child*, and ordered *Charles* to send him thither, and afterwards *Child*, as he said, went thither; and when he came back he did discourse with *Charles Atkins*, desiring him to join with him in the killing of a Man, and did propose a great Reward to him so to do.

This, my Lord, was the Discourse precedent to the Fact. But now to shew to your Lordship and the Jury, that as the Prisoner *Samuel Atkins* and he did design the thing should be done, so he did pursue that design, and bear a part in it, and was privy to it, and knew of it; we shall prove, that *Mr. Bedlow*, when he saw the Body after it was murdered; which happened, as was proved to you Yesterday, on the 12th of October last, found it removed from the place, where by the Testimony of *Mr. Praunce* he was first carried, into another Room, and there by the help of a dark Lanthorn several People then in the Room saw him. Amongst whom, I say, *Mr. Bedlow* was one, and *Mr. Praunce* speaks to the same matter, and this was on the Monday Night following. And I think we have a sufficient Proof, that *Mr. Samuel Atkins* was one in the Room, that did see the Body, and was consulting with them, how to dispose of it: For we have this Proof against him. *Bedlow* finding a young Man there, whom he did not know, he went up to him, desiring to know his Name; he tells him who he was, one *Atkins*, and describes himself by a particular Circumstance to whom he had relation, and *Mr. Bedlow* will tell you so much, that tho the Light was not very great, yet it was enough to let him see the Faces of those he took notice of, and that this Prisoner was there. And if this be true, it will have the effect of proving him guilty as Accessary, either before or after the Fact.

This will be the course of our Evidence, our Witnesses are not many, and therefore our Proof will not be long. We shall now call them, and when they have done, submit it to your Lordship and the Jury; and first we call Mr. Charles Atkins.

Cryer. Mr. Charles Atkins, lay your Hand upon the Book. The Evidence which you shall give for our Sovereign Lord the King against Samuel Atkins, the Prisoner at the Bar, shall be the Truth, the whole Truth, and nothing but the Truth; so help you God.

Mr. Recorder. My Lord, this is Charles Atkins, whom we desire to begin withal. It was he that had the Discourse first with Samuel Atkins about Child, and afterwards with Child about the Murder. Pray Sir, tell the Discourse you had with the Prisoner at the Bar, and what Discourse you had with Child, and the Time when.

Cha. Atkins. My Lord, it was much about the time that his Majesty went to Newmarket.

L. C. J. That was in September, I think.

Cha. Atkins. No, my Lord, it was in the beginning of October. I cannot speak to a Day, I cannot very well tell that, but it was much about that time. I had been with Sir John Williams about the same Business that I came to speak with Mr. Atkins about, (this Gentleman whom I am forced to be Witness against on the King's Account; but otherwise I have a great Regard for him) and coming there, I asked the Porter below Stairs whether Mr. Atkins were in the House.

L. C. J. At what House was it?

Cha. Atkins. At Derby-House in Channel-Row. He said, Yes: So I went up Stairs, and found him there all alone in the Study; where he generally writes near another Study, where was the Clerk that usually wrote with him, but he was alone; it was in the Afternoon: And after I had spoken to him, I desired him that he would walk out into the other Room. And at the Window, which is next the Door that is to the Office, he and I stood talking together. After we had discoursed a little about the Plot; he told me, that Sir Edmundbury Godfrey had very much injured his Master; and if he lived would be the Ruin of him. And thereupon I having heard that his Master was questioned in the House of Commons, asked him whether he were a Parliament Man, thinking that might be the occasion of their questioning him. No, said he. But then he went off from what we were then discoursing, and he desired me to be secret, and went on upon that account in several Particulars, that I cannot now exactly remember. And as we were talking he broke off his Discourse short, and asked me if I knew Mr. Child; what Child, said I? He that I used to meet at the three Tobacco Pipes? Said he, It is that Child that you recommended to me: for I had recommended such a one to him to be Purser of a Ship, by the means of one Owen. Said he, is he a Man that is stout, or to be trusted with a Secret? Said I, As to his Valour I know nothing of it, but he has a very good Character. Then said he, when you see him, send him to my Master; but as for myself, I desire not to have him ask for me when he comes thither. I could not meet Child that Night, but I did the next Night; and so he said he would go thither. And afterwards I met him again, and he said he had been there, and

falling into discourse, he would have engaged me to join in the Murder of a Man.

L. C. J. What did Child say to you? What is Mr. Atkins's Master's Name?

Cha. Atkins. Mr. Pepys.

L. C. J. What, Mr. Pepys of the Navy?

Cha. Atkins. Yes, my Lord.

L. C. J. Had Child been with him?

Cha. Atkins. My Lord, he told me so.

L. C. J. What did he say when he came from Mr. Pepys?

Cha. Atkins. He told me nothing of Mr. Pepys, but he would have engaged me to join in the Murder of a Man. I was then just coming from walking, and met him in Holbourn Fields near the three Tobacco Pipes, and he desired me to walk with him, which I was unwilling to do. He told me he had something private to say to me; I told him there was a Shed in the back part of the House that was private enough; and thither we went, and I sat with my Back to the House, and he with his to the Garden. And as soon as the Master of the House had brought a Pot of Ale, he fell into discourse; and told me he believed, that by reason of the necessity of my Fortune, and the Troubles I lay under, and my want of Money, I would undertake a Business that might relieve my Wants. I replied, any thing that was honourable I would undertake, or that became a Gentleman; but to rob on the Highway, or any thing of that Nature, that was base, I would not do it. He answered me, that it was a thing of greater moment than that, he told me it was the killing of a Man. I immediately utterly denied to join with him in it; he gave me eight or nine Days to consider of it; and I should have a great Reward, if I would join with them. I heard of him no more for a considerable while, and then I met him at the three Cans, or the six Cans in Holbourn; and renewing his Discourse, he told me, if I would not agree with them to help to murder him, yet if I would conceal it, I should have 100 l. brought to my Chamber; but if I did reveal it, I should not out-live it.

L. C. J. This Child said?

Cha. Atkins. Yes, my Lord.

L. C. J. Who were *them* were to be with you, Captain Atkins, do you know?

Cha. Atkins. I do not know, my Lord, he did not tell me who they were.

L. C. J. Pray tell us again: What was the first Discourse you had with Mr. Samuel Atkins.

Cha. Atkins. I came to borrow a little Money of him, and it was at the great Window in the great Room above Stairs, the very Window next the Office where the Prisoner writes, and there he began his Discourse. We were talking of this Plot that was discovered, and something about Coleman, but the Particulars I cannot remember; and then he fell into Discourse about Sir Edmundbury Godfrey.

L. C. J. What Discourse was it?

Cha. Atkins. That he had injured his Master; and if he lived, he would ruin him. I asked him whether he was a Member of the House of Commons, because I knew his Master had been there questioned for his Religion. No, said he; but then he went off from that, which he was then talking of, which was concerning the Plot and Sir Edmundbury Godfrey, and asked, if I knew where there was a stout Man, and parti-

cularly enquired about *Child*, and bid me send him to his Master.

L. C. J. Did he fear Sir *Edmundbury Godfrey* would ruin his Master by discovering something about the Plot?

Cha. Atkins. I understood so.

L. C. J. Why, he did not say that his Master knew of it, did he?

Cha. Atkins. No, not to me.

L. C. J. And what did he talk of killing any body?

Cha. Atkins. No, he did not mention it to me.

L. C. J. Then all that he said to you was, that Sir *Edmundbury Godfrey* had very much injured his Master, and if he lived would ruin him; and then asked, if you knew a Man that would be stout and secret, and bid you send him to his Master, but not ask for him.

Sam. Atkins. Pray, Mr. *Atkins*, will you tell what time that Discourse was?

Cha. Atkins. I cannot tell that exactly. It was two Days before Sir *John Williams* went into the Country. It was about the time of the Dutchess her going beyond Sea.

Sam. Atkins. Was there no body by when we had that Discourse?

Cha. Atkins. There was another in a Study hard by, I cannot tell exactly who.

Sam. Atkins. Do you know his Name, when you hear it? Was it Mr. *Lewis*?

Cha. Atkins. I think it was so. I cannot exactly tell.

L. C. J. What Day was it, as near as you can?

Cha. Atkins. I cannot say what Day it was, it was about seven or eight Days in *October*, as I can remember.

L. C. J. You say it was about the time of the Dutchess her going over into *Holland*.

Cha. Atkins. I think so. I cannot positively remember.

Mr. Sol. Gen. Had you any Reward offer'd to you for killing of a Man?

Cha. Atkins. Yes, I had by *Child*.

Sam. Atkins. By whom was that Reward to be paid?

Cha. Atkins. He did not tell me.

Mr. Att. Gen. Now, my Lord, because it seems a strange thing, that Mr. *Atkins*, who says he is a Protestant, should be engaged in this Business, we have a Witness here to prove, that he hath been often seen at *Somerset-house* at Mafs, and so he is a Party concerned; for those that are of that Party, it was their Interest to cut him off. And that is this Boy. [Pointing to a Boy that was then brought in.]

L. C. J. How old are you, *Child*?

Boy. About Seventeen.

Mr. J. Wild. Do you know what, if you swear false, will become of you?

Boy. I will not swear false.

Mr. J. Wild. What, if you do swear false, will become of you?

Boy. I shall be damned.

Mr. Att. Gen. He is as like to speak Truth, as another.

Sam. Atkins. What Religion are you of, Boy?

Boy. A Protestant.

Sam. Atkins. Do you know me?

Boy. No.

Mr. J. Wild. Sir, you are too bold with the Witnesses.

L. C. J. Swear him.

Mr. Att. Gen. Pray hold. My Lord, this is a Witness that Mr. *Ward* brings from below. I have him not in my Brief. I desire, before they swear him, that he would give an Account whether he knows the Prisoner or no.

Boy. No, I do not. [And so the Boy was carried off, with some Expressions of Mr. Attorney's Displeasure to Mr. *Ward* for bringing him in.]

Mr. Recorder. My Lord, I perceive it was a Mistake; it was somebody else. We will proceed to other Evidence.

* *Mr. Sol. Gen.* We have hitherto gone upon the Evidence to prove, * *Sir Francis Winnington.* that Mr. *Atkins* sought out for a stout Man, and when he had found one he thought was for his purpose, he bid him send him to his Master. This stout Man, *Child*, would have engaged the other Witness in a Murder; and it is very probable what that Murder was, to wit, the Murder of Sir *Edmundbury Godfrey*, for we shall prove that the Prisoner was aiding and assisting to carry off the Body, and for this we call Mr. *Bedlow*.

Then Mr. *Bedlow* was sworn.

Mr. Recorder. Pray, Sir, will you tell my Lord, and the Jury, whether you were in the Room where the Body lay, and in what Company you saw it?

Bedlow. Your Lordship had an account Yesterday, how *Lefaire* came to acquaint me, that such an one was murdered, and that they intended so and so to dispose of the Body. When I came to meet him at *Somerset-House*, I asked him who were to be concern'd in carrying him off. He told me it was a Gentleman, one Mr. *Atkins*. I thought, it might have been this Gentleman, [pointing to Captain *Atkins*] whom I had known several Years since, and so I enquired no further, but remember'd he told me so; and when I came into the Room, there was a great many there, and some of them their Faces I did see. I asked a young Gentleman whether his Name was not *Atkins*, and he said yes; then I asked him, if he were Mr. *Pepys's* Clerk. He answer'd yes, and added, I have seen you often at my Master's House. There was a very little Light, and the Man was one I was not acquainted with, tho I had been often at the House, but could never meet with him, and yet the Man said, he had seen me often there: so that 'tis hard for me to swear that this is he. And now I am upon one Gentleman's Life, I would not be guilty of a Falsehood to take away another's. I do not remember that he was such a Person as the Prisoner is; as far as I can remember he had a more manly Face than he hath, and a Beard.

L. C. J. You do well to be cautious, Mr. *Bedlow*.

Mr. J. Wild. Pray, what store of People were there?

Bedlow. I believe there were seven or eight. Some there were that I knew.

L. C. J. Who were those?

Bedlow. *Lefaire* and *Praunce*. I remember very well, I asked Mr. *Atkins* this Question, Are you Mr. *Pepys's* Clerk? He said Yes: I have seen you often at my Master's House.

L. C. J.

L. C. J. And that was all the Discourse you had with him?

Bedlow. Yes, for I was but a very little while there..

L. C. J. But you cannot charge the Prisoner to be him?

Bedlow. I do think he had a more manly Face than the Prisoner has, and a Beard.

L. C. J. So you think it rather was not he, than it was he?

Bedlow. I can't say it was he, nor I could not at first. I did not know, but it might be some one that did assume his Person to put me off.

Mr. J. Wild. Mr. *Bedlow*, pray let me ask you one Question. Did you never know of any Design to murder Sir Edmundbury Godfrey, till *Lefaire* spoke to you to carry him off?

Bedlow. I knew not till I saw him murder'd. They told me I should help to carry off the Body of one that was murder'd, but I could not imagine whom.

L. C. J. But you knew that they were to murder a Man?

Bedlow. Yes, my Lord, but I knew not whom.

Mr. J. Wild. But you were appointed to insinuate yourself into Sir Edmundbury Godfrey's Acquaintance?

Bedlow. Yes, my Lord.

Mr. J. Wild. And upon what Errands were you sent?

Bedlow. To take out Warrants for the Peace.

Mr. J. Wild. And did you take out any?

Bedlow. Yes, against some Persons, and there were none such.

Mr. Recorder. Now if your Lordship pleases, I desire Mr. *Bedlow* to let us know whether he did ask the Person, that said he was Mr. *Atkins*, any other Questions?

Bedlow. No, I did not.

Mr. Recorder. How came you to ask him no other Questions, but only whether he were Mr. *Pepys's* Clerk?

Bedlow. Because I never heard of any of that Name, but he and this Gentleman [*pointing to Captain Atkins*] whom I know very well, and I could not tell but it might be he.

L. C. J. Here is the thing. *Lefaire* told him one *Atkins* should help him to carry the Body off; and when he came into the Room, that Person told him his Name was Mr. *Atkins*; and then he asked, if he were Mr. *Pepys's* Clerk, for he could not tell but that it was *Charles Atkins*.

Mr. Recorder. We have another Reason, my Lord, for the asking that Question. Pray, what Discourse had you about any Commission?

Bedlow. I had often been with Captain *Ford* at Mr. *Pepys's* about his Commission, and I had often desired to speak with Mr. *Pepys*, or Mr. *Atkins* his Clerk, but I could never find either of them at home; and therefore when I met that young Gentleman there, I asked him whether he were *Pepys's* Man, and he said Yes. I asked him if he knew me, and he told me Yes. I had been often at his Master's House with Captain *Ford*, but I had never seen Mr. *Atkins*.

Mr. Recorder. What did he tell you besides?

Bedlow. That was all the Discourse we had.

Mr. Sol. Gen. Did you ever hear of any other *Atkins*, that lived with Mr. *Pepys*?

VOL. V.

Bedlow. No, none at all. And the same Testimony I give now, I gave at the first. And, my Lord, I could not be positive before the Lords of the Committee, and I cannot be positive now.

Mr. Att. Gen. Indeed he was never positive at the first. Now, my Lord, if you please, we will call a Witness to prove, that that Day, when this was suppos'd to be done, Mr. *Samuel Atkins* had bespoke a Dinner at Mount *Horeb*, but he had some other Business, and did not come, and lost the Price of a good Dinner. Pray, swear *Thomas Walton*. [*Which was done*].

Mr. Recorder. Pray, Sir, what can you say?

Walton. As to the Body of the Cause, I have nothing to say. I have not seen Mr. *Atkins* these two Years; but there having been some Friendship between us, I had a mind to see him, and sent a Particular Friend to desire him to appoint a Meeting.

L. C. J. When?

Walton. At Mount *Horeb*.

Mr. Att. Gen. My Lord doth not ask Where, but when, at what Time?

Walton. At two of the Clock.

Mr. Att. Gen. What Day?

Walton. The Twelfth of *October*.

L. C. J. How come you to remember the Day?

Walton. I will tell you my Reason, my Lord. When I heard that this Gentleman was in this unhappy Affair, I said, how much better had it been for him to have been in my Company, that I might have vouched for him. But you [*Pointing to the Prisoner*] did appoint, you know, Sir, to meet me. And I took Cognizance of this Affair, speaking to a particular Friend.

L. C. J. How long after was this?

Walton. When the Tidings were, he was taken Prisoner.

Mr. Att. Gen. A great while ago, my Lord.

L. C. J. How long after Sir Edmundbury Godfrey was murdered?

Mr. Att. Gen. About a Fortnight.

L. C. J. Was there a Dinner bespoke?

Walton. I bespoke one for him; he knew nothing of it.

Mr. Att. Gen. Did he appoint to be there that Day?

Walton. Yes, he did. I think he will not deny it.

Mr. Att. Gen. Did you send a Messenger to him?

Walton. Yes, I did.

Mr. Att. Gen. What Answer had you?

Walton. He brought me word, he would come at two of the Clock to me.

Mr. Att. Gen. Did you bespeak the Dinner for him, and did you pay for it?

Walton. I never gave him any Account what was to be for Dinner.

Mr. Att. Gen. But let this Evidence go as far as it will. This Gentleman had a mind to meet him; sent a Messenger to him to meet him; he appointed at Two of the Clock; and he bespoke a Dinner for him, but he came not. Now we use it thus. I desire to know of him, when was the Message sent? How long before that Day? Or was it the Day before?

Walton. It was a Week before.

Mr. Att. Gen. What Day before?

Walton. It was a Week before.

F f f 2

Mr.

Mr. Att. Gen. Can you remember what Day?

Walton. I do not, for I had no Disatisfaction because he did not come.

Sam. Atkins. Will your Lordship give me leave to ask him one Question? I own Sir, you sent to me by a School-fellow, about a Week before, and desired me to appoint a Day to meet you, and I appointed this Day, and that for this Reason, I knew my Master would be then out of Town, and so I thought I could conveniently meet you; but it being Ten Days before, I entirely forgot it; but can prove by several Witnesses, where I did dine that Day, which I desire may be called. But now, my Lord, this Gentleman is upon his Oath, who is a Protestant, and was my School-Master, I desire him to declare, whether I was bred a Protestant, or no; and whether my Friends were so or no?

L. C. J. How was he bred, Sir?

Walton. He was bred up in the Protestant Religion, my Lord.

L. C. J. Were his Father and Mother Protestants?

Walton. Yes, my Lord, they were so, and I know them very well.

Sam. Atkins. Pray, Sir, declare whether I was not only bred a Protestant, but whether I was not so also when I left your School?

Walton. Yes, my Lord, he was always a Protestant, and a very zealous one too.

L. C. J. There is very much in that.

Mr. Just. Wild. Where is this Mount Horeb?

Mr. Recorder. It is in Pudding-Lane, at one Mr. Appleby's.

L. C. J. Well, have you any thing more, Mr. Attorney?

Mr. Att. Gen. No, my Lord, I have no more to say, till I hear what Defence the Prisoner makes.

L. C. J. Then, Mr. Atkins, you have Liberty to defend your self.

Sam. Atkins. My Lord, and Gentlemen of the Jury, I hope I shall in my Defence proceed very inoffensively towards God, and towards this Court. First, towards God (before whom I am, in whose Presence I must appear, and before whom I can protest my Innocence as to what is charged upon me) in that I shall declare nothing but what is true: And towards this Court in the next Place, because I intend to deliver my self with all the Respect and Submission to it, that becomes a Prisoner. My Lord, this Gentleman, Mr. Atkins, who hath brought this Accusation against me, is a Man whom I have kept from perishing, I suppose he will own it himself; I petitioned, solicited for him, and was instrumental in getting him out of Prison for a Fact which I shall by and by tell you. And tho this, my Lord, may seem against me, yet by and by—

L. C. J. Hold, you mistake, Mr. Atkins, he does you no mischief at all, for he saith no more than, that he had been discoursing with you about the Plot, and you said Sir Edmundbury Godfrey had very much injured your Master; and that you desired to know, if he were acquainted with a stout Man; and asked particularly of Mr. Child, and bid him send him to your Master; and he said afterwards, he had been there, and would have engaged him to join in a Murder. All which is nothing to the Purpose.

Sam. Atkins. But I never had any such Discourse with him, my Lord.

L. C. J. If you had, or had not, it is no matter, you need not labour your Defence as to any thing he says.

Sam. Atkins. I protest before God Almighty, I know nothing of it.

Mr. Just. Dolben. But what say you to Mr. Bedlow's Testimony? Did you see the Body of Sir Edmundbury Godfrey at Somerset-House?

Sam. Atkins. No, my Lord; I am so far from that, that in all my Life I was never in the House.

L. C. J. Then call a couple of Witnesses to prove where you were that Monday Night, the 14th of October, and you need not trouble yourself any further.

Sam. Atkins. There is Captain Vittles, and his whole Company.

L. C. J. Can any of these say where you were the 14th of October; if they can, a couple of them is enough. Who is this?

Sam. Atkins. This is the Captain, my Lord.

L. C. J. What is your Name?

Capt. Vittles. My Name is Vittles.

L. C. J. Do you know Mr. Atkins the Prisoner?

Capt. Vittles. Yes, very well.

L. C. J. How long have you known him?

Capt. Vittles. These Fourteen Years.

L. C. J. Can you tell where he was the 14th of October?

Capt. Vittles. I can tell you by several Circumstances, that your Lordship shall understand, that I do remember the Day.

L. C. J. Why, you cannot tell what Day of the Week it was.

Capt. Vittles. Yes, I can, it was of a Monday.

L. C. J. Where was he on Monday?

Capt. Vittles. The King was pleased to command me to go to Antwerp, to carry over some Officers of the King's to the Garison; I returned back the 6th of October, which was Sunday.

Mr. Just. Jones. How come you to remember the Days so exactly?

L. C. J. Mariners are very exact and punctual; they keep Accounts of every Day, and have Journals of all Passages.

Capt. Vittles. Ay, my Lord, and I have it here in my Pocket: The 6th Day I arrived at Greenwich, which was Sabbath-Day, and that Day I would not come ashore, but I let it alone while Monday, which was the 7th Day; then, my Lord, I went and appeared, and gave an Account to the Secretary of what I had done, according to my Instructions, to see whether he had any further Service to command me. At present, the Secretary told me, No; so I told him I would go down to the Yatch, and wait His Majesty's Commands; and there I stayed till Thursday; and on Friday the Secretary, I think, was going out of Town to New-market, and so I could receive no Orders from him, but was to stay till he came back. On the Monday following I came up about Eleven of the Clock, and I met with Mr. Atkins at the Office he had at his Master's the Secretary's; said I, I am glad you are at home; and, said he, I am glad you are not gone, for there are a couple of Gentlewomen that desire to see a Yatch, and if you will go down, I will come down too, and bring down my Friends by and by: Said I, I am glad

I am in a way to serve you, and you shall be welcome to what I have. So I disappointed two or three Friends that I had appointed to meet at *Billingsgate*, that I might get my Boat ready. When I came a-board, I order'd my Men to clean it, and I got ready some Provisions, such as I had : But in the mean time my young Lord *Berkley* and his Men came to see the Yatch in the Afternoon, where she lay then at *Greenwich*, over-against the College ; and I being glad of such a Gentleman's Company, entertained him with a Bottle or two of Wine, and what the Ship would afford, and when he went away, I fired five Guns. And when he was gone, I was walking upon the Deck : and I wonder, said I to my Men who were with me, that Mr. *Atkins* doth not come ; he told me he would be here with some Friends ; I will go a shore if he does not come quickly. And so, if it shall like your Honour, I stay'd an Hour longer ; and, said I, if he doth not come in half an Hour, I will go a shore ; and I was ready to go, when I saw a Boat at a Distance, and then said I, I will stay, for I believe that is the Boat ; and it proved so. It was Two of the Clock when my Lord went away, and it was then half an Hour past Four, or thereabouts. So when he came aboard, his two Friends came aboard with him, and went down into the Cabin, and drank a Glafs of Wine, such as we had ; and the Wine being good, and just come from beyond Seas, we drank till Seven of the Clock, and I would not let them go. Then, said he, I will not keep the Boat upon Charge here : No, you need not, said I, my Boat shall see you ashore. So he discharged the Boat, which was, I say, about Seven a Clock ; and so about Eight or Nine a Clock we had drunk till we were a little warm ; and the Wine drinking pretty fresh, and being with our Friends, we did drink freely, till it was indeed unseasonable : I must beg your Lordship's Pardon, but so it was ; and at half an Hour past Ten, I ordered my Men to go off with the Boat of four Oars, that belonged to the Yatch, and that would go much swifter than any other Boats, and I put him into the Boat very much fuddled. Now, my Lord, away goes he, with four of my Men (they are here) and I ordered them, Pray, said I, put ashore Mr. *Atkins* and his Friends where they will go ashore. So I went to sleep when he was gone ; and the next Day in the Morning, when the Boat came a-board, said I, Where did you put ashore Mr. *Atkins* and the two Gentlewomen ? At *Billingsgate*, said they. Why so, said I ? Which way would they get home ? for I knew Mr. *Atkins* was very much in drink. Why, said they, the Tide was so strong at the *Bridge*, that we could not get thro' with our Boat. Now it flowed that same Night till twelve Minutes past Ten ; so that it must be near half an Hour past Ten when they went away.

Mr. *Just. Wild.* What, it flowed there at past Ten ?

Capt. *Vittles.* Yes it did.

L. C. J. Mr. *Bedlow*, what Time of the Night was it, that you were at *Somerset-House* ?

Bedlow. It was betwixt Nine and Ten.

L. C. J. He was on Shipboard then.

Mr. *Just. Wild.* He was very sober, that you spoke withal, was not he ?

Bedlow. Yes, very sober, my Lord.

L. C. J. Then call another Witness, one of your Men, and we have done.

Capt. *Vittles.* Give the Word for the Boatswain *Tribbett*.

L. C. J. Did the Women pledge you, Captain ?

Capt. *Vittles.* Pledge me, my Lord !

L. C. J. Ay, did they drink with you ?

Capt. *Vittles.* Ay, and drink to us too, my Lord.

L. C. J. Those be your Men that stand there ?

[He, and several other of the Ship's Company were there.] Whither did you carry Mr. *Atkins* when your Captain commanded you to set him ashore ?

Tribbett. To *Billingsgate*.

L. C. J. What Time of Night came you there ?

Tribbett. At half an Hour past Eleven.

L. C. J. What Time did you carry him from the Yatch ?

Tribbett. It was about half an Hour past Ten a Clock.

L. C. J. What Day of the Week was it ?

Tribbett. It was on a Monday.

L. C. J. Well, you need not trouble yourselves any more.

Mr. *Att. Gen.* My Lord, in this Matter, it is in vain to contend in a Fact that is plain. But I would desire (because some perhaps will make an ill Use of it) that they would please to take notice, here is no disproving the King's Evidence. For Mr. *Bedlow* did not at first, nor doth he now, charge him directly to be the Man : So that whoever reports, That the King's Evidence is disproved, will raise a very false Rumour.

L. C. J. No, no ; it is so much otherwise, that for all he hath said herein, he is the more to be credited in his Testimony : and Mr. *Atkins* needed not to make any Defence, but must have come off without any, upon what Mr. *Bedlow* says for him.

Mr. *Att. Gen.* So likewise for the first Man, all that he says consists together, and may be true, and yet Mr. *Atkins* innocent.

L. C. J. So it may.

Mr. *Att. Gen.* I desire the Company may not go away with a Mistake, as if the King's Evidence were disproved.

L. C. J. Not in a Tittle.

Mr. *Att. Gen.* Then I have done, my Lord.

L. C. J. No, I will tell you how it did arise. It arose from the Jealousy of the Murder of Sir Edmundbury Godfrey, and Persons were willing to lay hold on any Opportunity to find it out. And Mr. *Bedlow* was told such a Man should be his Fellow to help him to carry away the Body ; and hearing of such a Name, thought it possible it might be such a one ; and he owning himself to bear that Name, and to be Mr. *Pepys's* Clerk, when he gave in his Information, the People, who were put into such Alarms as these, were very ready to catch at it. Therefore no Body was to blame for pursuing *Bedlow's* Evidence. He said nothing then, but what he says now, and that is nothing at all positive ; which is all true, and yet Mr. *Atkins* doth appear to be a very innocent Man in this Matter.

Then

Then the Jury consulted together at the Bar, and agreed.

Cl. of the Cr. Gentlemen, are you all agreed of your Verdict?

Omnes. Yes.

Cl. of the Cr. Who shall speak for you?

Omnes. Our Foreman.

Cl. of the Cr. Samuel Atkins, hold up thy Hand. [Which he did.] Look upon him. How say you, is he Guilty of the Felony and Murder whereof he stands Indicted, or Not Guilty?

Foreman. Not Guilty.

Cl. of the Cr. Did he fly for it?

Foreman. Not that we know of.

Sam. Atkins. God blefs the King and this Honourable Bench. [On his Knees.]

Cl. of the Cr. Sam. Atkins, hold up thy Hand. [Which he did.] Look upon the Prisoner. How say you, is he Guilty of the Felony, as Accessary to the Murder, as he stands Indicted, or Not Guilty?

Foreman. Not Guilty.

Cl. of the Cr. Did he fly for it?

Foreman. Not that we know of.

Sam. Atkins. God blefs the King, and this Honourable Bench. [On his Knees.]

Cl. of the Cr. Then hearken to your Verdict, as the Court hath recorded it. You say, that Samuel Atkins is not Guilty of the Felony and Murder, whereof he stands Indicted; nor that he did fly for it. And you say, that he is not Guilty, as Accessary to the Felony and Murder whereof he stands Indicted, nor that he did fly for the same; and so you say all?

Omnes. Yes.

L. C. J. Mr. Atkins, I should have been very glad that the rest, who have been condemned, had been as innocent as you are; and I do assure you, I wish all Mankind had been innocent. For, if any Protestant had been guilty of such a thing as this, it would have grieved me to the very Heart, that any Protestant should do such things, as those Priests provoke their Profelytes to at this Day.

Capt. Vintles. My Lord, here is his Schoolmaster will give your Lordship an Account how he was bred and brought up, and what a good-condition'd young Man he was.

L. C. J. Well, well, Captain, go you and drink a Bottle with him.

Then Mr. Atkins went from the Bar.



The Trial of Slingsby Bethel Esq; at the Bridge-House in Southwark, for an Assault and Battery on Robert Mason at the Election of Members of Parliament for the Borough of Southwark. October 5, 1681. 33 Car. II.

The Court being sat, the Jury were call'd, as follows:

JURY MEN,

Edward Collingwood,	Humphrey Roberts,
Brazier,	John Allyn, Baker,
Francis Waker, Comb-	John Morgan, Grocer,
maker,	William Morrice,
Zebulon Newington,	Francis Ferrey,
Chandler, alias Salter,	Richard Frankling,
William Head, Woollen-	Thomas Wade, Butcher,
Draper,	Edw. Kemp, Ale-Draper.

Being Sworn, the Indictment was read.



THE Jurors for our Sovereign Lord the King, upon their Oath do present, That *Slingsby Bethel*, late of the Parish of St. Olave's Southwark, within the Town and Borough aforesaid, in the County of Surrey, Esquire, on the Twelfth Day of March, in the Three and Thirtieth Year of the King, with Force and Arms, in the Parish aforesaid, and within the Town and Borough aforesaid, in the County aforesaid, in and upon one *Robert Mason*, at that

Time one of the King's Watermen, in the Peace of God; and of our Lord the King, then and there standing, did assault and make a Battery, and the said *Robert Mason* then and there most grievously and dangerously did beat, wound, and evil entreat, so that his Life was greatly despair'd of, and other Enormities that then and there he offer'd to, and brought on the said *Robert Mason*; and that the same *Slingsby Bethel*, then and there, (to wit) the same Twelfth Day of March, in the Thirty-third Year aforesaid, in the Parish aforesaid, in the Town and Borough aforesaid, in the County aforesaid, in the Presence and Hearing of very many of the Subjects of our Sovereign Lord the King, then and there to the said *Robert Mason*, he spake, utter'd, and with a loud Voice declar'd and published these provoking, threatening, and opprobrious Words, (to wit) *Sirrah*, pointing at the said *Robert Mason*, I (meaning himself, *Slingsby Bethel*) will have your Coat (a certain Cloth Coat of a Red Colour, with which the said *Robert Mason* was cover'd, and adorn'd with a certain Badge of our said Lord the King upon the said Coat) pluck'd off your Back, to the great Terror, Disturbance, and Trouble of divers of our Sovereign Lord's liege People and Subjects, being then

then and there present, to the evil Example of all others offending in the like Case, as also against the Peace, Crown, and Dignity of our Sovereign Lord the King, &c.

Mr. Peafely. **M**Y Lord, and you Gentlemen of the Jury, *Slingsby Bethel* Esq; stands indicted, for that he the said *Slingsby Bethel* made an Assault and Battery on *Robert Mason*: As also for menacing and threatening Words; saying to him the said *Robert Mason*, *Sirrah, I will have your Coat pluck'd off your Back*, to the great Terror and Damage of the said *Robert Mason*, &c. to which Indictment he has pleaded, Not Guilty.

Mulloy. My Lord, and you Gentlemen of the Jury, I am Counsel for the King, against *Slingsby Bethel* Esq; who, upon the Twelfth Day of *March* last, in the Thirty-third Year of the King, did assault *Robert Mason*, one of the King's Watermen, and did injuriously beat and strike the said *Robert Mason*, did give several opprobrious Words, saying, he would have his Coat pluck'd off his Back, &c. To which he pleadeth, Not Guilty.

Mr. Holt. My Lord, and you Gentlemen of the Jury, I am Counsel for the King, against *Slingsby Bethel* Esq; You understand the Issue you are to try, it hath been open'd; the Question is, Whether Mr. *Slingsby Bethel* be guilty of this Battery, and the Matter contain'd in the Indictment, and the aggravating Words therein, or no? The Occasion was, That in *March* last, there was an Election for two Burgesses to be chosen to serve in Parliament for this Borough; this *Robert Mason* was desired to come from *Lambeth*, to see whether any of that Parish came to Poll, which had no Right so to do. The Competitors were, Sir *Richard How*, Captain *Rich*, *Slingsby Bethel*, and *Edward Smith*, Esqs. Mr. *Slingsby Bethel* shew'd, at his Entrance into the Borough, what Inclination and Temper he came with; for his Followers, and such as came with him, came with their God-damme's, and several execrable Oaths, against those that voted against him; after the Election began, and the Poll demanded, truly, then Mr. *Bethel* acted his Part, and took Occasion to go off from the Place where he was, and strike several Persons that were acting against him, particularly this *Robert Mason*, finding him to be against him, took his Cane, and knocked him over the Pate, and afterwards knowing him to be the King's Waterman, said he deserved to have his Coat pluck'd over his ears: Were the Affront against him as a single Person, it were not of so bad Consequence; but we are to take Notice of the Solemnity of the Occasion of the Meeting: Now, consider the Occasion; it was for the chusing of Parliament-Men; and had it not been for the Prudence of the Waterman, in forbearing to strike again, God knows the Effects, and what an Uproar it might have occasion'd: But he prudently refrained, and took his Course in a legal Way, and according to Law hath preferred this Indictment against Mr. *Slingsby Bethel*. Now tho the said Mr. *Bethel* be so great a Man, and a Person of Value, lately Sheriff of the City of *London*; and he, *Robert Mason*, appearing to be but a poor Waterman, yet I don't question, he will find an *English* Jury to do him Right.

King's Counsel. Call Mr. *Robert Mason*, *Arthur Adams*, *Thomas Walbrooke*, *Griffin Meade*, *Tho. Smith*, *Alexander Dory*, *Lawrence*.

Mr. Holt. *Mason*, What can you say on the King's and your own Behalf, concerning this Matter?

Robert Mason. I was standing on the Steps, by the Door in the Artillery-Ground, and Mr. *Bethel* came and gave me divers Blows on the Stairs, knock'd me with his Cane, and follow'd me down beating of me, and said, *Sirrah, I will have your Coat pluck'd over your Ears*; and I answer'd, *So you would my Master's too, if you could*.

Mr. Thompson. By whose Sollicitation came you there?

Mason. I was desired to be there.

Thompson. What, did he strike you also with his Fist?

Mason. Yes.

Thompson. Where did he hurt you with all his Blows?

Mason. On the Breast.

Thompson. How many Blows?

Mason. He gave me Twenty Blows at least, I can swear safely; but how many more, I know not.

Thompson. Did not you, before Mr. *Bethel* came there, interrupt the People's coming to Poll, and what did Mr. *Bethel* say?

Mason. He ask'd what I did there, and bid me go down.

Justice Pyrs. Did Mr. *Bethel* single you out from the rest of the Company?

Mason. Yes, he did.

King's Counsel. Call *Adams*. *Adams*, what can you say? Did you see Mr. *Bethel* strike *Mason*, and what Words did he say?

Adams, first Witness. There was a Tumult at the Stairs, and they called to me, being Constable, and when I came, Mr. *Bethel* and *Mason* were together, and a great Company follow'd them; I said, *Sirs, pray keep the Peace*; and I saw Mr. *Bethel* give him two or three Shuggs, and said, *Sirrah, I will have your Coat off your Back*; and *Mason* answer'd, *Ay, and so you would my Master's too, if you could*.

Holt. *Adams*, tell the Court what you think would have been the Consequence if *Mason* had struck again.

Adams. It would have been of a sad Consequence.

Holt. What was Mr. *Bethel*'s Behaviour, when he enter'd into the Borough? Did you see him come into the Borough?

Adams. They came in and cry'd, No Abhorers, No Abhorers.

Thompson. Did you hear Mr. *Bethel* say so?

Adams. No.

Thompson. Did you hear him swear?

Adams. No.

Thompson. Who was it that swore?

Holt. He that rid first.

Thompson. *Mason* said, Mr. *Bethel* gave him twenty Blows: Did you see it?

Adams. I was not there all the while, I did not see it.

Third Witness. *Thomas Walbrooke*, what can you say to the Case in hand?

Walbrooke. I stood by the Stairs when Mr. *Bethel* passed by; I saw Mr. *Bethel* thrust him down the stairs, and I said, *Robert, take care what you do*: Mr. *Bethel* said, *Sirrah, come down*: *Mason* said, *I will come when I see my own Time, I do no body any Hurt*: Mr. *Bethel* answer'd, *I command you to come*

come down; and his Answer was, *I will, when I see my own Time.*

Thompson. Did you see any Blow given by Mr. Bethel?

Walbrooke. No, I saw none; I won't swear to any Blows, but I saw two or three Pushes in the Breast; he push'd him back.

Thompson. And how many Blows were given, Ten, or Twenty, or how many?

Walbrooke. I will not answer any thing concerning that.

Thompson. Upon the Oath you have taken (being, I think, you are an honest Man) had the Waterman this Coat on at that Time? Or had he not a Campaign Coat over it?

Walbrook. He had that Coat, but I don't remember any other.

King's Counsel. Call *Griffith Meade.* Give an Account of what you can of this Matter.

Griffith Meade. I saw a great Number of People come to the Place, and saw Mr. Bethel give him a Push, and that was all.

Thompson. What Words did you hear?

Meade. No Words.

Thompson. How was this Man clothed? Was he clothed with this Coat, or had he a Campaign Coat over it?

Meade. I cannot tell.

Thompson. Upon the Oath you have taken, how many Blows did you see given, because they say Twenty?

Meade. No Blows at all, but a little Push.

Call *Thomas Smith.* (He appeared.) What do you know?

Smith. As *Robert Mason* and myself stood together, Mr. Bethel came round the Burying-place, and he brought a great Multitude of Persons with him, and bid *Mason* come down the Steps: *Mason* answer'd, *I will come down when I see my Time.* Mr. Bethel said, *If you will not come down, I will have your Coat pluck'd off your Back.* Afterwards many Words passed, which I cannot remember, and Mr. Bethel push'd him on the Breast.

Second Counsel. Mr. Smith, Pray give the Court an Account of the Behaviour of the Men that follow'd Mr. Bethel: Did you not see Mr. Bethel give *Robert Mason* a Push, when he was in the Artillery-Ground?

Smith. I saw none.

Holt. What do you think the Consequence had been, if *Mason* had struck again?

Smith. Had he given any Blows again, I do believe a Hundred and a Hundred had been slain.

Thompson. *Smith,* Pray give an Account of the Behaviour of the Men that came with Mr. Bethel, and what Coat *Mason* wore, and whether he had not a Campaign Coat on it?

Smith. Sir, I know not that, but he had the same Coat then on his Back, which he has on now.

Thompson. Why, what made you think, if *Mason* had struck Mr. Bethel, that it would have made such a great Disturbance?

Smith. Because he was the King's Servant.

Call *Alexander Dory.* *Dory,* Give the Court an Account of the Matter in Question. Did you see Mr. Bethel give *Mason* any Blows?

Dory. Sir, Mr. Bethel gave him some Pushes in the Breast, and said, *He would have his Coat off his Back.*

Thompson. Had he the same Coat on as now he hath?

Dory. I saw the same, and no other.

Mulloy. Call *Lawrence.* (He appear'd.) *Lawrence,* give the Court and Jury an Account of what you know of the Quarrel between Mr. Bethel and *Robert Mason.* Did you see Mr. Bethel give him any Blows? And give an Account of the Behaviour of Mr. Bethel and his Company, when they came into the Borough.

Thompson. This Indictment is for an Assault and Battery; if you can give an Account of that, do; but not of the Behaviour of those that came with Mr. Bethel; that is not the Matter at this Time.

Holt. I answer, Sir, it is not; but we ask the Question, to make out the Behaviour of Mr. Bethel and his Company, and shall leave it to the Jury, what Judgment to make of it.

Lawrence. I saw the Persons that came with Mr. Bethel, hectoring and swearing at a strange Rate, and the Persons which rid before, cry'd, Hollow, Hollow.

Thompson. I appeal to Mr. Holt; What if *John a Nokes,* or *Tom a Styles,* swear and hector, &c. shall Mr. Bethel answer for that, in a Matter that falls out long afterwards, as this did?

Lawrence. I saw their Behaviour, as I have said; and when Mr. Bethel came to *Robert Mason,* he stood with his Hands behind him, Mr. Bethel bid him come down; he said, No, he would not; Then said Mr. Bethel, *I will pluck your Coat off your Back;* and *Mason* answer'd, *Ay, and so you would my Master's too, if you could.*

Lord Mayor. Did Mr. Bethel swear, when he came into the Borough?

Lawrence. No.

Lord Mayor. Who did swear?

Lawrence. He that rid first.

Mr. Thompson. May it please your Lordship, I am of Counsel for Mr. Bethel, the Defendant, who has been, and stands indicted for making an Assault and Battery upon *Robert Mason;* and for speaking many menacing and threatening Words, as *That he would pull his Coat over his Ears,* &c. and for giving several Blows; unto which we have pleaded, *Not Guilty.* They have produced several Witnesses, and *Robert Mason* himself, who is so thorough-fitch in the Case, that he swears so as no one can believe him; for his own Witnesses do not: for they do not swear, nor pretend to swear like him, being not able to stretch at that Rate; he is desperately mistaken, to speak the best of him.

For this *Mason* swears Mr. Bethel gave him Twenty Blows at least, but how many more he cannot say: See how this will look when we shall prove, by substantial and credible Men, that not one Blow was given, or Push either. But suppose he were push'd, yet his Evidence agree not one with another; for some swear to one Push, some to more: But Mr. *Mason* swears to the full Number of Twenty Blows at least, and that positively, but how many more, he doth not remember. But suppose it were so, yet the Matter is not so much, but what may be justify'd by the Occasion given; and what would be a good Plea in Law in an Action, will be the same upon pleading *Not Guilty* in this Case.

May it please your Lordship, The Occasion of Mr. Bethel's coming here was this; being about the Chusing of Parliament-Men for this Borough, the Competitors were, Sir *Richard How,* Mr. *Rich,* Mr. *Bethel,* and Mr. *Smith;* there was

a House wherein they appointed to poll, call'd the Artillery-House: When they came to take the Poll at this Place, where there is a Pair of Stairs which leads to the Door, the Manner of taking the Poll was thus; first to fill the House, by that Door to the Stairs, and after they had voted, to put them out at the other Door; this being the Occasion of the Battery, (however aggravated) will, to all that know it, or shall take the Matter into Consideration, seem a very shameful Thing to ground an Indictment upon. But this *Mason*, a very officious Man, who had no Right to poll, (as himself confesses) and who might have spar'd the Trouble (for any Authority he had) of coming there; and it might have been better he had stay'd at home, by what he has sworn. This Man and one *Sam. Sams*, a hectoring Carman, were set upon the Stairs; and their Business was not (as they now pretend) to take Notice who were fit to poll, but to understand who were for Mr. *Bethel* and Mr. *Smith*, and those they did abuse, and push them down the Steps; which Mr. *Bethel* being inform'd of, came out of the House, and spoke civilly to them, and said, *Friends, What have you to do here? If you have not a Right to poll, come down from the Place:* Which *Mason* refusing, the Defendant took him gently by the Hand, and led him down the Steps, giving neither Blow nor Push; we shall call Witnesses to prove this.—Now, for a Gentleman that stood as one of the Competitors for a Parliament-Man, at that Time, in that Place, he might do this to a Person that had nothing to do there. Nay, they themselves say, there ought not to be any Interruption at an Election: and that the Interruption was from themselves, and that occasion'd the mighty Battery they make so much of. We shall call our Witnesses, and make this Matter appear to be our Case; and then, tho' *Mason* hath spoken of Twenty Blows, if believ'd, as there is but little Reason for it, it will be sufficiently justify'd by the Witness we shall produce, and the Evidence we shall give in this Matter.

Call Mr. *Nath. Travers* Constable, Mr. *Benjamin Tarrant*, Mr. *Geo. Hampton*, Mr. *Mark Clark*, Mr. *Thomas Weekes*, Mr. *Benjamin Gerrard*.

Thompson. Let us begin with Mr. *Travers*. Mr. *Travers*, What Account can you give of the Matter?

Travers. May it please your Lordship, I remember it as if it were but just now; I was call'd out of the House, to come to this Door, hearing the People were in a very great Disturbance; I came to this *Robert Mason*, and said, *What do you there, to make this Disturbance, have you a Right to poll?* He answer'd, *It may be I may.* I told him, *If he would not be civil, I should take a Course to indict him.*

Thompson. And what was he doing?

Travers. He was throwing People from both Sides with his Elbows. In this Time, a Report being carry'd to Sheriff *Bethel*, of a Person's Leg broken, and a Man like to be kill'd, Sheriff *Bethel* came to the Steps, and took him just by the Arm, thus — [*Shewing the Manner*] — and said, *Pray Friend, what hast thou to do here, hast thou a Right to poll?* At first he said, *He had*; afterwards he said, *No*. Then said Sheriff *Bethel*, *Pray go about your Business.* Mr. *Bethel* gave no Blow, nor did so much as shew any Passion, or

angry Countenance; and said no more: But others said, *Mason* was a rude Person, and that he deserv'd to have his Coat pluck'd over his Ears.

Thompson. Did you not hear Mr. *Bethel* say so?

Travers. No, but it was said by some of the Company.

Thompson. I ask one Question more — *Mason* said he had Twenty Blows, what say you to that?

Travers. He had not one, upon the Oath that I have taken.

Thompson. Had he this Coat on, or no?

Travers. Truly I know not, I cannot tell; but he had a Badge, whereby he discover'd himself to be some Gentleman's Servant.

Thompson. Was *Sams* there?

Holt. Mr. *Thompson* is that a fair Question?

Thompson. I did it purposely to try your Observation; you would call to what others did long before the Battery, I must not ask if one was there at the Time of the Battery.

Holt. Did you not see Mr. *Bethel* on the Artillery-Ground, was not *Mason* push'd there?

Travers. I tell you, Sir, there was not one Blow given.

Holt. Then you did not see the Quarrel on the Ground?

Travers. I tell you, there was no Quarrel on the Ground: I stood on the Steps when Sheriff *Bethel* came; and the Sheriff, when he was half Way on the Steps, seeing the Waterman's Posture he was in, said, *Friend, have you any thing to do to poll? if you have not, why do you make a Disturbance?* He answer'd, *It may be I have, and it may be not.* Pray, *Friend*, said Sheriff *Bethel*, *if you have not, come down.* I went from thence about the Ground, and did not see the least Blow given, or any Appearance of Passion.

Thompson. Before Mr. *Bethel* came, how did this Man behave himself, did he not shout, and behave himself rudely?

Holt. Let him speak of himself, let not Words be put into his Mouth.

Thompson. Had he a Red Coat on?

Travers. I cannot say it.

Thompson. Mr. *Tarrant*, what can you say?

Tarrant. I was on the Ground when the Sheriff came, I was at some Distance; but upon the Oath I have taken, I saw Mr. *Bethel* and the Waterman coming together, but I saw no Blow, and I am sure there was not one Blow given.

Mr. *Weekes*, give an Account of what you know.

Weekes. My Lord, I saw Sheriff *Bethel* when he came into the Ground, and went up the Steps; I made haste after him, and was there all the while, and there was nothing like a Blow; but all he did was to this Purpose—Pray, *Friend*, (said he) *if you have no Right to poll, go your Way.* What have you to do here? And I follow'd after him into the Artillery-Ground, and there was nothing of a Blow, or any thing like it.

Thompson. You were there all the while?

Weekes. Yes, I was.

Thompson. Yet *Mason* saith, there were Twenty Blows given.

Weekes. Upon the Oath I have taken, there was none, nor any thing like it.

Holt. Mr. *Weekes*, do you live in London, or do you live in the Borough?

Weekes. Sir, I live in London.

Holt. What is this Witness to the Purpose then?

Thompson. May not a Man live in London, and be a good Evidence here? Notwithstanding, call Mr. Gerrard.

Mr. Gerrard, what can you say?

Gerrard. I was in the Ground before Mr. Bethel came out of the Polling-House; and I saw this Waterman, and Sam. Sams, thrusting of People down, that seem'd to be for Mr. Bethel and Smith, crying, *How and Rich.*

Weekes. My Lord, my Memory fail'd in this Point; but, upon the Oath I have taken, what that Gentleman swears, it is true.

Thompson. Pray, Sir, (as you seem to be a sober Man) were any Blows struck by Mr. Bethel?

Gerrard. I went with Sheriff Bethel there at that Time, and he ask'd the Waterman what he had to do there? I cannot well tell what Answer he made; but Mr. Sheriff said, *If you have no Right to poll, pray go about your Business.* Upon the Oath I have taken, he did not strike one Blow, no more than he doth now, standing in this Court before your Lordship.

Lord Mayor. Was there any Pushing or Thrusting by Mr. Bethel?

Gerrard. Upon my Oath, my Lord, not any.

Thompson. And you say you were there all the while, and saw no Disturbance given by Mr. Bethel?

Gerrard. I am sure there was not.

Thompson. Had he this Coat on, or no; or had he not a Campaign Coat on?

Gerrard. To the best of my Remembrance he had a Campaign Coat on, and I believe he had.

Thompson. Mr. Hatfield, pray give an Account of what you know of this Matter.

Hatfield. There were two Men which I saw in Red Coats, which push'd down the People that came to poll for Mr. Bethel, before Mr. Bethel came; and had not Mr. Bethel come to appease the Tumult, I do believe there had been much Mischief done by them and Sams.

Thompson. Upon the Oath you have taken, were there any Blows given?

Hatfield. No, Sir, there were none.

Thompson. Were there any Blows given by Mr. Bethel?

Hatfield. No, Sir, not one; for Mr. Bethel being inform'd of the Incivility of Mason and Sams, Mr. Bethel came civilly to them, and intreated them to come down, and bid them be gone, and not make a Disturbance.

Mulloy. Call Lawrence again, to shew that Mason did not make the Disturbance.

Lawrence. I saw Robert Mason, and the Party with him, behave themselves very civil; and the Disturbance that was, proceeded from the other Party.

Thompson. This is the same Man we had but now, he is call'd to witness again; a pretty Way of multiplying Witnesses: I appeal to Mr. Mason himself, whether this be not the same Man you called once before.

Thompson. My Lord, and you Gentlemen of the Jury, I think the Case is plain, and needs no Arguments: I shall only take Notice how careful these Men are (as they pretend) to keep the King's Peace. The Matter you see, in short, is, Mr. Bethel (who stood for a Parliament-Man of this Place, and at the same Time bore an eminent

Character, as Sheriff of the City of London) upon Information given of the Disturbance made by this Mason, and of the Unfairness of their Proceedings, only came civilly, and took him by the Arm, persuading him to come away, and make no Disturbance. And this is the Truth of the Case, and the mighty Battery they pretend to. Now, suppose that when People are in such a Crowd, and upon such an Occasion, there were some Pushes, (as is the utmost here pretended) could this be a sufficient Matter to ground an Indictment upon? No, Gentlemen, no: This Indictment, and the Design of it, is to raise a Dust, and (if possible) to cast reflections on Mr. Bethel; but 'tis more than they can do in Point of Law, by any Matter here proved, if Mason's Witnesses do swear true: Yet you see how Mason behaves himself, crying *How and Rich*, striking down all that came between Sam. Sams and him; so they broke the Peace, and raised the Disturbance themselves. And in that Case any Man (and why not Mr. Bethel?) might have taken him, and carry'd him before a Magistrate, and have justify'd it. But now, for the Credit of the Thing; You see that none swears it but Mason himself; but even he swears to that Impossibility, so over-reaches the Matter, thro' the Excess of his Passion in Swearing, that no one can believe him; if he had sworn modestly, as the rest did, to two or three Pushes, it might have been credited; but to Twenty Blows, no one can believe it; neither doth any one of his own Witnesses swear like him, or of so much as one Blow given: So there is not one Word Mason saith, can be credited.

Then, my Lord, admit it be so, yet you saw Mr. Bethel was not the Person that first began this Disturbance: Now, if the other Party had been indicted and try'd, (as indeed it had been much more fit they should) we could have proved much against them.

And as to the Fact, and Manner of what Mr. Bethel did, it was no more than coming in a civil Manner asking whether he had a Right to Poll: when he said no, he took him civilly by the Arm and led him down; and this is a justifiable Assault, being the Nature of the thing required a Necessity of somewhat of Action in it. I appeal to you of the Jury, whether here be any Cause for this Indictment, or Colour of Reason for you to find it?

Holt. Gentlemen of the Jury, you have heard the Evidence on both Sides, and the Question is, Whether in your Consciences, you can disbelieve eight Witnesses, that swear positively to the Battery, and believe those Witnesses that did not see it? if you acquit Mr. Bethel, you must necessarily convict eight Persons of Perjury: But if you do not find for Mr. Bethel, the other Witnesses cannot be convicted of Perjury; for how can Men swear (tho they were there all the Time) that they did not see? Possibly they may be very honest Men, and present at the Time, and yet not see Mr. Bethel strike, and so not swear to it: But our Witnesses swear very true; I hope you will be guided by Sense and Conscience, and not by Spectators Humours, and Apprehensions, that come here and hiss in a Court of Justice. Now, eight Witnesses swearing it, I do appeal to the Court, whether in Matters of this Nature, one Witness for the Affirmative, be not more valid than many of the Negative?

They

They take Notice of the Impossibility, and why? because they swear (as they say) at an extravagant Rate, that Mr. *Bethel* gave him Twenty Blows.

Gentlemen, if Mr. *Bethel* will beat a Man extravagantly, it is not Extravagancy to swear it. Now, *Mason's* Evidence is confirm'd by all the rest produced, and no Contradiction: if one swear to ten, and another to two, and another to three, is this inconsistent; No, Gentlemen, it is evident those Men swear cautiously and fearfully; for if otherwise, they could swear to as many as Twenty, as *Mason* hath done. Who is the best Judge, he that felt the Blows, or they that swear there was not one given? He that felt them, I am sure.

Gentlemen, It was in a Crowd, 'tis possible they may not see all; yet their Evidence is a concurring Circumstance.

Next I come to the Point of Law; how a Man that is a Candidate at an Election, can beat any Man that stands in his way; I do not understand that to be Law. If any Man had beaten Mr. *Bethel*, he might have beaten him again in his own Defence; but there was no such Thing, Mr. *Bethel* saw no Disturbance himself, but was inform'd of it, and so became too officious: tho he was Sheriff of *London*, yet he was not an Officer there; for he was not a Constable there; and it was a Constable's Office, and he only could have seiz'd him; and not a Constable neither, unless he had seen the King's Peace broken.

And as to what Mr. *Thompson* saith, that it is impossible that such an Election should be carry'd on without some Bustle. It's true, in a Crowd, Men jostling one another, and by Accident strike another down, it's no Battery: But is it necessary for Mr. *Bethel* to thump a Man on the Breast? Is it necessary for Mr. *Bethel* to beat a Man with

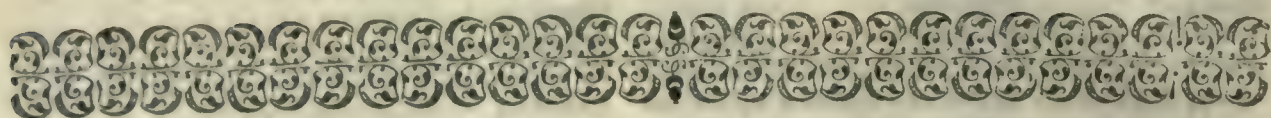
his Cane? Is it necessary for Mr. *Bethel* to give a Man twenty Blows? Is it necessary for Mr. *Bethel* to pluck a Man's Coat off his Back? Is it necessary to an Election? It is not necessary; and so being not necessary, is not by Law justifiable. Gentlemen, as Mr. *Thompson* saith, it is a Case of Example, I say so too; and it is fit Persons that will do such Things, should be made an Example.

Justice *Pys* afterwards summ'd up the Evidence, and told the Jury, (as Mr. *Holt* the Counsellor for the King had before well observ'd) that they were to have regard to the positive affirmative Evidence, *Mason* having sworn positively to several Blows that were struck by Mr. *Bethel*, and that eight Witnesses had sworn in the Affirmative; and that tho there were seven Witnesses produced by Mr. *Bethel*, which were on the negative Part; yet they were to observe, that the Law did not allow of those Negative Evidences. But for that so many had sworn in the Affirmative, that they saw a Thing done, and as many swear that they saw it not; he could not tell what to say, but to leave it to the Jury, saying, that One Affirmative was better than Forty Negative Oaths.

So the Jury went out, and in a very short Time were pleased to find the Indictment, and brought Mr. *Bethel* in Guilty.

Then Mr. *Bethel's* Counsel moved in Arrest of Judgment, for that no Indictment lay for the Words, and the Court for that Reason stay'd the Judgment, as to that Part of the Indictment, and gave Judgment only as to the Assault and Battery, and fined Mr. *Bethel* five Marks. Upon which, the Counsel for the King moved to have him taken into Custody, until he paid the Fine; which he presently paid, and so was discharged.





*The Trial of Sir PATIENCE WARD Kt. * at the King's Bench, for Perjury at the Trial between the Duke of York Plaintiff, and Thomas Pilkington Esq; Defendant, on an Action † upon the Statute de Scandalis Magnatum. 19 May 1683. Paschæ 35 Car. II.*

The JURY were,

Sir Thomas Bridges Kt.
Henry Reynell Esq;
Thomas Herriott Esq;
Thomas Airsby Esq;
Richard Pagett Esq;
John Foster Esq;

Thomas Eaglesfield Esq;
Edward Mapleden Esq;
John Sharp Esq;
James Suckle Gent.
John Olinger Gent.
Richard Fisher Gent.



IN Information had been preferred by the Attorney-General against Sir Patience Ward, for that he had maliciously and wilfully perjured himself in the Court of King's-Bench, upon the Trial between the Duke of York, and Thomas Pilkington, Esq; to which the Defendant pleaded *Not Guilty*, and was tried May 19.

Cryer. Oyez: If any Man will give Evidence on the Behalf of our Sovereign Lord the King, against the Defendant Sir Patience Ward, let him come forth, and he shall be heard.

Mr. Dolben. May it please your Lordship and you Gentlemen that are sworn. This is an Information of *Perjury* preferred against Sir Patience Ward. Whereas the most Illustrious James Duke of York brought an Action upon the Statute de Scandalis Magnatum against Thomas Pilkington, wherein was declared, that, whereas he was the only Brother to our Sovereign Lord the King, the said Pilkington did speak in the hearing of divers of his Majesty's Leige Subjects, these false and scandalous Words, *He hath burnt the City* (meaning the City of London) *and is* (meaning the said Duke) *come to cut our Throats*. Gentlemen, the Information sets forth further, that the Defendant Pilkington pleaded he was *Not guilty*, and that upon the Trial of this Issue, Sir Patience Ward was produced as a Witness upon the Behalf of the Defendant Pilkington; and that the said Sir Patience Ward then and there was duly sworn to speak the Truth, the whole Truth, and nothing but the Truth, in the Premises, and that the said Sir Patience Ward did falsely and corruptly swear and give in Evidence to the Jurors empanelled to try the Issue aforesaid, *that there was no mention at the Time of this Discourse aforesaid had between the said Thomas Pilkington and divers of his Majesty's Subjects, concerning the*

said James Duke of York, that there was no mention of cutting of Throats, and that before Mr. Pilkington, (meaning the said Thomas Pilkington) came in (meaning the Time when the Discourse aforesaid was had) the Discourse about the Duke of York was over; and further that the Duke of York was not named, (meaning at that Time when the Discourse aforesaid was had) whereas in Truth at the same Time there was mention of cutting of Throats, and whereas before Mr. Pilkington came in, the Discourse concerning the Duke of York, was not ended, and whereas the said Duke of York was named at the Time when the Discourse aforesaid was had; so that the said Sir Patience Ward in the Case aforesaid did commit wilful and flat Perjury.

Mr. Attor. Gen. My Lord, and you Sir Robert Gentlemen of the Jury, Sir Patience ^{Sawyer.} Ward the Defendant stands accused for *Perjury*, committed in a Cause that was between the Duke of York Plaintiff and Mr. Pilkington Defendant, and in that Cause Mr. Pilkington was accused to have spoken false Words of the Duke of York, *He hath burnt our City, and is come to cut our Throats*; to excuse this, Sir Patience Ward he comes, and swears, positively, first, *That the Duke of York was not mentioned in the Discourse, and therefore those Words could not be meant of the Duke of York*; this little Evasion we don't trouble you with, but they related to one Hubert hanged many Years before, however we will lay that aside, and not trouble you with it. The next direct Matter, which proves it was maliciously done, that he was so ill a Man, and that he had spoken such Words, he swears, *that all the Discourse relating to the Duke of York was over before Pilkington came into the Room*. This Allegation is directly false, he swears positively, *there was no mention made of cutting Throats*. Gentlemen, we will first prove unto you the Words, then we will prove unto you that they were false, for Pil-

* Burnet's History of his own Times, Vol. I. p. 536.

† In this Action the Duke of York had recovered 100,000 l. damages.

kingston did speak these Words of the Duke of York. Gentlemen, we will leave it to you whether that this Gentleman hath forsworn himself.

Mr. S. Jefferies. If it please your Lordship and you Gentlemen of the Jury, I must need say that this is a Cause of very great Consequence of one Side and t'other; it concerns a very great Person, a Man that has been Lord-Mayor of London, and I think is still an Alderman of London; it is in its own Nature of very great Consequence, it is no less, than the charging him with the Crime of wilful Perjury; it comes to a Publick Audience, as it was very requisite it should. The Crime we charge this Gentleman with was committed in this very Place, in the Face of this Court; and I think to the Admiration and Astonishment of all Persons, that heard this Gentleman swear at that very Time, and therefore that the Thing may be intelligible to these Gentlemen, I shall crave your Lordship's Patience, to give an Account how this Matter was. This Matter was attended with Circumstances of Malice, which shew it was not a Slip in Evidence, but a malicious perjurying himself, Gentlemen; and they are these. Upon his Royal Highness's return out of Scotland, and coming to Newmarket to his Majesty, a very loyal Gentleman, then Lord-Mayor of London, Sir John Moor by Name, with some other Persons, that I have in my Eye, had it in Prospect, as it became them to do, to so great a Prince as he was, to wait upon him. My Lord, there being this Design of the Aldermen and Lord-Mayor to attend upon his Royal Highness, to congratulate his Arrival from Scotland; in order thereto upon a special Court-day, there was an Order made, that the Lord-Mayor and Aldermen should attend his Majesty, to desire his Leave, that they might come and attend likewise his Royal Highness, to congratulate his late Arrival. This I think was upon a special Court before they went to Church, upon a Sunday. In order to this there happen'd another Meeting of the Lord-Mayor and Aldermen, to prosecute this Design of theirs, to wait upon his Royal Highness to congratulate his Arrival, and thereupon an Intimation was given to Sir Patience Ward, with one of the Sheriffs, Pilkington, of their Intentions. At which Time, Sir William Hooker, and another worthy Gentleman, Sir Harry Tulse, happening to be together in a Place, which I presume some of you do well know, in the Long Gallery or Antichamber to the Council-Room, where the Lord-Mayor and Aldermen most usually sit, some Discourse arose touching the Occasion of their then Meeting, whereupon a Question was proposed, whether they should wait upon his Royal Highness or not; one of these Gentlemen was pleased to say at that Time, that it was too late now the Court had determined it, there being then present this Sir Patience Ward, and these two Gentlemen along with Mr. Pilkington then Sheriff, who in Objection to the Proposal of waiting upon the Duke of York, (after this Discourse was over, and after they had mentioned the Duke of York's Name to him) said, *He hath burnt the City, and is now come to cut the Throats of our Wives and Children.* This, Gentlemen, was to deter and fright the others from going, and given as a Reason why he would not go to attend the Duke of York. My Lord this thing happening thus, an Action was brought for this, and came to a Trial before

your Lordship. It is very true, in that Trial we did only produce Sir Harry Tulse that was present, and he swore to all the Words about *burning the City*, and likewise to the *Cutting of Throats*. But Sir Patience Ward without any Manner of Hesitation; nay, and not only that, (I appeal to the Memory of those that heard him swear at that Time) but boasting himself, as having as good a Memory as any Man in England, (tho he was cautioned at that time to have a Care what he swore) did positively say, *the Duke of York was not named after Pilkington was there; that the Discourse of the Duke of York was done before he came in.* He doubled his Evidence on purpose to make the thing more plain. But afterwards, when it came a little further to be discours'd of, I appeal to the Memory of the Court and the Gentlemen at the Bar, whether he did not flutter about in St. James's Park, and out comes Hubert; the Duke of York was not named, but Hubert, Hubert. I clapp'd my Hand upon his Mouth, says I, you mean Hubert, and so we had got Hubert into the Cause, on purpose to shuffle out the Business about the Duke of York. My Lord, after this (I do it to refresh the Memory of these Gentlemen) he was positive, and said, *I do positively say, there was not a Word of cutting of Throats*, even to the surprize not only of all the Auditors, but even of all those People that were concerned in Affection for him, as well as they who were engaged in the Cause that they were to support. My Lord, in the first Place we will give you an Account that it was a designed and malicious Evidence, necessary for the bringing off that Man, for if there were not a Word spoken of the Duke of York, then our Action was no Action; if there was not a Word spoken of *cutting of Throats*, then, of Consequence, the Verdict must have been against us; and therefore finding there was but one Evidence, which was Sir Harry Tulse against his Evidence, that made him swear so positively; but afterwards your Lordship may please to remember, we called Sir William Hooker (a Gentleman of well known Integrity) to preserve the Credit of so great a Prince, maugre the Malice of all his Enemies. I speak this to shew it is fit, it is necessary to clear this Cause. In the first Place we will prove what is recited in this Record, and give you an Account what this Person did swear at the time of the Trial. The Matters, that I have opened, I think they will sufficiently satisfy the Court and the Jury, as they did satisfy the Jury before, that what Sir Patience Ward swore then, is false now, and was false then.

The Record of Pilkington's Trial read.

Mr. S. Jefferies. Read the Information. *The Record was Anno prædicto, but when it was recited in the Information, it was Anno ultimo supradicto.*

Mr. Ward. It is necessary, when we come by way of recital of the Record, to recite the very Words in the Record; now in the Record it is *Anno prædicto.*

Mr. Williams. My Lord, they are reciting the Record.

L. C. J. They do not recite it in Sir Edmund *hæc verba*, the substance is true, the *Saunders*. Words are varying from the Record, in the Record they are *Anno prædicto*, but in the Recital, *Anno ultimo supradicto.*

Mr. Wil.

Mr. Williams. That is not the same in Substance as to say *Anno pradiet'*, the Year before said, there are many *Anni pradieti*, and that may refer to any of them; if there had been but one, it might have been so, but when there are several Years mentioned before, *Anno ultimo pradiet'* restrains it to the last Year *pradiet'*.

Mr. Attor. Gen. You may spend as much Time as you will; in the first Record there was but one Year mentioned.

Mr. Recorder. That the City of
Sir George London was burnt in the Year 66;
Trek. that was one Year mentioned before
I am sure.

Mr. Attor. Gen. There are several Years mentioned in this Record; there we must say *ultimo pradiet'*.

L. C. J. The Objection is, That whereas it was in the Record *Anno pradiet'*, here you have more, and when you recite *Anno pradiet'* you add *ultimo*.

Mr. S. Jefferies. We could not do it otherwise, my Lord.

L. C. J. As if a Thing could not be well except it were in such precise Words: That was *Anno pradiet'*; this, you say, is *Anno ultimo pradiet'*. Now if the first had been *Anno ultimo supradiet'*, and in this you had said *Anno pradiet'* when several were mention'd, then it might have been an Objection; now it is not.

Mr. S. Jefferies. If Sir Patience had been as exact in swearing, as you are in observing, he had done well enough.

— Call Mr. Hatch.

[Who was Sworn.]

Mr. Williams. Pray let's know your Name, Sir?

Mr. Hatch. My Name is Hatch.

Mr. S. Jefferies. Pray, Mr. Hatch, was you present at the Trial between his Royal Highness and Mr. Pilkington?

Mr. Hatch. Yes, my Lord, I was present.

Mr. S. Jefferies. Was Sir Patience Ward produced as a Witness?

Mr. Hatch. Sir Patience Ward was sworn.

Mr. S. Jefferies. What did he swear?

Mr. Hatch. He did swear, upon his Oath, That the Sheriffs were not present; that there were some Aldermen at the Table in the matted Gallery in Guildhall, smoking a Pipe of Tobacco, and that they had some Discourse about waiting upon the King and the Duke, pursuant to an Order from my Lord-Mayor the Day before, and he said, the Sheriffs were not present.

Mr. S. Jefferies. What Sheriffs?

Mr. Hatch. The Sheriff: And he did afterwards say, he did positively affirm upon his Oath, that Pilkington did not come in till all the Discourse was over about the Duke.

Mr. S. Jefferies. What did he say about cutting of Throats?

Mr. Williams. Good Mr. Serjeant.

Mr. Jones. You say he positively said, there was no Discourse about the Duke of York after Pilkington came in.

Mr. Hatch. But then after, my Lord, he said; I do positively affirm, upon my Oath, that Pilkington did not come in till all the Discourse was over concerning the Duke of York. And further, there was Discourse about Burning the City by the Papists, saith Pilkington, he hath burnt the City; with that Sir Patience Ward took him by the Shoulder, saying, Explain your self: What! you mean Hubert, I warrant you? Yes, said he.

He being ask'd the Question, Whether any Thing of the Duke was nam'd, he said, No: And further, Whether there was not any mention of cutting of Throats, he did positively say, there was no mention made of cutting of Throats.

Mr. Williams. Mr. Hatch, Where were you placed at the Trial?

Mr. Hatch. At the Trial, Mr. Williams, I stood just there.

Mr. Williams. Had you a Pen and Ink about you?

Mr. Hatch. Yes, Sir, I write Characters.

Mr. Williams. Pray, Sir, did you take the Words in Writing, then, or no, in the Court?

Mr. Hatch. I believe I might, I can't positively tell.

Mr. Thompson. Have you your Notes here?

Mr. Hatch. I think I have not.

Mr. Thompson. A Man of a good Memory.

Mr. S. Jefferies. We have a Matter of some thirty or forty Witnesses; don't make such a Rout.

Mr. Pollexfen. Mr. Hatch, you are repeating what Sir Patience Ward said; Did he, in that Evidence, mention the Duke of York or not?

Mr. Hatch. He said, there was Discourse about going to the King at St. James's, but not to the Duke. Sir George Jefferies asked him that very Question.

Mr. Pollexfen. Let him now repeat the Evidence which he swore just before.

Mr. S. Jefferies. I thought that would not have been such a mighty Question at this Time of Day.

Mr. Williams. I desire he may say again what was sworn by Sir Patience Ward.

Mr. S. Jefferies. Begin and repeat, Sir, in what manner he swore, in the very same Form he spake then.

Mr. Hatch. Sir Patience Ward, being sworn and examined upon the Account of Mr. Pilkington, did say, That there were some Aldermen met at the Matted Gallery, the Matted Chamber in Guildhall, and smoking a Pipe of Tobacco, and there was Discourse of waiting upon the King, and the Duke, pursuant to an Order of the Lord-Mayor the Day before, and being asked, Whether Mr. Pilkington was not present, he said, the Sheriffs were not present, but at the Court of taking Licences in Guildhall, and that there was a Discourse about Burning the City by the Papists, and, says Mr. Pilkington, Hath he burnt the City? Hath he burnt the City? Upon that, Sir Patience Ward took him by the Shoulder, and bid him explain himself: You meant Hubert, I warrant you, saith he. Yes, saith Pilkington; and being asked, Whether there was any Discourse about the Duke of York, he said No; but positively said, that there was no mention made of cutting of Throats.

Then Mr. Boxton was sworn.

Mr. Williams. Your Name, Sir.

Mr. Boxton. My Name is Boxton.

Mr. S. Jefferies. Mr. Boxton, will you tell my Lord and the Jury, whether you remember what was said by Sir Patience Ward?

Mr. Boxton. My Lord, I was present at his Trial, I happened to return the Jury.

Mr. S. Jefferies. Pray will you tell my Lord and the Jury, what was said by Sir Patience Ward?

Mr. Boxton. My Lord, I was present at this Trial, having returned the Jury that was to try that Cause of his Royal Highness: I was above

in the Gallery, and I could not so well understand it; but as that Gentleman said before, he was saying, *he heard no mention made of cutting of Throats*; I can't say the very Words, for I took no Notes.

Mr. Williams. You were in the Gallery then?

Mr. Boxton. Yes, Sir.

Mr. S. Jefferies. Pray Mr. Aston, I think you were present.

Mr. Aston. I was present in the Court that Day, and I do remember, that Sir *Patience Ward* did swear, I think positively, to the best of my Remembrance, that *the Duke of York was not named, while Mr. Pilkington was by*. That is all I do remember.

Mr. S. Jefferies. What do you mean by *positively*? that he used the Word *positively*?

Mr. Aston. I think I am pretty sure he did take it *positively*, or upon his Oath.

Mr. S. Jefferies. What did he take *positively*?

Mr. Aston. That the Duke of York was not named while Mr. Pilkington was by.

Mr. S. Jefferies. Do you remember any Thing else?

Mr. Aston. As to *cutting of Throats*, I do not remember it. Several People have asked me, and I gave them that Relation, or else I believe, that had been out of my Mind.

Mr. Wood sworn.

Mr. S. Jefferies. Mr. Wood, pray will you give my Lord and the Jury an Account of what you heard Sir *Patience Ward* swear, in the Cause between his Royal Highness and Mr. Pilkington.

Mr. Wood. My Lord, I was in Court when Sir *Patience Ward* gave Evidence for Mr. Pilkington, and I heard Sir *Patience Ward* say, that *the Duke of York was not named*; and that *the Discourse concerning the Duke was over before Mr. Pilkington came in*, and that *there was no mention of cutting of Throats*.

Mr. Jones. Did he swear these Things *positively*, or as he believed, or heard?

Mr. Wood. To the best of my Remembrance, I think he clapt his Hand upon his Breast, and said *positively there was no mention of cutting of Throats*.

Mr. Attor. Gen. Do you speak of your best Remembrance as to his Posture, or to the Word?

Mr. S. Jefferies. Did he say that Word *positively*?

Mr. Wood. To the best of my Remembrance, he said *positively*, or upon my Oath; one of them he did say, I can't tell which.

Mr. S. Jefferies. Either he said *positively*, or upon my Oath. Now, my Lord, if your Lordship pleases, we have given your Lordship and the Jury, a sufficient Account how *positive* this Gentleman was; but as *positive* as he was at that Time, we will give you an Account that he did forswear himself.

Swear Sir James Smith (which was done.)

Mr. Attor. Gen. Pray will you tell the Court what you can say.

Sir James Smith. I did little think to be call'd to give any Evidence upon the Account of Sir *Patience Ward*, considering the Relation that is between us, as Aldermen. I did not take particular Notice, but I do remember that he used that kind of Posture as they say, and did *positively*, or upon his Oath say, I can't be certain of the Words he used, that Mr. Pilkington was not there while they were discoursing concerning going to St. James's,

for he did declare the Duke of York was not talked of, and I do remember a very good Circumstance that he did swear so, for my Lord Chief Justice Pemberton was pleased to apply himself to Sir Harry Tulse upon it; and I remember Sir Harry Tulse made answer, *I am very sorry to say it, he was there all the while*.

Mr. Attor. Gen. Did you hear any Thing about cutting of Throats?

Sir James Smith. I don't remember that.

Sir William Rawsterne sworn.

Mr. S. Jefferies. What say you, Sir William Rawsterne?

Sir Will Rawsterne. My Lord, I was here, but I took no particular Notice, but I do remember that Sir *Patience Ward* did say, that the Duke was not named when Pilkington was in the Room; I can say nothing else.

Mr. Jones. Did you hear him swear it?

Sir Will Rawsterne. Yes, Sir.

Mr. S. Jefferies. Sir James Smith, did he swear it upon his Oath?

Sir Ja. Smith. My Lord, I said before, I cannot say the Word he expressed it in, but either *positively* or upon his Oath, he was not there all the while that Discourse was.

Mr. Pollexfen. First he says the Discourse was of going to St. James's.

Sir Ja. Smith. My Lord, as I said before, he did declare, that the Sheriff that then was, Mr. Pilkington, was not by while they were discoursing of going to St. James's, for he said they did not speak of the Duke of York; but the Discourse was about going to St. James's, and that Discourse was at an end before Mr. Pilkington came in, and while they were talking about firing the City, upon that Mr. Pilkington saying, *he hath fired the City*, he desired him to explain himself, whether he did not mean Hubert.

Sir John Peake sworn.

Mr. S. Jefferies. Sir John Peake, I desire to know what you can say.

Sir John Peake. I was present at the Trial, and Sir *Patience*, I do remember this, laid his Hand upon his Breast, and either said *positively* or upon his Oath, I cannot tell which, one of the two I am certain of, that Mr. Pilkington was not by while the Duke of York was mentioned.

Mr. S. Jefferies. What about cutting of Throats?

Sir John Peake. There was something said of cutting of Throats, but I am not so positive.

Mr. S. Jefferies. Sir Thomas Field, I think you was one of the Jury that tried the Cause.

Sir Tho. Field. Yes, Sir, I was upon the Jury.

Mr. S. Jefferies. Pray do you remember that Sir *Patience Ward* was a Witness?

Sir Tho. Field. Yes, I do remember it.

Mr. S. Jefferies. Do you remember what he swore?

Sir Tho. Field. I do remember he swore the Duke was not named, that I can remember.

Mr. Attor. Gen. Do you remember any thing else?

Mr. S. Jefferies. Do you remember any thing about cutting of Throats?

Sir Tho. Field. There was something, I cannot positively say that.

Mr. S. Jefferies. Do you remember what other Words he said?

Sir Tho. Field. He did say likewise, that Mr. Pilkington

Pilkington was not in the Room when any thing was spoken relating to the Duke of York.

Mr. S. Jefferies. Sir Francis Butler, pray will you please to give my Lord and the Jury an Account whether you were of the Jury in the Cause between his Royal Highness and Mr. Pilkington.

Sir Fr. Butler. I was of that Jury.

Mr. S. Jefferies. I think you were the Foreman, Sir.

Sir Fr. Butler. I was the Foreman.

Mr. S. Jefferies. Pray do you remember Sir Patience Ward was produced as a Witness?

Sir Fr. Butler. He was produced.

Mr. S. Jefferies. Do you remember any thing he swore? and what?

Sir Fr. Butler. The Evidence he swore (which I thought we had Reason to observe, for the great Question was whether the Words related to the Duke of York or no?) was, that it did not relate to the Duke of York, and Sir Patience Ward was proving Alderman Pilkington was not in the Room while they discoursed of the Duke of York, and that the Duke of York was not named.

Mr. S. Jefferies. Did he swear that positively?

Sir Fr. Butler. To the best of my Remembrance, positively, I heard nothing of qualification at all.

Mr. S. Jefferies. This is a Gentleman of great Worth, and the Foreman of that Jury.

Sir Fr. Butler. We did debate it after we went out of the Court among ourselves, before we brought in our Verdict, and I remember something more in it, for we should have laid a little more Weight upon his Evidence, if he had not said, that when Sir William Hooker took some Exceptions at his Words, and asked, *what do you mean?* Sir Patience Ward then laid one Hand upon Alderman Pilkington's Mouth, and as I remember, t'other upon his Breast, and asked, *what do you mean?* and t'other answered *Hubert*. That made us believe his Evidence was to be laid by.

Mr. S. Jefferies. Now, my Lord, if your Lordship pleases, I think we have sufficiently satisfied your Lordship and the Jury what Words he swore; now we will prove that they were false.

Mr. Att. Gen. Sir Harry Tulse, pray will you acquaint my Lord and the Jury— We will ask you first; Sir Harry Tulse, were you present when this Gentleman swore?

Sir H. Tulse. I was present; I sat down on a fore-Seat, and he gave his Evidence behind, I never saw him touch the Book nor kiss it.

Mr. Att. Gen. What did you hear him say?

Sir H. Tulse. I was a little discomposed at what I had heard him say, and so I am not able to give an Account, and I thought I had some Reason for it.

Mr. S. Jefferies. Why what Reason? Was it because he swore truly or rashly?

Mr. Thompson. Good Mr. Serjeant, don't lead so.

Mr. Williams. I think it is a Reflection upon an Alderman to be led by any.

Mr. Att. Gen. Mr. Williams, I can shew you, you have led Aldermen, and against Law too.

Mr. Sol. Gen. Will you please to give my Lord an Account whether Mr. Pilkington was by when there was any Discourse about the Duke of York?

Sir H. Tulse. Gentlemen, I don't know whether you expect the Account I formerly gave, that I think I have very perfect in my Memory.

Mr. Att. Gen. Give an Account of that Passage.

Sir H. Tulse. The Evidence I gave was this, upon the tenth Day of April, (I will not be positive, I think it was that Day) according to an Order of Court made the Day before, we met at Guildhall; there was Sir William Hooker, Sir Patience Ward, Sheriff Pilkington, and myself, I remember no more; and Alderman Pilkington said, *He burnt our City, and is come or will come, one of these two Words, to cut our Throats*. This was the Evidence that I gave, this was true. I was asked by the Court what was the preceding Discourse, whether made by Alderman Pilkington or Sir Patience Ward I can't be positive; but it was concerning an Order of going to St. James's or to the Duke of York, one of the two; he did complain of that Order, they were complaining of that Order, and seemed to me as if they would have it re-debated; I made Answer, it was too late, for the Court hath agreed it.

Mr. Att. Gen. Was there any Discourse concerning the Duke of York while Mr. Pilkington was by?

Sir H. Tulse. Alderman Pilkington was by all the while the Discourse was.

Mr. Att. Gen. And was there any Discourse about the Duke of York.

Sir H. Tulse. I did never hear the Duke of York named by Alderman Pilkington at all, as I remember; they complained of the Order made the Day before, that is concerning going to St. James's or to the Duke of York, seeming to me as tho they would have it re-debated; upon which I made Answer, it was too late now, for the Court had agreed it, and then came these Words, *He hath burnt our City, and is come, or will come to cut our Throats*.

Mr. Att. Gen. Do you say Pilkington was there when the Discourse was?

Sir H. Tulse. Yes, Sir.

Mr. S. Jefferies. Sir Harry Tulse, I would ask you a Question, by your Favour, you say there was then mention of cutting of Throats, and you say Mr. Pilkington did not name the Duke of York himself, that you can't say, but you say he was there while there was a Discourse about going to congratulate the Duke.

Sir H. Tulse. I cannot be positive of that; we discours'd about the Order, that was the Order that was made before, to congratulate the Duke of York; I cannot say that Alderman Pilkington did ever name the Duke of York, but he was present at that Discourse.

Mr. Sol. Gen. Sir Harry Tulse, you say there was mention made concerning debating the Order, was there mention made of the Order? Did they name what Order they would have re-debated?

Sir H. Tulse. Yes, Sir. The Order was this, an Order made the Day before, that we should go and congratulate the King's safe Return, and with the King's good Leave or License, we should then congratulate the Duke of York, that was the subject Matter.

Mr. S. Jefferies. Pilkington was present then?

Sir H. Tulse. He was present there.

Mr. S. Jefferies. And upon that Discourse, pray Sir Harry Tulse, did Pilkington say these Words,

Words, he hath burnt the City, and is come to cut our Throats.

Sir *H. Tulse*. No, Sir, that did not immediately follow.

Mr. *Sol. Gen.* Sir *Harry Tulse*, what Order did they say they would have re-debated?

Sir *H. Tulse*. I took it for the Order made the Day before.

Mr. *Sol. Gen.* Did they name the Order?

Sir *H. Tulse*. I did make mention of the Order, that the Court had agreed to it, and it was too late for that.

L. C. J. He says it was too late to be debated or spoke of in Court, I apprehend it so.

Mr. *Just. Jones*. Was the Duke named, or not?

Sir *H. Tulse*. At that Time, truly, Sir, I cannot positively say he was named, for the Debate was about the Order made to congratulate the Duke of *York*, or of going to *St. James's*: one of them, I am sure, was named, but I cannot be positive.

Juryman. I desire to know whether this Gentleman was there all the while.

Sir *H. Tulse*. My Lord, I believe I was there all the Time that there was a Word spoke in this Matter, the whole Time.

Mr. *S. Jefferies*. Sir *Harry Tulse*, I would ask you another Question. Who did you apprehend to be meant when *Pilkington* said, he hath burnt the City? Who do you think he meant by that?

Sir *H. Tulse*. I will answer any thing that the Court thinks fit I should answer. I humbly pray my Lord and the Court would ask me Questions.

L. C. J. Sir *Harry Tulse*, it was said the City was burnt, pray who did you apprehend was meant that burnt the City? Who did they mean?

Sir *H. Tulse*. Who did I apprehend, my Lord? Truly, my Lord, I think I was the Man that made answer, that it was *Hubert* that burnt the City, because he was hang'd for it.

Mr. *Just. Withins*. Did you apprehend it was *Hubert*?

Sir *H. Tulse*. My Lord, there was a Talk of *Hubert*, and I remember Sir *Patience Ward* took hold of it, and bid him explain himself, who do you mean? *Hubert*? And then there was a little Stop among us, and as I remember, I made this Answer, I think, that *Hubert* burnt the City, for that he was hang'd for it.

L. C. J. Hark you; I would ask you one Question, if you please; you heard the Expression of cutting of Throats, he is, or will come to cut our Throats.

Sir *H. Tulse*. Yes, my Lord.

L. C. J. Pray who did you apprehend should be meant by that? He could not mean *Hubert*, surely, for that?

Sir *H. Tulse*. My Lord, I must give my Opinion, that it was the Duke of *York*.

Mr. *Thompson*. Did you understand that he meant so at that Time?

Mr. *S. Jefferies*. Sir *William Hooker*, will you give an Account of it?

Sir *W. Hooker*. My Lord, I will, as near as I can, tell the very Words; I may lose some Words, but of the Matter of Fact, I am confident I shall miss nothing. We met in pursuance to an Order made the Day before; the Order was made to meet on the Monday following, to wait upon the King and the Duke of *York*. My Lord, accordingly, when I came into the Gallery, I found Sir *George Waterman* sitting on one Side, and I

sate opposite to him, and Sir *Henry Tulse* at the End of the Table; not long after, came in Sir *Patience Ward*, my Lord, Sir *Patience Ward* sate down close by me, and Mr. *Pilkington* stood at the other end of the Table, opposite to me. My Lord, to the best of my Remembrance and Belief, Sir *Patience Ward* did move, that we might consider this Business of waiting on the Duke, and, my Lord, answer was made, I do believe by Sir *Henry Tulse*, that it was now too late, for my Lord-Mayor was come, and would be going; upon his saying it was too late in this Manner, *Pilkington* standing at the End of the Table, said these Words, *Hath he burnt the City, and is he come to cut our Throats?* Upon this, my Lord, I reply'd; Brother *Pilkington*, said I, thou art infinitely mistaken in this Point; thou mayest as well charge it upon a Child unborn, as upon him; for the Duke of *York* was as careful in the Fire to preserve the City at the same time, in a Yard in *Coleman-street*, as any who was by, was; tho the Ashes came upon our Heads; and I never knew a Man look more carefully than he did, at the same Time. This, my Lord, is the Substance, but I can't say that Mr. *Pilkington* made a Reply either one Way or other, but I think there was something of *Hubert* spoke besides. Then Sir *George Waterman* went away, and I went away afterwards.

Mr. *Att. Gen.* So that you are positive that *Pilkington* did say, *he is come to cut our Throats*?

Sir *W. Hooker*. *Hath he burnt the City? And is he come to cut our Throats?*

Mr. *S. Jefferies*. And did you immediately tell him this of the Duke of *York*?

Sir *W. Hooker*. Immediately.

Mr. *Sol. Gen.* I think you say it was pursuant to an Order about waiting on the Duke of *York*?

Mr. *Att. Gen.* Did you name the Duke of *York*?

Sir *W. Hooker*. I did name the Duke of *York* to *Pilkington*, after these Words were spoke.

Mr. *S. Jefferies*. *Pilkington* was there then before the Discourse of the Duke of *York*. Was Sir *Patience Ward* there while the Discourse was, concerning cutting of Throats?

Sir *W. Hooker*. I am not able to swear whether Sir *Patience Ward* did hear it or no; undoubtedly he was there.

Mr. *Sol. Gen.* Sir *William*, do you think that Sir *Patience Ward* did wink when he stop't his Mouth, or no?

Sir *W. Hooker*. Truly I did not see him stop his Mouth.

Mr. *Sol. Gen.* Sir *William*, was it plain to you that he meant the Duke of *York*?

Sir *W. Hooker*. I am not able to know other Mens Thoughts; but certainly nothing could appear more plain.

Mr. *Sol. Gen.* Was the Subject Matter of Discourse concerning the Duke of *York*?

Sir *W. Hooker*. About that and nothing else.

Mr. *S. Jefferies*. He named the Duke of *York*, did he?

Sir *W. Hooker*. He did not name the Duke of *York*; I don't say that.

Mr. *S. Jefferies*. But you named him.

Sir *W. Hooker*. Yes, Sir.

Mr. *Att. Gen.* Was that all you discours'd of?

Sir *W. Hooker*. This is all.

Mr. *S. Jefferies*. Here is the Order.

Mr. *Williams*. We agree the Order.

Mr. S. *Jefferies*. For the present we will rest here, and see what Account they will give.

Mr. *Recorder*. May it please your Lordship, and you Gentlemen of the Jury: I am of Counsel for Sir *Patience Ward*, the Defendant. My Lord, as the Counsel for the King say they will rest it here, so if we should rest here too, I think there is nothing proved that sticks upon us. My Lord, I observe first, that of all their Witnesses they produce concerning the Words in Court, there is not one of them all, but the first pretends to be a Penman, and he says he believes he did write, he can't tell whether he writ or no, and he can't tell whether he hath his Notes about him, and this is all we can have of him. And the Truth is, they vary so much among themselves, that that is enough to make any one wonder, on the whole speaking of the Words. And we see these worthy Aldermen are very cautious; they did expect to be call'd upon their Oaths, I did take particular Notice of it. The Truth is, my Lord, for this Matter, it is certainly as great and heinous a Crime, as any can be, and I believe these Gentlemen will think that in this Case they should have no less Evidence to convict this Gentleman of this foul Crime of Perjury, than to convict him of any Crime that concerns his Life. The Truth of it is, if such a foul Disreputation and Scandal should stick, yet the Jury must have plain Proof. If there were a rash Word, if there were a Mistake in a Person's Remembrance, it is not every Slip that will criminate a Man of Perjury, it must be a wilful and corrupt forswearing a Man's self against his own Knowledge, and nothing less than that, is sufficient. My Lord, it is agreed on all Hands, the Record shews it, that the Duke hath recovered a Verdict. The Cause went for him. If the Duke would have had a Verdict, he hath it; if he would have had more Damages, for ought I know he might; he hath more than an 100000 *l.* for he hath all Costs, to the utmost Farthing. My Lord, in Cases of this Nature a Man's Words must be taken together. Your Lordship will acquaint the Jury, that if there be any thing in any Part of his Evidence, that does explain, that does limit, that does qualify it, the whole Discourse must be taken as one entire Evidence, and that he shall have the Advantage of it in every Part. My Lord, the Use I would make of this is to this Purpose, that whatever these Witnesses fix upon him, they do it by culling and picking out Pieces of Words; they don't pretend upon their Memory, much less upon Writing, that they are able to repeat the whole Evidence. Your Lordship does very well remember the Lady *Carr's* Case, a greater and plainer Instance than this, if it were proved as it was pretended, in Chancery; she swears she never received Money of such a Man, and she made a second Answer, and there she says she received no Money after such a time, and it was resolved that that should be taken together, and that that was no Perjury. My Lord, we shall insist upon these two Things: First of all, that the Words were not spoken as they are laid; that they were not sworn by Sir *Patience Ward* as they are laid and charged in the Information, for they are charged there positively and directly, but we say they were spoken with all the Caution that any Man can speak them with, as he believed, and to the best of his Memory, and as he apprehended; and this, I say, circumscribed with great Caution and

great Tendernefs. If they had been spoken as they are laid, yet this could not be Perjury; that is the second Thing. So that if it fall out that he was mistaken in this, your Lordship will acquaint the Jury, that a rash Oath is not Perjury, if it were so. My Lord, as to this latter Part, Sir *Harry Tulse* does go a great way; for he says, that he can't take upon him to say that Sir *Patience Ward* ever saw Mr. *Pilkington*; if he did never see Mr. *Pilkington*, how can he be charged with Perjury then, for saying he was not there? Under Favour, if he did not see him there, he must swear according to his Senses that he was not there, and you cannot charge Perjury upon that. It demonstrates the Uncertainty of these Words, that when they come to lay the Declaration, they are fain to lay these Words four several Ways, as they do. And yet these two worthy Aldermen, say they took down the Words that very day. If these Words were so uncertain then, tho they were writ down, what should make them otherwise now?

Mr. *Att. Gen.* There hath not been such a Word said yet.

Mr. *Recorder*. We will prove it, Sir. As to the third Point, we say this; it is charged there was no cutting of Throats, no mention of cutting of Throats; as to that my Lord, I take it from one of their Witness's Mouths, that is, Mr. *Buxton*; he says that Sir *Patience Ward* swore that he heard no mention of cutting of Throats; under Favour, Sir, to say that there was no mention of cutting of Throats, that is positive that there was no such thing spoken; but their own Witness says, that there was no such thing heard: can there be a greater Difference than for a Man to say there was no such Word spoken, and to say there was no such Word heard by me? This of cutting of Throats, if it were spoken at all, tho I believe it was; for I have that good Opinion of these worthy Aldermen, I mean Sir *William Hooker* and Sir *Henry Tulse*, that I presume there was something about cutting of Throats; but I answer, that Sir *Patience Ward* might not hear it. And I think they have given a very good Ground for it: Says Sir *Harry Tulse*, is he, or will he come to cut our Throats? Whether it were *is*, or whether it were *will*, that he cannot tell. Sir *William Hooker* says he *is* come to cut our Throats: One speaks affirmatively, the other interrogatively: Sir *Henry Tulse* says it was *our* Throats; says Sir *William Hooker*, the Throats of *our* Wives and Children. Do not these two Aldermen differ as much between themselves, as either or both of them do with Sir *Patience Ward*, when Sir *Harry Tulse* shall say there was no *Wives and Children* mentioned? It is no Reflection at all, and I hope there will be no Cause to reflect upon the other Alderman. The next Point is, that there was a Discourse concerning the Duke of *York*, and that it was before Mr. *Pilkington* came in: Here the Witnesses vary extremely; one says before he came in, another says before he came to the Table, another says while he was in the Room; all these Varieties we find in the Witnesses that swear the Words out of Sir *Patience Ward's* Mouth; and certainly Sir *Patience Ward* would never say these Words, it is impossible to say the Discourse concerning the Duke was ended, when in the very next Words he says the Duke was not named at all: For, my Lord, Sir *Henry Tulse* says he was never named. But, my Lord, besides this, if, I say, he was not there in the Sight and View of Sir

Patience Ward, he is not guilty, be it true or false, that he was there before the Discourse ended; for it is a long Room, and no Man can say but a Man might be behind *Sir Patience Ward* as he sat at the Table. The second Thing, my Lord, is this, that the Duke was not named, that he is charged to have sworn. My Lord, the Evidence that he delivered was, that the Duke was not named in his Hearing. Now *Sir Harry Tulse* says the very same that *Sir Patience Ward* did, that there was a Discourse about an Order, he says, but no Body named the Duke, and *Sir William Hooker* says the Duke was not named.

Mr. Just. *Witchins*. He says he cannot say he was named.

Mr. Recorder. Till after the Words spoken; and, my Lord, it was so doubtful, that it seems there was need of Explication; for the Words (under Favour) as proved, do not relate to cutting of Throats, but to the burning of the City; and what *Sir William Hooker* says afterwards, makes it more plain. If we prove these things, that *Sir Patience Ward* carried himself thus, if he expressed himself with so much Caution, under Favour, that doth clearly avoid this Charge in the Information. But, my Lord, if these were Perjury, it was committed at the Trial of Mr. *Pilkington*, and at that Trial when it was committed, it was best understood; for here is no new Evidence as to the Words spoken in the Gallery; therefore, under Favour, the Perjury was as observable then, and more, because it was fresh then. Now it is said, that it was with great Astonishment; we shall give in Evidence that there was no such Apprehension; that the Court, that the Council, that every Body did apprehend it as delivered with that Caution as I have opened it to your Lordship: First, *Sir George Jefferies*, in the very Conclusion, asked him if there were nothing spoke of the Duke while Mr. *Pilkington* was by: no, saith he, not to the best of my Memory, saith *Sir Patience Ward*. Saith *Sir George Jefferies*, by reply, your Invention is better than your Memory. Surely that were the most impertinent Thing in the World, if it had been otherwise. And every Body knows *Sir George Jefferies* is a Man that would not have said such a Thing, if he had not wholly referr'd to his Memory, and given him an Occasion for that Reply. And Mr. *Solicitor*, he says these Words in repeating the Evidence to the Jury; *Sir Patience Ward* goes a great way to confirm that of the other Aldermen; and that shews that they did observe it far enough from Perjury; and my Lord Chief Justice, my Lord, when he came to direct the Jury, he says that *Sir Patience Ward* had said that as he conceived there was no mention of cutting of Throats, and so on; and says he, it is easy to forget such Circumstances. If in the Judgment of my Lord Chief Justice it were an easy thing to forget, can it be wilful Perjury in any Man to testify that which was spoken as he conceived; and truly, my Lord, it is the more, for that my Lord Chief Justice was upon his Oath as well as the Witnesses. And your Lordships that sat with him would have rectified my Lord Chief Justice, if he had misapprehended him; And the Jury did apprehend it so, and looked upon *Sir Patience Ward's* Evidence as a Confirmation. My Lord, all these things are negative, and they do refer to the Memory, and that my Lord Chief Justice said a Man may easily forget, and that is enough

to excuse him. Besides, my Lord, this was given in Evidence seven or eight Months after the time that the Words were spoken; and if any Man were to repeat what was said at this Bar, no doubt but in seven or eight Months they would differ more than *Sir Patience Ward* did from these Gentlemen. Besides, my Lord, he is a Man of good Reputation and Credit, he hath borne great Offices in the City, Mayor and Sheriff of London, and this is a Crime for mean Persons, and we think much less Evidence than this will satisfy your Lordship. We will prove what was said at the Trial, not by the imperfect Memories of People that did not write, or cannot tell whether they writ or not; but by some that did take very exact Notes, and especially by one that wrote the whole.

Mr. *Williams*. My Lord, the Question is, what was spoken by *Sir Patience Ward*. My Lord, if *Sir Patience Ward* did not swear as they have laid it in the Information, *Sir Patience Ward* is not guilty. They have laid the Information thus, that as to the cutting of Throats it was sworn positively by *Sir Patience Ward*, but if *Sir Patience Ward* did only speak as by Hearsay, as he heard, that there was no mention of cutting of Throats in his hearing, then we are not guilty. My Lord, how far then the Evidence doth touch us in this Matter, how far they have proved us guilty, is to be considered. I do not find that any one Witness in this Trial, says that *Sir Patience Ward* did swear positively, that there was no mention of cutting of Throats. Every Man that speaks, speaks to the best of his Memory, and to the best of his Knowledge, and no otherwise; and I will appeal to your Lordship, upon what every Witness hath said, whether any Witness can be convicted of Perjury; for every Man hath appealed to his Memory. Observe every Witness, and not any of them do agree. The two Aldermen that were then sworn, one of them *Sir Harry Tulse*, tell you of the Discourse concerning coming to burn the City and cutting of Throats; as I take it, *Sir Harry Tulse* said it by way of Question, *is he come, is he come to cut our Throat?* *Sir William Hooker* tells it positively, *he is come, he is come to cut our Throats*. If Gentlemen do vary, as these two Witnesses, and have several Apprehensions of the same thing, it ought to have no influence upon this. In this Case, we are here for wilful Perjury. If it be a Mistake of the Memory that will never come to Perjury. We will make it out that it was spoken with great Caution, and Restriction. And then for the other of the two Assignments, if this be true, that there was no Discourse of the Duke of York, then the second will naturally fall. The first thing is this, that he should swear there was no Discourse of the Duke of York; if this be true, that there was no Discourse of the Duke of York, then the second will fall. If the Discourse of the Duke of York, was done before Mr. *Pilkington* came into the Room, if there were no Discourse of the Duke of York, it is impossible that should be the Meaning. And here I must observe *Sir Harry Tulse* is a Thousand Witnesses in this Case: he tells you expressly that there was no Discourse of the Duke of York, he hath told you plainly there was no Discourse of the Duke of York, nor any Discourse of the Duke's Name; and what says *Sir Harry Tulse*? He says very plainly, there was a Discourse of an

Order made the Day before, we allow the Duke is mention'd in that Order, but the question is, whether there was mention of the Duke's Name at this Time. If you believe Sir Harry Tulse, there was no mention of the Duke's Name.

Mr. Just. Jones. He did not remember that there was. He did not remember that the Duke of York was named.

Sir Fr. Winnington. By any Body.

Mr. Just. Jones. He does not say that the Duke was not named.

Mr. Williams. Sir Harry Tulse is as much obliged to remember in this Case as any Man here. This will be a mighty Evidence to justify my Client, then the Perjury will certainly fall upon these, but we will clear this too. In this Matter Sir Patience Ward was a most cautious Evidence, so is he, he did not say positively that there was no mention of the Duke's Name, but he says to the best of his Remembrance. So that there is nothing proved against us. We will call Mr. Blaney, Mr. Blaney is a thousand Men in this Case.

Sir Geor. Jefferies. Is he so?

Mr. Williams. He takes Notes exactly. We will tell you what was sworn by Sir Patience Ward.

Sir Geor. Jefferies. I have known him out in a Verdict.

Mr. Pollexfen. That the Duke of York's Name was named in the Discourse, is not proved; no Body says it was before the Words spoken.

Mr. Just. Jones. After the Words spoken; it was then he tells you; but it was not before the Time of the Discourse.

Mr. Pollexfen. There was a Discourse of going to St. James's, and upon this Discourse these Words were spoken, that Pilkington did speak; but the naming the Duke was after the speaking of the Words in the Declaration; therefore, there being no Body that does prove that the Duke was named in any Discourse preceding the Words spoken by Pilkington, I think it is no Evidence at all.

L. C. J. You make Things so intricate, that no Man shall be able to understand what another says, but must take it as you would have it. When it was said he had burnt the City, well what says t'other? Sir William Hooker, I think, makes answer, says he, the Duke is as innocent as a Child, and he was one that endeavoured to save it. Must not we understand, now, that this was a Discourse of the Duke, all this while?

Mr. Pollexfen. My Lord, the Question is, whether there were any such Discourse preceding the Words, or any thing in Question, but what happened after the Words.

Sir Geo. Treby. If the Duke were not named before the words, can the Name of the Duke refer to the expounding of them?

Sir Geor. Jefferies. No; but Hubert, ten Years after he was hang'd.

Sir Fr. Winnington. My Lord, I see we are in Question for corrupt and wilful Perjury.

L. C. J. You had best call your Witnesses; for ought appears you are so yet.

Sir Fr. Winnington. We will call our Witnesses, and shew what he did swear.—Mr. Blaney, will you acquaint my Lord and the Jury, whether you were by at that Trial; and give an Account of what you know Sir Patience Ward did swear, and whether you took any Notes.

Mr. Blaney. I was present at the Trial between his Royal Highness and Mr. Pilkington; I did sit

upon one of those Stools there, and I did take Notes, to the best of my Skill.

Sir Geo. Jefferies. Have you your Notes?

Mr. Blaney. Yes, Sir.

Mr. Williams. First of all acquaint my Lord and the Jury, what was sworn by Sir Patience Ward.

Mr. Blaney. Having received a Subpœna from Sir Patience Ward about this Matter, I looked over my Notes, and turned down the Leaves in several Places.

Mr. Williams. Tell what Sir Patience Ward swore concerning cutting of Throats; and what that was: Recollect yourself about what was sworn by Sir Patience Ward concerning cutting of Throats.

Mr. Att. Gen. Pray, Sir, don't look upon your Notes.

Sir F. Winnington. Your Witness don't remember whether he writ Notes or no.

Mr. Blaney. I have read my Notes to Day, again, and looked upon them; I do find it is thus, and I do really believe to be true; for I don't know I ever altered any Man's Evidence, either in Substance, or Form. He did then say, Upon my Oath, if it were the last Word I was to speak I did not hear one Word of cutting Throats.

Mr. Williams. Pray, Sir, say as he said.

Mr. Blaney. These were the Words, Upon the Oath I have taken, if it were the last Word I was to speak, I did not hear one Word of cutting of Throats.

Sir F. Winnington. Was it writ so in your Notes at that Time?

Mr. Blaney. It is so in my Notes.

Sir F. Winnington. Are your Notes alter'd since?

Mr. Blaney. No, Sir.

Sir F. Winnington. There was no Thought of Perjury then.

Sir Geo. Jefferies. Not by him, but by others.

Mr. Williams. Are these the Notes that were then taken?

Mr. Blaney. These are the Notes that were then taken.

Sir Fr. Winnington. I ask you this; did you take them as he said them?

Mr. Blaney. I did to the best of my Skill, neither added or diminished; Sir Patience in the beginning of his Evidence did say these Words, that there was nothing mentioned of the Duke, but of St. James's in his Hearing.

Sir F. Winnington. Are you sure the Words are there?

Mr. Blaney. They are here. Any Man that could read my Short-hand may see it.

Sir Fr. Winnington. Were the Words taken then?

Mr. Blaney. They were taken then.

Sir Fr. Winnington. Are they altered since?

Mr. Blaney. They are not, Sir.

Sir Fr. Winnington. How are the Words?

Mr. Blaney. That there was nothing mention'd of the Duke's Name, but of St. James's in his Hearing.

Mr. Williams. If this be true, it shuts out the second Assignment; but however we will ask him concerning the other Assignment, whether there was any Discourse concerning the Duke after Pilkington came in.

Mr. Blaney. If you please, Mr. S. Jefferies was pleased to press it upon Sir Patience Ward. Sir, you were pleased to ask the Question, was all the Discourse over concerning going to St. James's, or the Duke of York, before Mr. Pilkington came in? Was it all over before Mr. Pilkington came in? And Mr. S. Jefferies then said—

Sir

Sir *G. Jefferies*. What did he answer to my Question? Was there nothing said of it while he was by?

Mr. *Blaney*. Sir *Patience Ward* said not one Syllable of it to my Memory; whereupon Sir *George Jefferies* said, your Invention is better than your Memory; and he reply'd, my Lord, I thank God, I have a good Memory; tho perhaps that Gentleman hath not.

Mr. *Williams*. Was this written down in your Book?

Mr. *Blaney*. It was then taken by me in Writing, in my Book.

Mr. *Williams*. Is any thing altered?

Mr. *Blaney*. Not one Word.

Mr. *Williams*. Did you write them sitting there as they were spoken?

Mr. *Blaney*. Just as he said them: There I sat where Mr. *Owen* sits now.

Mr. *Att. Gen.* Do you swear you remember any part of it?

Mr. *Blaney*. Sir, this I do remember, as well as I can remember any thing in the World.

Mr. *Att. Gen.* *Blaney*, tell me positively what he said.

Mr. *Blaney*. He said not one Syllable of it, to my Memory; I do remember it.

Mr. *Att. Gen.* Upon what Question?

Mr. *Blaney*. Sir, of the Duke's being not named, but St. *James's*, I do remember likewise; but I can't well say any thing of the Business of cutting of Throats; I find it in my Book unaltered, I do not know that I am mistaken.

Mr. *S. Jefferies*. Hark you, Mr. *Blaney*; I know his Notes have been mistaken sometimes; I remember once, upon *Raree-show* Business, they were mistaken. Upon your Oath, Sir, did you hear Sir *Patience Ward* speak at that time any Words concerning a Lawsuit? Look upon your Notes.

Mr. *Blaney*. Sir, I will so.

Mr. *Pollexfen*. What have we to do with *Raree-show*? Are we trying that?

Mr. *Just. Withins*. Gentlemen, don't be angry, let the Cause be tried fairly.

Mr. *S. Jefferies*. I may ask a Question, I hope. I ask a fair Question, I would fain meet with that among his Characters.

Mr. *Blaney*. Sir, I would not have looked it over, if I had met with any such thing in my Notes.

Mr. *Att. Gen.* Can you swear any thing positively upon your Notes?

Mr. *S. Jefferies*. It is some Discourse near the Question.

Mr. *Blaney*. Then, Sir, indeed it is not in my Notes.

Mr. *S. Jefferies*. Did Sir *Patience Ward* use the Word positively at any time in your Notes; and tell us to what?

Mr. *Att. Gen.* Whether he was positive to any one Thing?

Mr. *S. Jefferies*. Did he swear positively to any one Thing? And tell us to what? I desire to be satisfied by Mr. *Blaney's* Notes, some Men can take Notes on the one Side, and forget Things on t'other.

Mr. *Williams*. Come, Mr. *Beaver*.

Mr. *Blaney*. I don't see the Word positive.

Mr. *S. Jefferies*. No, not at all.

Mr. *Blaney*. I don't pretend to say I have written every Word.

Mr. *S. Jefferies*. But you do pretend to write more than he said.

Mr. *Williams*. What he writ, is true.

Sir *Fr. Winnington*. He does not undertake to say he writ every Word that pass'd, but whether or no he writ any Word that was not said. Is all that you writ true?

Mr. *Blaney*. I verily believe it is true.

L. C. J. Is that any manner of Satisfaction when he hath not taken all that was said, and so spoiled the Sense, by leaving out some of the Words?

Mr. *Just. Withins*. How is it possible for a Man to be a good Witness, that comes and swears in one part, I know nothing of any such Words; and at another Time says he does not write all in his Notes.

Sir *G. Treby*. Let that pass for a Rule, and then no Witness they produce can be believed.

Sir *F. Winnington*. They have given Evidence by Witnesses *viva voce*, without Notes, and make an Objection, because he does not remember every Passage; therefore he signifies nothing. We urge it in point of Evidence, my Lord; he is known to be a Man very dexterous in writing Short-hand, in a material Thing he swears to the best of his Remembrance. He took them from the Mouth of the Person that swore at that Time. My Lord, we asked him whether he writ any thing that was not said. We leave it in point of Evidence, my Lord, to encounter theirs.

Mr. *Williams*. We would give our Evidence in, if they would give us Leave.—*Richard Beaver*, were you by, at Mr. *Pilkington's* Trial?

Mr. *Beaver*. My Lord, I was by, all the while.

Mr. *Just. Jones*. Did you take Notes?

Mr. *Williams*. Were you present at the Trial of Mr. *Pilkington*?

Mr. *Beaver*. I was present.

Mr. *Williams*. Can you remember what was sworn by Sir *Patience Ward* upon that Trial?

Mr. *Beaver*. Yes, Sir.

Mr. *Williams*. Can you remember what Sir *Patience Ward* swore, concerning cutting of Throats?

Mr. *Beaver*. My Lord, he did say that to his best Remembrance the Discourse was over before *Pilkington* came into the Room. To the best of my Remembrance, my Lord, that Discourse concerning the Duke, was over before *Pilkington* came into the Room.

Mr. *Williams*. How did he express it? Pray swear what Sir *Patience Ward* spake; tell how he expressed himself.

Mr. *Beaver*. Sir *Patience Ward* did say, to the best of his Remembrance, that the Discourse concerning his Highness the Duke of *York* was over before Sheriff *Pilkington* came into the Room, where they were smoking Tobacco.

Mr. *Williams*. He said these Words to the best of his Remembrance?

Mr. *Beaver*. He did so. Upon which Sir *George Jefferies* said again to him, that he had a good Memory, and he said he had, and my Lord Chief Justice said, you may thank God you have a good Memory; my Lord Chief Justice himself, said so.

Mr. *Williams*. What did he say?

Mr. *Beaver*. To the best of his Knowledge, he did not hear any thing of cutting of Throats.

Sir *F. Winnington*. Can you remember the Way of his Expression?

Mr. *Beaver*. The Way of his Expression was, as I remember, to the best of my Remembrance, he did strike his Hand upon his Breast, and said, When Sheriff *Pilkington* came in, he struck his Hand upon his Breast, and asked him if he meant

Hubert,

Hubert, so he said upon his Salvation, or to the best of his Knowledge.

Sir F. Winnington. What did he say?

Mr. Beaver. He said——

Sir F. Winnington. What did he say concerning cutting of Throats?

Mr. Beaver. He said he did not hear any thing, as he believed.

Mr. Just. Jones. Of what?

Mr. Beaver. Of cutting of Throats.

Mr. Just. Jones. Is that all he said, he did not hear any thing of cutting of Throats?

L. C. J. You Friend; you said that *Sir Patience Ward* said he did not remember any thing of cutting of Throats; did you say so?

Mr. Beaver. Yes, my Lord.

L. C. J. And thereupon you say, my Lord Chief Justice did commend his Memory for it; prithee, how came he to be praised for such a great Memory, when he said he did not remember any thing? Thou hast not laid the Plot well together.

Mr. Just. Withens. Was he commended because he said he did not remember?

Mr. Just. Jones. Where did you stand?

Mr. Beaver. I stood over-against *Sir Patience Ward*.

Mr. Just. Jones. Did you hear well?

Mr. Beaver. Yes, my Lord, I heard every Word. He said he got Honour by speaking Words against the Duke of York.

Mr. Just. Jones. What is that?

Mr. Beaver. That *Pilkington* had got Honour by speaking against his Highness the Duke of York.

Mr. S. Jefferies. In the mean time look that Part out in your Notes, that he speaks of. Now I would ask you a Question, Friend.

Mr. Att. Gen. Pray will you recollect yourself; Did you hear *Sir Patience Ward* say, to the best of his Remembrance the Discourse concerning the Duke of York was ended before *Pilkington* came in? Pray what did he say, touching the Discourse of the Duke of York.

Mr. Beaver. Sir, he said to his best Remembrance, that Discourse was over.

Mr. Att. Gen. What Discourse?

Mr. Beaver. Concerning his Highness, that it was over.

Mr. S. Jefferies. *Mr. Beaver*, I would ask you a Question, because I know you will remember it presently. Do you remember any thing *Sir Patience Ward* swore, that he never had a Law-suit in his Life? Do you remember any thing of that?

Mr. Beaver. If you please, Sir, there was something said of that.

Mr. S. Jefferies. Then look that in your Notes too, *Mr. Blaney*.—Pray, upon your Oath, do you remember he used the Word *positively*?

Mr. Beaver. Nothing at all, *positively*.

L. C. J. Upon my Word, your Memory must be commended.

Mr. S. Jefferies. *Mr. Beaver*, where do you live, *Mr. Beaver*?

Mr. Beaver. I live, Sir? You know well enough, Sir, what would you say to me?

Mr. S. Jefferies. I only desire to know where you live, Sir.

Mr. Beaver. I live in *Soaper-Lane*, Sir.

Mr. Williams. He is an honest Man. He was commended when he was Church-warden.

Mr. S. Jefferies. Many a wise Man hath been in that Employ.

Mr. Williams. *Mr. Crisp*, you were present at the Trial between his Royal Highness and *Mr. Pilkington*.

Mr. Crisp. My Lord, I was present here.

Mr. Williams. Can you remember, Sir, what was sworn by *Sir Patience Ward* concerning cutting of Throats, and how he swore it?

Mr. Crisp. I cannot give any perfect Account: I was here, and a great many Expressions I did hear, a great many I did not hear. I heard *Sir Henry Tulse* give some Account, and *Sir William Hooker*, that *Mr. Pilkington* should say such Words about the Duke's being come——

Mr. Just. Withens. Go on, pray, Gentlemen.

Mr. Williams. Can you say any thing of what *Sir Patience Ward* swore about cutting of Throats?

Mr. Crisp. *Sir Patience Ward* was speaking whether or no such Words were spoken that were sworn: he did say there was something said that he was come to burn the City, that he did confess; but as to cutting of Throats, there was not a Word spoken in my Hearing, or to the best of my Remembrance, or something to that Purpurse, I cannot be positive.

Mr. Williams. Can you be positive in this, Sir, that he said in his Hearing, or I cannot be positive?

Mr. Crisp. I took it in that Way, Sir.

Mr. Williams. Pray, *Mr. Crisp*, I would ask you this: Do you remember any thing he said, whether *Mr. Pilkington* was in the Room, when there was any Discourse of his Royal Highness, or the Duke of York?

Mr. Crisp. To the best of my Memory, he spake it thus: We were discoursing together about going to wait on his Majesty, and then to go to his Royal Highness; and we entered into some other Discourse; and when we were discoursing of that, *Mr. Pilkington* came to the Table to us: It was concerning the Work of the Day; and when we were about that Discourse, *Mr. Pilkington* came to us to the Table. Whether he said he was not in the Room, or came into the Room then, I can't tell; but I remember he said he came to the Table to us when we were about this Discourse.

Sir F. Winnington. Do you remember any thing that my Lord Chief Justice said to *Sir Patience Ward's* Evidence?

Mr. Crisp. That I remember more than any other Particular, because *Sir George Jefferies* had made some Reflection upon *Sir Patience Ward*, and my Lord said, *Sir Patience*, that is usual with Counsel to speak so to Evidence; but do you go on with your Evidence for all that, says my Lord Chief Justice; *Sir Patience*, recollect yourself; it is supposed by your Evidence, that you leave out those Words, either about the Duke of York's being named, or about cutting of Throats; therefore *Sir Patience*, recollect yourself. Says *Sir Patience*, I do speak it to the best of my Memory. Says *Sir George Jefferies*, upon that or some other Time, your Invention is better than your Memory, which I took more Notice of than other Things.

Sir F. Winnington. When my Lord Chief Justice bade him recollect himself, how did he express himself? Did he say, to the best of his Memory?

Mr. Crisp. That he did, positively.

Mr. Williams. *Mr. Crisp*, recollect yourself, as near as may be, when my Lord Chief Justice made that Answer, either to those Words of cutting of Throats, or the Duke of York's being mentioned; was it in the Conclusion of his Evidence?

Mr.

Mr. Crisp. It was towards the Conclusion ; for I went away, being very much sweltered.

Mr. S. Jefferies. Mr. Crisp, did you hear Sir Patience Ward say, in his Evidence, that he never had any Suit ?

Mr. Crisp. He did speak something when you did reflect upon him, *I don't remember that ever I had any thing to do with Courts ; my Business is at Home.*

Mr. S. Jefferies. A further Question I ask.—Mr. Crisp, can you tell upon your Oath, whether Sir Patience Ward swore any thing positively ?

Mr. Crisp. I don't know, Sir ; I took no Notes at all ; I cannot swear, or declare those Words were not spoken ; but still it was in *his Hearing*, or the *best of his Memory*.

Mr. S. Jefferies. Do you remember he ever used the Word *positively*, or was positive in any Part of that Trial ?

Mr. Crisp. I do remember he spoke it very positively ; but whether he said the Word *positive*, I can't say : But still it was with this Reservation.

Mr. S. Jefferies. Hark you, Mr. Crisp, I will ask you one Thing more. Do you take it upon your Oath positively, that he used either to the *best of his Memory*, or the *best of his Belief*, in any thing he said ?

Mr. Crisp. In his Answer to my Lord Chief Justice he did.

Mr. S. Jefferies. In any other Part, will you take it upon your Oath, positively, that he ever used the *best of his Remembrance*, or the *best of his Belief* ?

Mr. Crisp. I said before, I did not fix it in my Memory.

Sir F. Winnington. My Lord, he thinks it convenient to say to the best of his Memory too—Call Mr. Wright.

Here the King's Counsel attempted to remark on the Evidence.

Mr. Williams. Pray, my Lord, when we have given all our Evidence entire, if they have any Observation, we will submit to it ; but to remark upon every Witness, would occasion too many Interruptions. We would give our Evidence entire.

L. C. J. You will agree that they may ask a Question, when you have done with them ?

Mr. Holt. (to Mr. Wright.) Was you present at the Trial between his Royal Highness and Mr. Pilkington ?

Mr. Wright. Yes, Sir ; and Sir Patience Ward, I remember, was asked this Question, Whether he heard any Words concerning killing, or cutting of Throats, and Sir Patience Ward said, *for killing I heard that Discourse, but for cutting of Throats, he never mentioned.*

Mr. Williams. You are a Gentleman that exercise your Memory ; pray, Sir, did he say any thing of cutting of Throats ?

Mr. Wright. It was to *his Hearing*, or the *best of his Remembrance* ; he did it very cautiously.

Mr. Williams. Was it as he believed or remembered, Mr. Wright ? Did he say positively there was no Discourse of cutting of Throats, positively, or with any Reference to his Hearing ?

Mr. Wright. As far as I can remember, thus he said, there was a Discourse concerning *firing the City*, but not concerning cutting of Throats.

Mr. Williams. Did he say that positively, or to the best of his Understanding ?

Mr. Wright. The Occasion of it was this, Sir, whether Mr. Pilkington was present when the Discourse was about waiting on his Majesty, to congratulate his coming to Town from New-market, and his Royal Highness ; Sir Patience Ward did believe he was not then present when the Discourse was ; he was in *Guildhall*, with the Lord Mayor licensing of Ale-houses.

Sir F. Winnington. When he did mention that about *cutting of Throats*, how did he express himself ?

Mr. Wright. *I believe, or do think, there was no such Word spoken.*

Mr. S. Jefferies. I would ask your Parson one Question.

Mr. Wright. What you please, Sir George.

Mr. Att. Gen. Can you swear yourself positively what he said ?

Mr. Wright. I swear thus far, according to my Remembrance.

Mr. S. Jefferies. I would ask him a Question.—

Mr. Att. Gen. All Issues must be tried by Belief or Memory ; what new Practice is this ? Can you swear this upon your Oath, or do you only say, I think or believe it ?

Mr. Wright. I speak to the best of my Remembrance.

Mr. S. Jefferies. Mr. Wright, I would ask you a Question. If I take you right, at the Beginning, there was a Talk concerning killing and cutting of Throats ; my Lord, I appeal to the Memory of the Court and the Jury, if he did not say it two or three Times over. Mr. Wright, remember what I say.

Mr. Recorder. He did say it cautiously.

Mr. Just. Jones. He did not insist upon it.

Mr. S. Jefferies. Was there any Discourse, upon your Oath, when Sir Patience Ward gave his Testimony that there was any Discourse concerning killing and cutting of Throats ?

Mr. Wright. He believed that the word killing was not spoken in Mr. Pilkington's hearing.

Mr. S. Jefferies. Now I ask you another Question : Now, Mr. Wright, pray do you remember that there was any Discourse concerning Sir Patience's having a Law-suit, or no Law-suit ?

Mr. Wright. Sir Patience said this when you made a Reflection upon him ; my Lord, *I hope you will not suffer me to be abused, for I never remember I was in any Court upon any Occasion of Law before.*

Mr. S. Jefferies. Now I would ask you another Question, Mr. Wright, because you have remembered more than other People have remembered ; you have, by your Profession, an extraordinary Occasion to use your Memory ; do you take it upon your Oath that he did give any Evidence positively ?

Mr. Wright. I do not remember he used the Word *positively*.

Mr. S. Jefferies. Did he swear any thing positively ?

Mr. Wright. I do not know what you mean by *positively*.

Mr. S. Jefferies. Do you take it upon your Oath, that he did positively declare any thing in that Trial ? Methinks a Man of your Profession should understand that.

L. C. J. Did he speak *positively* or the *best of his Remembrance* ? Do not you understand that Word ?

Mr. S. Jefferies. Or directly or categorically, or any Word you use ; I perceive you do not understand

understand *positive*, therefore I put another Word.

Mr. Att. Gen. Did he swear any thing *positively*?

Mr. Wright. The most of his Evidence that I heard, was with *cautionary Words*, to the best of his Remembrance.

Mr. S. Jefferies. Do you remember he swore any thing *positively*?

Mr. Wright. I cannot remember, Sir, the whole Trial.

Mr. S. Jefferies. Did he swear any thing *directly* or *positively*?

Mr. Wright. Thus far he said, to the best of my Remembrance, to the best of my Knowledge, this Discourse was over.

Mr. S. Jefferies. Did he *directly* swear it?

Mr. Wright. My Lord, he spake *cautionarily*, those Words he spake *directly*.

Mr. Att. Gen. Did he swear any thing *indirectly*?

Mr. S. Jefferies. Where does my Parson live? Where do you live Mr. Wright? Upon your Oath, where do you live before you go?

Mr. Wright. If it be a *material Question*, I will answer it.

Mr. Just. Raymond. You must do it.

Mr. Wright. My Lord, I live in *Essex* at *Walthamstow*.

Mr. S. Jefferies. Are you the Minister of the Place?

Mr. Wright. Yes, Sir.

Mr. S. Jefferies. He hath heard the Word *killing*, which no body else heard before.

Mr. Williams. Pray call Colonel Birch.

Mr. Holt. Come Col. Birch, will you come over on this Side?

Mr. Williams. Thus, were you at the Trial between his Royal Highness and Mr. Pilkington?

Col. Birch. I was—My Lord, I am sworn to speak the Truth, and the whole Truth, and nothing but the Truth. As for speaking nothing but the Truth I shall be sure to do; as to speak the whole Truth I cannot. My Lord, I stood where those Gentlemen do, sometimes I could hear, sometimes I fell back and could not hear, so that indeed I cannot speak to any one Sentence as it was delivered. This is all I can say.

Mr. Williams. Then say what you can.

Mr. Holt. Colonel, please to go your own way.

Col. Birch. My Lord, that which I took Notice of was the *Caution* that I observed Sir Patience Ward to give his Evidence with, that was the principal thing; I heard some Pieces of other Things, and then by and by I was put out of Hearing. But methought it was something strange, because I have not usually heard the like, and therefore I charged my Memory with it; that is, some Things he said to the best of his Memory, other Things as he remembered, or to the best of his Knowledge, these, were the Things that I charged my Memory withal, but to what Sentence he applied, I am not able to give your Lordship an Account upon my Oath.

Mr. Williams. Colonel Birch, did you observe this in giving his Evidence, generally, was it according to his Remembrance or cautiously?

Col. Birch. That was the main Thing he spoke of, what he did in the general, was with *Caution*.

Mr. Att. Gen. Can you judge of that by what you heard?

Col. Birch. I am very ancient, Mr. Attorney, but I can judge of a Man's Caution by his speaking.

Mr. Att. Gen. Colonel, Did you see him strike his Hand upon his Breast?

Col. Birch. I do not remember. I cannot apply it to any Sentence, but from henceforth I will never give Evidence, but what I can do *directly*.

Mr. Williams. Mr. Northey, were you at the Trial between his Royal Highness and Mr. Pilkington?

Mr. Northey. My Lord, I was there, and stood behind there, but I could not hear very perfectly, to know any Sentences fully.

Mr. Williams. What did you observe?

Mr. Northey. I do remember that Sir Patience Ward did several Times say, to the best of his Memory, and to the best of his Knowledge, one Time particularly, Sir George Jefferies did particularly say, that his *Invention* was better than his Memory.

Mr. Thompson. Was that towards the Conclusion of his Evidence?

Mr. Northey. He did it several Times.

Mr. Thompson. But that Time, Sir?

Mr. Northey. He did swear very cautiously to the best of his Remembrance; I cannot, my Lord, say what he swore.

Mr. S. Jefferies. You heard my Question. When I said to him his *Invention* was better than his Memory, upon your Oath, upon what Occasion was it?

Mr. Northey. Really I cannot say, Sir George, what, but your Voice being much louder than other Mens, I heard you plainly.

Mr. Holt. Mr. Nelson, were you at the Trial?

Mr. Nelson. My Lord, I was present at the Trial, and in some Cases Sir Patience Ward did rely upon his Memory, for Sir George told him, his *Invention* was better than his Memory.

Mr. Williams. Do you remember generally he did so?

Mr. Nelson. I had not remembered this, Mr. Williams, if it had not been for Sir George Jefferies's Reply.

Sir Fr. Winnington. Mr. Baker, pray will you tell my Lord what you know of Sir Patience Ward's giving Evidence?

Mr. Baker. My Lord, according to the best of my Remembrance, my Lord Chief Justice Pemberton did say, Sir Patience, Sir Patience, you speak to the best of your Memory, to the best of your Remembrance; I say my Lord Chief Justice Pemberton did speak to Sir Patience Ward, Sir Patience, Sir Patience, you speak to the best of your Memory. My Lord, says he, I do it to the best of my Remembrance, my Lord, all that I can say.

Mr. Williams. Can you remember the Occasion of this, or the Time?

Mr. Baker. My Lord spoke to him once or twice, as I remember, he said once, mind your Evidence, Sir Patience; Sir Patience was angry a little at somebody.

Mr. Williams. Can you say what was it?

Mr. Baker. Some words as I remember passed between Sir George Jefferies and Sir Patience.

Mr. Williams. And what was the Occasion?

Mr. Baker. I cannot remember indeed.

Mr. Williams. Did you observe upon the Trial, that Sir Patience Ward did swear generally *positively*, or to the best of his Remembrance?

Mr. Baker. I apprehended him to swear to his Hearing and Memory sometimes.

Mr. Just. Jones. Do you remember the particular Things he swore?

Mr. Baker. No, my Lord.

Mr. S. Jefferies. I would ask Mr. Blaney this. I know you exactly take Notice of what he says, find out in your Book Sir Patience, Sir Patience, you speak to your Memory.

Mr. Williams. Mr. Bennet, Pray can you remember what was sworn by Sir Patience Ward?

Mr. Bennet. Sir, I was here, and I could hear very little, but then some time after, something towards the latter End, I got my Head in, and could hear a little, and that was that Mr. Pilkington was not at the Table, and the Discourse was ended before he came, of waiting upon his Royal Highness, about going to his Majesty, and after to St. James's.

Mr. Williams. How did he speak that, positively or to his Remembrance?

Mr. Bennet. He was asked both by you and Sir George Jefferies. He did not answer you; but he answered Sir George, for Sir George asked him this Question, Was this Discourse quite over before Mr. Pilkington came in? He did declare—I will tell you immediately if you will give me leave, He did declare not one Tittle was spoken, or to that Purpose. It was the latter Part, near it I am sure.

Sir Fr. Winnington. How did he express himself in that.

Mr. Bennet. He declared, as I have told you, that not one Syllable was spoken in his Hearing.

Sir Fr. Winnington. He says, my Lord, that not one Syllable was spoken in his Hearing.

Mr. S. Jefferies. The Court hears what he says.

Sir Fr. Winnington. Sir, that agrees with the Notes of Mr. Blaney.

Mr. S. Jefferies. The Word that he said was to the best of his Memory. How was the Word, Sir Patience, Sir Patience?

Mr. Blaney. That was not in, Sir.

Sir Fr. Winnington. My Lord, now we will go to another Part of our Evidence, we will call Persons of Quality that have long known Sir Patience Ward, that will give your Lordship an Account whether he be a Man likely to forswear himself corruptly and wilfully.—Sir William Russel, are you sworn? pray how long have you known Sir Patience Ward?

Sir Will. Russel. Near upon twenty Years.

Sir Fr. Winnington. Pray will you give an Account what you know of him?

Sir Will. Russel. I have had several Transactions with him for considerable Sums of Money, I never found but very fair and honest and reputable Dealing. I have known him almost twenty Years, I have dealt with him for several Sums of Money, and have found him very fair, just and reputable in all Transactions between him and me.

Mr. Williams. Do you think he would wilfully or corruptly forswear himself?

Sir Will. Russel. I never had that Opinion of him. I was empannelled upon the Jury, but the Court refused me, and I went away.

Mr. Williams. Sir did you observe him to be a Man of Truth in his Trading?

Sir Will. Russel. Ever, Sir,

Mr. Williams. Was he given to tell Lyes or prevaricate?

Sir Will. Russel. I always found him a Man of Truth and Justice in his Dealing, all the Time I dealt with him.

VOL. V.

Mr. S. Jefferies. Sir William, I know you will speak the Truth, you are a civil Gentleman. Have you not taken him to be a factious, seditious Man? Did you look upon him to be a Man well-affected to the King and Government?

Sir Will. Russel. I never did concern myself in those Affairs much, I never had any Converse with him about them.

Mr. S. Jefferies. I know you were a Common-Council-Man in his Mayoralty.

Sir Will. Russel. I was a Common-Council-Man in his Time.

Mr. Att. Gen. Pray, upon your Oath, did you look upon him to be a Man well-affected to the Government?

Sir Will. Russel. I do not understand, Mr. Attorney, that I ought to pass my Opinion upon Persons in that Point.

Mr. Att. Gen. Have you not observed in the City his Actions there?

Sir Will. Russel. I was concerned at that time when he was Mayor.

Mr. Att. Gen. How did you observe him?

Sir Will. Russel. I do not know that I have heard him speak in a Court of Aldermen.

Mr. Att. Gen. I ask you, Sir, would he strain a Point to serve a Party?

Sir Will. Russel. I do not know, Sir.

Mr. Williams. I think you have known Sir Patience a great while, do you take him to be a good Subject to the King or no?

Sir Will. Russel. I never knew otherwise by him.

Sir Fr. Winnington. Mr. John Johnson.

Mr. Just. Jones. This Kind of Evidence doth weigh very little.

Mr. Recorder. It is a very improbable thing that a Man that hath borne so many Great Offices, that hath represented the King in that great Office of Lord-Mayor, should be guilty of this.

Mr. Att. Gen. My Lord, if they talk of Reputation at large, we will call all the Court here for the Reputation of our Witnesses.

Mr. Just Jones. For a Man that hath been so eminent as Sir Patience hath been, there is very little more to be said for his Reputation.

Sir Fr. Winnington. Mr. Johnson, do you know Sir Patience Ward?

Mr. Johnson. Yes, Sir.

Sir Fr. Winnington. How long, Mr. Johnson, have you known him?

Mr. Johnson. Ten or twelve Years, Sir.

Sir Fr. Winnington. Have you had Dealing with him?

Mr. Johnson. Yes, Sir, for considerable Sums, for Thousands of Pounds.

Sir Fr. Winnington. Has he dealt with you as a just Man?

Mr. Johnson. A very honest just Man as ever I dealt with in my Life.

Sir Fr. Winnington. Do you think he would forswear himself?

Mr. Johnson. I don't think he would tell a Lye.

Mr. Att. Gen. No, not for a Party?

Mr. Johnson. No not for a Party. Said I, Sir Patience Ward, you are looked upon to be a Person disaffected to the Government. Says he, it is my Misfortune; I am as loyal as any Man in England.

Mr. Just. Withins. Hark you, Sir, pray how came you to question whether he was or no?

Mr. Johnson. Being intimate with him, Sir.

Mr. Just. Withins. What made you doubt, to ask the Question?

Mr. Pollexfen. Do you apprehend him to be a Man that would forswear himself?

Mr. Johnson. No truly, he was a Man of few Words.

Mr. Pollexfen. Was he cautious?

Mr. Johnson. Yes, Sir, as exact a Man as ever I dealt with in my Life.—I am very well known in the Court, I don't come to serve a Party. I can serve his Majesty as well as some in Court.

Sir Fr. Winnington. Mr. Toriano, how long have you known Sir Patience Ward?

Mr. Toriano. Thirty Years.

Sir Fr. Winnington. In all the Time have you looked upon him as fair in his Dealing.

Mr. Toriano. I have known him a Man of Truth, one that would not be false to his Knowledge.

Sir Fr. Winnington. Do you think he would forswear himself?

Mr. Toriano. I don't think he would tell a Lye to his Knowledge.

Mr. S. Jefferies. You say how long you have known Sir Patience Ward, have you not wondered within three or four Years?

Mr. Toriano. I have not meddled with Things. He hath, by his Discourse, been as loyal a Man as any.

Mr. Williams. Mr. Pickering, how long have you been acquainted with Sir Patience Ward?

Mr. Pickering. My Lord, I have been acquainted near forty Years. We have dealt together as long as he did follow a Trade.

Mr. Williams. Pray in your Conversation and Dealing with him, did you observe him a Man given to Lying, or Falseness, or Deceitfulness in his Conversation and Dealing?

Mr. Pickering. I never in all my Life did observe him guilty of any Thing inclining that Way, but of a fair Conversation, never given to many Words.

Mr. Williams. Do you think he would corruptly forswear himself upon any Account?

Mr. Pickering. Truly I believe not willingly do it, nor any Thing that Way.

Mr. Att. Gen. Mr. Pickering, you have observed him to be swerving of late?

Mr. Pickering. Truly I have been a Common-Council-Man in the Ward where he is Alderman, and all the Discourse I heard from him was very loyal truly.

Mr. S. Jefferies. By his Actions you have looked upon him to be a Man very well affected to the Government?

Sir Geo. Treby. (To Capt. Griffith.) Do you know Sir Patience Ward?

Capt. Griffith. I have known him ever since he hath been Alderman of that Ward.

Sir Geo. Treby. How many Years, Sir?

Capt. Griffith. About thirteen or fourteen Years.

Sir Geo. Treby. In all that Time how have you looked upon him?

Capt. Griffith. I have looked upon him in that Repute he was in as an Alderman. I never had any Dealing with him.

Sir Geo. Treby. Did you think he would forswear himself?

Capt. Griffith. No truly, I think no Man of Honour would forswear himself.

Mr. Att. Gen. Captain Griffith, upon your Oath, how hath he carried himself towards the Government?

Mr. Williams. Sir Harry Tulse, in all your Time

did you find him to be a Man given to tell Stories for Truth?

Sir H. Tulse. Sir, I never had any Dealing with him in Matter of Trade.

Mr. Williams. How did you find him in his Conversation?

Sir H. Tulse. Truly, Sir, I never heard any Thing ill of him.

Mr. Williams. Did you find him a Man of Falsity or Truth in his Conversation?

Sir H. Tulse. I never had any Dealing, so can speak little, I never heard any Thing amiss of him; I have heard he is a very considerable Merchant, and I believe he is so, and accounted a very civil Gentleman. I have had the Honour to sit in the Court of Aldermen, ten Years with him, and we have had sometimes some Difference in Judgment.

Sir Geo. Treby. Would he wilfully forswear himself do you think?

Sir H. Tulse. Truly, I believe not.

Mr. S. Jefferies. Do you believe every Thing he swore at the last Trial was true? you are upon your Oath, Sir Harry Tulse.

Sir H. Tulse. I believe they were not true.

Mr. S. Jefferies. Sir William Hooker, we would give you no more Trouble.

Mr. Williams. Because they called you, Sir William, I would ask you a Question, what do you think of Sir Patience Ward?

Sir William Hooker. Truly thus according as it hath been said; but truly when I consider what a Condition Sir Patience Ward was in, when he delivered his Evidence, for to my remembrance he looked like a Man three quarters dead.

Mr. S. Jefferies. Do you believe whatever he swore was true?

Sir Will. Hooker. I do not remember any Thing he swore then.

Mr. Just. Jones. Have you done?

Mr. Williams. We have done, we leave it to the Court.

Mr. S. Jefferies. Sir Francis Lee—Sir Francis, were you at this Trial, and do you remember what Sir Patience Ward said at the Trial?

Sir Fr. Winnington. Always you come with Drops at last.

Mr. Williams. This is a new Way of going to Work.

Sir Fr. Lee. I was upon the Jury between his Royal Highness and Mr. Pilkington, and Sir Patience did swear that Mr. Pilkington was not in the Room, when the Discourse concerning the Duke of York was mentioned; but afterwards did swear, when Mr. Pilkington said he hath burnt the City, said he, I clapt my Hand upon his Mouth, and t'other upon his Breast, and bid him explain himself, who do you mean? Hubert? Sir Francis Butler, who was our Foreman, and stood next to me, jogged me and bid me take Notice of that. And so I did, and after we had this Discourse together, he said, Sir Francis, I would have had you to take Notice, did you take Notice of it? I told him I did. Truly it seemed clear to me, that he should swear he was not present at the Discourse about the Duke of York, and afterwards he must infer he meant the Duke of York, or else what should he have stopt his Mouth for?

Mr. Williams. My Lord, here are Gentlemen that heard all the Trial, they might have been called certainly in Order. But, my Lord, to come

in at last, when the Thing is heard on both Sides, then to come in with Witnesses again, I don't understand.

L. C. J. They may call theirs, when you have done with yours.

Sir Fr. Winnington. My Lord, I will but put this one Instance, in a *civil* Cause it hath been denied, much more in Perjury.

Mr. Williams. We will leave it to the Court, if *Mr. Attorney* says he will, we will.

Mr. Just. Withins. Take your Liberty on both Sides, I pray.

Mr. Att. Gen. If *Sir Patience* did not know it to be false, then it is no Perjury.

Sir Geo. Treby. I said no such Words.

Mr. Just. Withins. They resolve they will conclude, therefore Gentlemen take your Time.

Mr. Att. Gen. I remember what you proposed t'other Day, you made a Speech after two or three o' th' Clock in the Afternoon.

Sir Geo. Treby. Who, did I?

Mr. Just. Withins. Nay, good Gentlemen, don't quarrel.

Sir Geo. Treby. I desire to say a Word or two. That your Evidence doth not at all encounter ours, it stands with it; let them have as much Reputation as they will. They say, *Sir Patience Ward* did say thus and thus, as concerning cutting of Throats, and as concerning the Discourse being ended, and as concerning the *Duke's* being not nam'd, ours say the same too, but they say more, they say he said with all the Caution in the World, from the Beginning to the End. My Lord Chief Justice bids him recollect himself, he says he speaks to his Memory. Upon *Sir George Jefferies's* Question he says, he speaks to the best of his Remembrance, and thereupon is that memorable Reply of *Sir George*, your Invention is better than your Memory. One of their own Witnesses says it was so, and so says *Mr. Blaney*, and so says another Witness. While the Discourse continued whether he was there or no, *Sir Harry Tulse* doth agree that he cannot say he did see him. Now under Favour if he did not see him, he might say he was not there, for no Man can swear otherwise than according to his Senses, what a Man does not see may be behind his Back, altho he had not limited himself with that Caution, as he did limit himself with the greatest Caution, and said as he did believe he was not there. My Lord, none of their Witnesses will undertake to say he used the Word *positive*, they don't deny the Thing, it is impossible any Man should; but that there were these Words of Limitation, they might be said and not heard by them, they might be said and not observed by them. None of them did pretend to write Notes, except the first, and from the Evidence of the first I have all the Reason in the World to believe that *his Notes* did contain all those Cautions, and all those Qualifications that we speak of, why else should he be to seek to that written Short-hand, he *did not know whether he had Notes here*; he did know whether he had consulted the Notes since. Would any Man in the World lay by Notes at this Rate, that intended to give full Evidence? Tho I will say that for him, he does not undertake to say positively, but according to the best of his Memory, and according to his Belief. *Sir William Hooker* says, he was in a great Confusion. Here are a great many Gentlemen beyond all Excep-

tion in the World, that do say his Dealing was so fair, that he never told a Lye, that he was most exact and most just in his Dealing. It is impossible that a Man should avoid such an Evil as this is, for so long a Time, and in so great Places and Offices, and should now at last be guilty of such a vile and base Sort of Crime as Perjury is, which no Man ought to presume of another, unless there be the greatest and plainest Proof to the contrary. But, my Lord, on our Side is the plainest Proof that can be, by Witnesses that remember the Words as well as the Qualifications, and one of our Witnesses is worth abundance of their Witnesses that did not write, especially such a one as *does not shew his Notes*. But as I said before, they were testified by *Sir Patience Ward*, with all those Cautions, and we do think that there is no Colour in the World that this should be Perjury.

Mr. Williams. Gentlemen, I am of Council for the Defendant, and the Question is, Gentlemen, whether *Sir Patience Ward* be guilty of the wilful and malicious Perjury that is laid to his Charge in this Information. Gentlemen, it is agreed on all Hands, and that will appear to you, there hath been no manner of Evidence given for the King against *Sir Patience Ward*, either as to his Honour, or Reputation, or Truth: There is nothing, Gentlemen, endeavoured to be charg'd upon him, but this particular Crime. The Gentlemen that prosecute him do not offer any one Thing against his Reputation or his Dealing; so that, Gentlemen, for ought appears to you yet, before this was laid to his Charge, he was a very clear Man. Gentlemen, he hath borne great Offices in the City of London; he hath been Lord-Mayor of London; he is now in a considerable Place of Magistracy; he is an Alderman. We have proved, by several Gentlemen, he is a Man of great Value; a Man of great Reckoning and Dealing; a Man of Truth; a Man of Veracity; a Man that they believe would not forswear himself for a World; Gentlemen, the very Witnesses against us, they say it. *Sir William Hooker* tells you, he was under that Consternation, he was like a Man three Parts dead, so that there could be nothing of Malice in that Man, he was without Sense, without Passion, and if any Thing was done, it was done as it were by a dead Man, a Man that was senseless. *Sir Harry Tulse* believes he would not willingly have perjured himself, then he is not guilty of wilful Perjury, and that is the Question you are to try. Now I have said this, Gentlemen, as to the Condition of the Person. And now for the Imputations that are laid upon him. The second Observation that I make is from the Nature of the Crime; we are accused of Perjury, *first*, that we have perjured ourselves. That in any one casual Thing done upon any Account whatsoever, to prove the Fact done, that a Man is perjured, it is an easy Matter. Men are subject to mistake; the Words spoken, Gentlemen, were spoken in a very few Moments. Consider what a thing the Memory of Man is, how subject Men are to mistake Words. To say that Men shall not differ, that there shall be no Variation between Man and Man, it is to put an end to all Conversation; there would be no Bringing of Witnesses, if there might be no Variation. Nay, Gentlemen, to justify what I have observed to you, observe these two Gentlemen; *Sir H. Tulse*, he tells you, that the Words

were by way of Question, *is the Duke come*, that *Pilkington* should speak the Words by way of Question, *is he come? Is he come to cut our Throats?* So that he tells you, *Pilkington* said these Words by way of Interrogation. This is the Evidence of Sir *Harry Tulse*; and both of them agree, Gentlemen, that they were spoken at one Time. What says Sir *William Hooker*? How does he apprehend these Words? He tells you they were positive, in the present Tense; *he is come, he is come to destroy our Wives and Children*. So that if these Gentlemen mistake, one takes them by way of Question, rather says they were delivered positively, in the present Tense. Suppose this were brought against these Persons, no Man will say this is Perjury. As these Gentlemen have misremember'd, so might Sir *Patience Ward* have misremember'd; and if he had, it is his Infirmary, no Crime: For any Man is subject to mistake. We are now upon the Perjury; and it is not any thing that is affirmative, but they are Negatives. The first Negative is this, that he should say there was no mention of cutting of Throats. Say the Question is, What was the Discourse about cutting of Throats? Say I, there was no Discourse about cutting of Throats; it is natural to a Man to say, I heard no such thing, and every Man must speak to his Hearing; it is that which must pierce your Ears; that Organ must be touched. There was no Discourse, I heard no Discourse; I could say no otherwise, nor any Man that goes by common Reason. It must be by Hearing, it is not natural: Won't you believe what they say, that Sir *Patience Ward* did say, and Mr. *Blaney*, and other Witnesses with him, there was no such Discourse, is it not rational for a Man to believe there was no such Discourse? So that I take it was the Nature of the Thing. For the other Thing, there is not one Man that hath proved it to you, that he said there was no Discourse of cutting of Throats. Let them shew me that Witness that he did positively say it, and then I will give up the Cause, for my Share. I am sure Mr. *Aston*, a Clerk in the Court, he says it was to the best of his Observation. Mr. *Aston* is a Man that uses to be here, and a vigilant Man in the Court; he does not take it upon him positively. These worthy Gentlemen, the Aldermen, don't take upon them positively. Their Witnesses were wary in it. Are there any two of them agree how the Words were spoken? So that, Gentlemen, there is no positive Proof against us. Now the Proof lies on our Part. We prove very plainly by Mr. *Blaney*; and can any Man do better in this Case? The same Evidence runs to the other two Instances, as to this, therefore I do not love to multiply Words. Now our Evidence is to justify this. Here is Mr. *Blaney*, he sat in a most proper Place, and the most likely to hear of any Man in the Court; he sat in the middle, between the Court and the Jury, near the Witnesses, heard as much as any about the Court. He tells you directly, he did refer his Evidence to his Hearing, he tells you he refer'd all the Parts of it either to his Memory, or his Observation. He does not trust to a frail Memory; but he tells you he took it in Writing, and tells you that Writing is here; he produces it here. He is a Gentleman that uses to take Writing; so that if you give credit to this Gentleman, certainly he is in the right. Mr. *Blaney* is not alone in this Matter; we have called several, and

they agree with Mr. *Blaney*. Every Witness that speaks, justifies Mr. *Blaney*. So that we have so many Witnesses that justify every thing, or most of the Things that we have said. Now, Gentlemen, when I have said all this to you, consider; for there are some Things remarkable in all Causes; and the Truth is, all the Witnesses give you one remarkable Instance, and that is, of Sir *Geo. Jefferies*, that he made a Comment upon the Word *Memory*; he admired his Invention, but lessened his Memory, as if the Gentleman had been troubled that he had not remember'd; for I remember it was a reflection upon his Memory, that his Memory was not better; but commended his Invention mightily. So that this, Gentlemen, is a remarkable Thing. They give you that Instance to justify what was said by Mr. *Blaney*. Now, Gentlemen, I have said all this to you, we must rely upon these Things. They ask whether any thing that was said, was positive; it was a Trial lasted some Hours, and I think Sir *Patience Ward* was an Hour in examining. Did he say any Word positively? Can any Man answer such a Question? It is an impertinent Question. Gentlemen, upon those three Matters that are assign'd, whereof he was accused, as for those three Things, they are answered particularly. Gentlemen, now we are in your Hands, and the Question is, what you will do in our Case; Here is a positive Proof for us; all the Presumptions that can be for us; here is the Proof of our Reputation; here is nothing against the Gentleman's Reputation; and a *Man of Honour had rather be tried for his Head, than for his Ears*. I know, Gentlemen, you are Men of Value, Men that value your own Reputation; I leave it to you, whether you can in Conscience say, upon your Oaths, that this Gentleman is guilty of wilful Perjury.

Sir *F. Winnington*. My Lord, this is a Cause of great Importance, not only now, but in point of Example hereafter. My Lord, the Information is, that Sir *Patience Ward*, by his Consent, and out of a wicked Mind, did falsely, voluntarily, and corruptly swear so and so: So that if so be that he hath not sworn wilfully and corruptly, I know your Lordship and the Court will tell the Jury, he is not guilty of Perjury. Truly, my Lord, in this Case, I must observe to your Lordship and the Jury, that we are now contending what Witnesses have the best Memory; for the Thing is not in Controversy for any Act done, but our Defence is, what Sir *Patience Ward* did swear at the Time when he was at the Trial. I must say, there are no Memorials in this Cause given on the other Side, of any Man that did undertake to write down at that instant Time for the King; but one Man says, he cannot very well tell whether he took Notes or no. So that I do say, my Lord, with your Lordship's leave, that of all the Witnesses they have produced, there is not any one of them but does vary in Words; they are not consistent in Expression, even to any particular Questions that were asked; and can it be said to be wilful and corrupt Perjury upon such an uncertain Evidence? I don't doubt, Gentlemen, but you will take great Care of it. My Lord, I will mention but two Particulars to your Lordship, that, I think, go thro' the Case: My Lord, Mr. *Blaney* hath told you several Particulars that have been remembred, he writ it at that Time, without any Variation; it hath a great Advantage over the other Side that have only retain'd it in their Memories,

Memories, and there Memories might fail them, and differ from the Time of speaking; but here the Writing remains, that was writ at that very Instant; here it was fresh written out of his Mouth. The Question was asked, Can you swear, Mr. *Blaney*, you writ every Word, or no? It was asked the Witnesses, Can you swear that he swore nothing *positively*; I must confess, my Lord, it is a Question that is strange for a Man to answer. Any thing positive! Does he know what a Man means? He must reduce it to Particulars. But, my Lord, I have asked Mr. *Blaney*, Did you take it as it came from his Mouth? He swears these Words he spake, and there is no Variation, but written instantly at that very Time. My Lord, I do think this is a thing goes a great way. My Lord, there is one thing more that I think goes thro' the Case, and that is Mr. *Crisp*; for *Crisp* acquaints your Lordship, that when there was some Variation between the Assertion of Sir *Harry Tulse*, and Sir *Patience Ward*, my Lord Chief Justice gave an Admonition to Sir *Patience Ward*, Sir *Patience*, Sir *Patience*, recollect your self; my Lord, saith he, what I deliver, I do according to the best of my Remembrance; and then this afterwards, (for this was at the End of his Evidence) is a Qualification quite thro' the Cause. This being to weigh it with t'other Side. But I would say one Thing more; to what End should this be? Is any Man damnified by this Oath? Is there any Man can say this Oath hath prejudiced any Man in his Reputation or Estate? It was very strange that a Man that hath brought so many Witnesses, and those very worthy Persons, that say they believe he would not forswear himself, should do this for nothing, that a Man should be the wickedest Man in the World at one *Jump*, that you can hear nothing of any Act of Falshood of him before. Now when there are such plain Evidences, undubitable Evidences, it is a Thing of great Consequence. And Colonel *Birch* says, generally, as he does remember and believe, he did cautiously speak. And Sir *William Hooker* says, he was under Consternation at this Time. So that it appears he had much Caution; and if so, it is of mighty Consequence, and concerns any Witnesses to come: Here is a Man perjured, and a great many Witnesses may. You are not to mind what is said by the Counsel of both Sides, but what is said in point of Proof. It will make all Men cautious, because they may infer Danger by a positive Assertion. My Lord, this is a Case of Perjury, in which I and every honest Man that values his Reputation, should be tender. If this Man be guilty, it is a great Crime; I must leave it to your Consciences.

Mr. *Pollexfen*. The Nature of the Case I do humbly pray your Lordship to take into Consideration, and the Jury. It must be wilful and corrupt; for so are the Words in this Information, and in all Indictments: It must be *wilful and corrupt Perjury*. My Lord, if so be that several Witnesses interfering one with another, one remembering one Parcel of Words that were spoken at the same time, any Man should be perjured in this Case, by remembering and not remembering, no Man almost durst be a Witness. What Discourse hath pass'd; let us but observe in this Matter. Here were three Aldermen present, one of them swears there was no Discourse of cutting of Throats; it is a *Negative*, not an Affirmation; and no Man that hears him, but must say of it,

no Discourse that he heard. When I say there was no Discourse of such a Thing, any Man will understand, no such Discourse came to my Observation or Hearing. For the others that say there was such Discourse, they vary themselves; one says it was *cutting our Throats*, t'other, *cutting the Throats of our Wives and Children*. I only say this to shew the Weakness and Fallibility of Mens Memories, that carry Things so in an Uncertainty: Two or three Men swear a Man said so, t'other says he did not; no Man can understand it in any other Sense, but he did not *hear him* say so: For a Man can say no more of what another says, than what he heard. So, my Lord, considering the Circumstances of the Case, it is so that Men may perjure one another upon Omissions. One Man may bring one little Part of a Discourse, and another another; it will be a very unsafe thing for a Man to be a Witness so. But, my Lord, the next Thing is this of positive Evidence, and upon Remembrance. My Lord, if so be there must be positive Evidence to convict a Man of Perjury, I would leave it to your Lordship in the Cause, whether there be any among all their Witnesses, have proved it positively. Next, my Lord, if so be that we must have of t'other Side positive Evidence, we have more positive Evidence than they, under Favour, considering that Mr. *Blaney* hath his Notes. This I answer to that Objection of theirs, Did he say any thing positive? Did you write down this or that? That is not the Matter; there is no Man that writes all: But the Question is of that he did write, whether that be true; if that be true, it is more certain, being written at that Time, being written here in Court, when there was no Thoughts of being made use of as an Evidence, is stronger than many Mens slippery Memories. But *he* in this is back'd with a great many other Witnesses that do speak it, tho not so positively as he does, because he hath his Notes to help him; and he says particularly to one Thing, that he does particularly remember it. And so, being they were written at that Time, that is, under Favour, a better Evidence than twenty slippery Mens Evidence can be. So that taking all this together, considering the Person accused, and the great Offices he hath borne, considering the great Shame and Scandal of the Crime, all Men that have known him for twenty Years together, saying he was not any false Man; better a Man had taken his Head from him, than taken away his Reputation. Unless, my Lord, there be plain and full Evidence, I hope it will not affect us, nor Witnesses that shall come afterwards.

Mr. *Att. Gen.* The Matter, Gentlemen before you, is, whether or no Sir *Patience Ward*, for swearing these Words, be guilty of wilful or corrupt Perjury. I shall admit that; but it is the first time I ever heard of, that we must go to prove the Intentions of this Gentleman, that if he did not intend to swear wilfully or voluntarily false, that it will not be a corrupt or wilful Perjury. My Lord, therefore I must observe this to the Jury; if the Matter that he swears be false, the Law construes it to be corrupt and wilful: If the Matter, I say, does directly come in Issue, and he in that Issue swears that which is false, so as that it hath an Influence upon that Issue, the Law Construes it corrupt and wilful: For that is the Reason, my Lord, why that Regard is given to all Oaths in Causes, that they may be plain and direct; and a great Punishment is upon them if they are not true;

true; that is the only Reason for it, and no other. For without Doubt we have nothing to prove the Case but these two Things; for we cannot search into a Man's Intentions, that when he speaks of the Duke of York, he intends *Hubert*; but we must take Things as they are, whatever a Man intends. So the Jury are to enquire but of two Things; whether or no these Words were spoken by him, as they are laid, the next is, whether they are false; we have nothing more to do: But if we prove these two Things, that the Words that were spoken, were spoken by him as they are laid, in that Manner, not as these other Witnesses would have, with the Words *I believe*, and as *I remember*, but that they were plainly and positively spoken, my Lord, that we are to prove, and we have proved it. The next Thing we are to prove, is, that the Words are false; that they are false, they do admit by all the Witnesses; they don't go about to encounter that Proof at all; they have not at all endeavoured it, but that these Words, as they are laid, are absolutely false; and they were contrary to the Matter, that was in Issue in that Case. That this Gentleman spake them, my Lord, the very Thing speaks; for he was heard by the Court as a Witness, and as their Evidence in the whole Cause; and the Court, after he was examined, put it upon this Gentleman, *What do you swear?* If it had been all as *I remember*, and as *I believe*, the Court would have declared it was no Evidence. My Lord, if a Matter be in Issue, and a Man comes and says, as *I remember*, and *believe*, this doth not encounter the Issue, nor the Proof, that is for that Issue, when there were two positive Witnesses, that positively swore the Words, that the Court should then refer it upon the Testimony of Sir Patience Ward to the Jury, the Court would give Judgment he was no Evidence, it is plain he was no Evidence, if he swore to his Memory and Belief. That that is no Evidence, the Reason is plain; for there would be an End of all Trials, if ever that Sort of Doctrine be admitted: No Man can be perjured upon his Remembrance, nor upon his Belief; who can tell he believes contrary to what he says? So that there is an End of that which ought to be the Cure of all the false Witnesses in England; for I take it in point of Law, the best of Remembrance in this Nature, or as *I believe*, is no Evidence at all, and therefore the insisting much upon that, is to charge the Court with Injustice to put that upon the Jury; and the Jury need not have given any Reason why they would not believe him; for there had been an End, if he had said, as *I remember*, the Jury might have said presently, there are two positive Witnesses against him. The two first Witnesses we have call'd, *Hatch* and *Wood*, they do swear as to those Words of cutting of Throats; they swear it positively, both of them. Whether he used the Word positively, or whether it was upon his Oath, that, indeed, they could not speak to; but they were positive, without any Reference to his Belief or his Memory. To the other Point of the Duke of York, and *Pilkington* being there, that they speak positively to, and I think Sir *James Smith* doth speak as positively that he was sure his Words were, either *I do positively say*, or upon my Oath, one of them; but without any Words of Reference. Mr. *Aston*, who is a Clerk of this Court, and sat there in this Place, he speaks to that positively.

Sir F. *Winnington*. I think, I am pretty sure, I think, these are the Words.

Mr. *Att. Gen.* The Foreman of the Jury he repeats the same positively, and gives a plain Reason; if it were not positive, it were an idle Thing.

Mr. *Williams*. Will you do us Injury in the Cause?

Mr. *Aston*. If he spake any Words of Mitigation, they were so low, I could not hear; and I think I could hear them all.

Mr. *Just. Withins*. Pray go on.

Mr. *Att. Gen.* I say, my Lord, several Witnesses we produced, and Sir *William Hooker* particularly, for we had never made use of him, if there had been only so idle an Evidence; for we did not call Sir *William Hooker* till after his Evidence was given, to encounter this positive Evidence. We then produced Sir *William Hooker*, after he had given positive Evidence, and Sir *William Hooker* did swear it positively upon him again; then the Court asked him, *What do you swear?* My Lord, after this, he might be shy in his Evidence, and say, *I remember*, and *I believe*. After this, we put it upon him again, and then we say the Words were sworn positively; for by way of Hearsay and Belief, is no Evidence. Now Mr. *Blaney* is all in all, and I think now Mr. *Blaney* will signify nothing. I say, my Lord, Mr. *Blaney*, what is his Evidence? He pulls out his Notes, and there he tells you, to such a Question, there was such an Answer, and there, indeed, it is to the best of his Remembrance. But what does Mr. *Blaney* tell you? Mr. *Blaney* positively tells you, that these are but short Notes, many Things omitted, and I perceive whole Sentences omitted, a great deal of Discourse omitted, and that appears by that Passage of Sir *George Jefferies* his Interrogation. Then, my Lord, in one Place he comes and says, to the best of my Remembrance, afterwards he is press'd, for surely it was to no Purpose we would let such an Evidence pass, but when he is press'd; Mr. *Alderman*, is it so, or no? For Belief is no Evidence. There, my Lord, he answers positively, and that is omitted out of Mr. *Blaney's* Book: This was necessary, my Lord, we should do, and not let such a Thing pass, as that to the best of my Remembrance. My Lord, then to see what Mr. *Blaney* himself says, he took Notes, he did not answer one Thing positively throughout the whole; for which he is to be rejected, I think, as no Witness in the Case, as a Person that comes and swears by Hearsay; and it was so remarkable a Thing, my Lord, that we who are of the King's Counsel, should take Notice of it to the Court. He is no Witness; he swears nothing positively: It is an Art, my Lord, was never invented till of late, and if it be allowed, it will make an End of all Trials; for you will have as much forswearing, as you have lying. Here is one gives Evidence he never told a Lye in his Life, and I care not whether the Jury believe that, or no. Surely, my Lord, we should not let a Man go away with such an Answer as this, to his Remembrance. If they take upon them this Way of swearing, I tell you plainly they are no Witnesses at all. My Lord, I must appeal to the Court, if such a thing be allowed, what will become of all Trials? The Punishment of Perjuries does make Men cautious in swearing; and so it was from the Beginning, ever since Swearing was allowed to decide Causes, Perjury was to be punished. By the Law of God it was severely punished. If there be a new Way introduced of giving Evidence, to the best of my Remembrance, you have shut out the Punishment. Can you convict any Man of all their

their Witnesses, when none of them swear? Colonel Birch, and others, they come and say to *some Things*, there were these qualifying Words; if it had been to material Things, my Lord, were we so senseless, or the Court so senseless, to let *the best of my Remembrance* pass for Evidence? So that, my Lord, they do not tell you plainly, they speak nothing at all express; when they are ask'd, Can you swear that he added these Words, *to the best of my Remembrance*? They say he did to some Things, but are not positive to what. So that your Lordship sees we have plain Testimony, they have no Proof. So you see what sort of Evidence this is. Now, my Lord, for his Crime. He hath been a fair Dealer, surely, in the World, or else he could never have gain'd such an Estate; but when Men are engaged in Parties, we see what a Man will do for a Party, and to help a sickly Brother that was falling into the Pit over the Hedge. But I say, my Lord, it is impossible that their Evidence should encounter ours. And, indeed, if we had had Notice that this would have been given as material Evidence, truly we could have given a great deal to shew the many Blots in this Gentleman; but, my Lord, I say this is not material, of what Reputation a Man hath been, but whether or no he spake these Words in this Manner, and whether they are false: that they are false, *is granted*, and that he spake them as they are laid, that *we have proved*.

Mr. Sol. Gen. The Questions that we were to prove were, Whether Sir Patience Ward did give his Evidence at the Trial between the Duke of York and Pilkington? Whether or no he did swear positively that Pilkington did not come in till the Discourse concerning the Duke of York was over? Whether he did swear positively that there was no mention made of *cutting of Throats*? Sir Patience Ward we say, did take upon him to swear this before positively, and not with that Restriction that they would have pass'd upon them. We call'd two Witnesses, and they are both very positive in it; for they swear, That Sir Patience Ward did swear, *That all the Discourse concerning the Duke of York was over before Mr. Pilkington came in*; that they swear positively, that he did it positively; both of them do swear, that Sir Patience Ward did take it upon his Oath, and to the Manner of it, positively, tho he did not use the Word *positively*, yet they swear them without any such Restriction. These are the two Witnesses Hatch and Wood. Then there is Sir Fr. Butler hath given you an Account of his Evidence, and they did debate it among themselves, and give you the Reason why they did not believe Sir Patience Ward. Now, *first*, they encounter us with the Evidence of Mr. Blaney, and his Notes must be the Measure of the Truth of his Case, and nothing must be taken for true but what he hath writ; he tells you at the same time he had not writ all. Mr. Attorney made a full Observation upon that, suppose he did say he did not hear any mention of *cutting of Throats*, or did say to the *best of his Remembrance*, yet surely that doth not contradict our Witnesses, that take upon them to swear positively that he swore it without any such Restriction; and it is reasonable to believe he might be press'd to say something to the Questions that were asked, for if he said he did hear it, it had been an immaterial Evidence. Sir Fr. Butler doth take upon him to say, that he did say it without Restriction,

and their considering the Weight of it to reject it as untrue, doth make good what our Witnesses have said, that he did swear it without any Restriction. But after all this, they say he cannot be found guilty, for this might not be wilful and corrupt Perjury, nay they go so far, that they are setting up a Doctrine, that I dare say no Man shall be guilty of Perjury for any Words he shall swear *wilfully* and corruptly. If a Man is conscious to himself, that the Truth is otherwise, or if he be uncertain whether it be so or no, yet if he take upon him to swear it, that is wilful Perjury in him, for he did not know it to be as he did affirm. Now, my Lord, I shall offer but one Circumstance more, consider how this Discourse did rise; it was upon a Debate concerning waiting upon his Royal Highness upon his Return, they were all present in the Gallery at Guildhall; and it is reasonable to be presumed that every one must hear the whole Discourse — and Sir Patience Ward, by the Action he did in this Case, must be presumed to hear every Particular of it. When Mr. Pilkington came to these Words, *he hath burnt the City, and is come to cut our Throats*, Sir Patience Ward catches him, and stops him immediately upon his saying this. Now he that was so near him as to lay Hands upon him, surely it cannot be presumed but he must hear what he said, and he check'd him for what he said, and would fain have fetched him off by an Invention that serves to little Purpose; but did verify this, that he had spoken Words of the Duke of York, and therefore did administer an Excuse to him; therefore I say it cannot be presumed but that he must hear it. But however, if he took upon him to swear a Thing positively, that he was *not certain of*, it will be wilful and corrupt Perjury in him. But they say, tho he should say it positively, it must be understood *he did not hear it*; that he swears there was no such Discourse as *he did hear*. At this Rate, my Lord, no Man will be found guilty of Perjury, but there will be all the Mischief in the World introduced; for a Man that swears to the best of his Remembrance, there will be no Danger of that Man's being indicted of Perjury, that is no Evidence. But a Man that will take upon him to swear positively there was no such Discourse, he is an Evidence, and a material Evidence in the Case. Suppose, my Lord, there were Witnesses concerning the Publication of a Man's *last Will*, that there were two Witnesses did sit upon the sick Man's Bed, one swears he did hear him publish it in that Form, and that this was his *last Will and Testament*; the other comes and says positively, he said no such Words; certainly this is a very material Evidence. Shall that Man come off from a Conviction of Perjury in this Case, by saying he did not hear? What a dangerous Case are all Mens Inheritances in at that Rate? My Lord, I will not trouble your Lordship, only there is one Observation they have made, which I cannot let pass, that there is no Damage in the Case. If a Man should forge a Deed, and the Jury detect this Forgery, there is no great Damage, shall the Man be accused, because he is discovered? Shall no Perjury be punished, but what is successful?

Sir Geo. Jefferies, I should not have troubled you in this Cause, but that Mr. Solicitor was call'd into another Court. My Lord, I shall not offer any Thing in this Cause, nor repeat any Thing that hath been said. My Lord, I shall say

say of this Cause, what the Gentlemen of the t'other Side said; it is a Cause of very great Consequence, and it is a Cause of that Consequence, that I know it hath a very great Impression upon your Lordship, and likewise upon the Jury; and they are not now come to try whether or no Sir *Patience Ward* did deal very fairly between Man and Man in a Matter of Money, but whether or no Sir *Patience Ward* did swear what we have alledged in the Information he did swear, and what he did swear was true: And for that Matter, my Lord, I must needs agree with them; nay, I cannot believe the Gentlemen of the Jury will take any Thing to be Evidence that is said by us that are Council at the Bar, but only so far forth as they have Evidence proved to them in Court, for in Case we were to guide Juries, I confess Mr. *Pollexfen* hath determined it, by saying the Jury's Verdict must be false if they find against Sir *Patience Ward*, which I think is a pretty strange Inference, and one of the sharpest Inferences for such a Way of reasoning, that I confess my poor Sense won't reach it. In the next Place I say the Gentlemen of the Jury ought not to take any Consideration in this of his Reputation, notwithstanding all his Dealings before this Cause; for certainly till such time as Sir *Patience Ward* came to be call'd upon his Oath, any Man of Conscience and Justice, and common Charity, had he been asked the Question, he must have said he did not believe that Sir *Patience Ward* would wilfully forswear himself; God forbid any Man should have such a Thought of him, if he were a Man of less Quality than Sir *Patience Ward*: But I must conclude, that after Sir *Harry Tulse* was of that Opinion, so I must conclude with Sir *Harry Tulse*, if in our Case he be to be believed, at that Time he did believe he did forswear himself.—Pray, good Sir, give me Leave, I will not, to the best of my Remembrance, do you any thing of Injustice. My Lord, I do say, in this Case, that tho he hath been Lord-Mayor of *London*, and borne the Office of Sheriff, and tho he is now an Alderman, yet I do say, Persons that have borne these great Offices, have been guilty of greater Crimes, that is, Crimes that have greater Punishments than this Gentleman is now accused of. I mean that of Rebellion, and all that Mankind can be capable of: So that it is not the Dignity of Place, excuses Men from Offence. But certainly upon his Evidence, Sir *Patience Ward* ought to be believed by the Jury, guilty of wilful Perjury, rather than three or four Aldermen that swore against him. Gentlemen, the next Thing is, the Observation of Mr. *Williams*, of the Variance and Difference of Expression between these two worthy Aldermen, Sir *Harry Tulse*, and Sir *William Hooker*; one comes and says as tho it were positive, t'other as tho it were a Question; if it can be expressed, my Lord, either one Way or t'other, or both, he wou'd be guilty of Perjury; for your Lordship remembers the Record mentioned in this Record, that all the Words that were swore by Sir *Harry Tulse*, were part of the Action that *Pilkington* was charged with; all the Words Sir *William Hooker* swore, were likewise Words put in the Record; so that both of them were material to the Issue. Now what comes Sir *Patience Ward* to do? Does Sir *Patience Ward* come and testify it to make a Difference between these two Gentlemen? You see both of them agree there was a Talk of cutting

of Throats. Says Sir *Harry Tulse*, is he now come to cut our Throats? Says Sir *William Hooker*, is he now come to cut the Throats of our Wives and Children? What says Sir *Patience Ward* as a third Man? He says there was no such Discourse of cutting of Throats, that is the Thing these Gentlemen have a Mind to forget; one says he is come to burn the City; is he come to burn the City, says t'other? That is not the main Question; these are little minute Differences. It is the Prudence of Mankind to take all Words in their Affirmations, rather than to make Contradictions between them. In this Case, he finds there was a Necessity to serve a Turn, and he comes positively, and says all the Discourse about the Duke of *York* was ended before such time as *Pilkington* came in, and there is an End of all, in case he swears true; for in this Oath he absolutely contradicts what both these Gentlemen swore; for this is not such a little Variance as these Gentlemen would have you to believe. But, Gentlemen, I shall apply myself to the Evidence they have offered, which is designed to overthrow ours. The first is Mr. *Blaney*, and there is a great Value put upon Mr. *Blaney*; he sate in a convenient Place, just in the Middle, and there he took Notes, and believes he did not alter them. Now I appeal to your Lordship, and the Court, I appeal to the Jury, whether or no their own Witness did not hear Sir *Patience Ward* say he had never been in a Trial; he never took notice of a Word of that. And another Man (Mr. *Baker*) says, that my Lord Chief Justice said, Sir *Patience*, Sir *Patience*, have a Care, you speak according to the best of your Remembrance. Now, my Lord, Mr. *Blaney* takes not the least Notice of that in his short Notes. The Question was asked Mr. *Blaney*, Can you take, upon your Oath, that he swore any thing positively, or that he did not? Truly, I can't tell, not in my Hearing, are his Words. Next comes *Beaver*; his Word was, in my Hearing. It was Mr. *Blaney's* Short-hand Remarks that Mr. *Beaver* prefaces all his Discourse with, to the best of my Remembrance. They have called Witnesses that could not be positive. I appeal to your Lordship, and the Memory of the Jury, whether ever any one of them was able to say that the Words to the best of my Remembrance were annex'd to this, or that, or t'other Sentence. But, my Lord, on the other Side, I must say, that there are here Aldermen that have sate upon the Bench, and have behaved themselves with Loyalty and Integrity, to the King and Government; these very Aldermen here do positively say, Sir *James Smith*, Sir *John Peake*, Sir *William Rawsterne*; it is true he cannot be positive as to the Business concerning cutting of Throats; but as to the first, does not Sir *James Smith* particularly say, I cannot say whether he did say positively, or whether he did say, upon my Oath; but he did undertake to say, that either the one or the other he was positive in, that he was very express that the Duke of *York* was not named after *Pilkington* came in. And for the saying that *Blaney* took Notes at that very Time, therefore Mr. *Blaney* must be a Man of ten Thousand, as they call him; he is worth ten Thousand Witnesses, because he took Short-hand Notes: I would have you consider what Sir *Francis Butler* says, that was Foreman of the Jury at that Time, that bid Sir *Francis Lee* take notice of it at that Time; he did it positively: He says, Sir *Francis* took notice of that, and says he, we debated it immediately among

among ourselves. And I remember particularly, Sir Francis Lee, Sir Francis Butler, and Sir Thomas Field, all three do agree together, this positive Oath they swear Sir Patience Ward did make. They did debate immediately after, among themselves, two Witnesses swearing against him was the Occasion of the Debate. But, my Lord, I must come to another Thing: Mr. Aston, a Clerk in the Court, a Man very well us'd, both to Writing and Hearing; Mr. Aston, as well placed as Mr. Blaney, he gives this Account: *I do positively say, that the Duke was not named after such time as Pilkington came there.* But his being a frail Memory, as they would have it, and no Notes to refresh him, they put no great Value upon it: But I remember what Mr. Aston said; I have several Times been asked the Question, and that makes me contain this Thing in my Memory. This does Mr. Aston positively speak to. So there, Gentlemen, all these five or six several Witnesses do positively swear to it: The two first Witnesses they are positive, Hatch and Wood; they do directly swear to every Particular. Gentlemen, you are not to mind the Flourishes that are made by the Gentlemen at the Bar; here is a Lord Mayor of London, here is an Alderman, can you believe him guilty? But do you think that these Gentlemen of Quality, that have acquitted themselves so dutifully, and so loyally, as they have done, and so faithfully that no Man can lay a Blemish upon them, will you take it upon your Oaths that these Gentlemen are forsworn? Will you take it upon your Oaths? That will be a strange Thing! The Laws and the Exercise of Justice are concern'd, and are to be maintain'd. I beg your Lordship's Pardon that I have taken up so much Time. My Lord, I say Justice is to be done; there is no Man so big as to be exempted from Punishment: The greater the Person is, the greater is his Crime. One that will come and tell an Untruth in a Court of Justice, the greater the Person, the more is the Crime. We have given your Lordship and the Gentlemen of the Jury an Account of the Matter before you, and we shall leave it to you.

L. C. J. Gentlemen of the Jury, this is an Information against Sir Patience Ward for Perjury, and the Information doth set forth, that there was an Action that was brought by his Royal Highness against Thomas Pilkington, and it was for speaking scandalous Words of his Highness; saying *he burnt the City*, and that *he was come to cut their Throats, and cut their Wives and Childrens Throats.* These were the Words that were laid in that Action. That Action was in this Court in Michaelmas Term last. The Information that now is before you, is this, Sir Patience Ward he was sworn to give Evidence, and that he in his Evidence, upon his Oath, did positively swear, upon mentioning the Discourse concerning his Royal Highness, by Pilkington, and concerning his burning the City, and cutting of Throats, Sir Patience did say, that there was not any mention of cutting of Throats at all, and that before Mr. Pilkington came in, the Discourse of the Duke of York was over. And upon this Mr. Attorney-General hath assigned a Perjury that this was false, whereupon the Defendant hath pleaded not guilty. The Question is, whether Sir Patience Ward is guilty of this Perjury or no. In the first Place, I must aver to you, that if so be this was false, then this

VOL. V.

must be what the Law calls a wilful and malicious Perjury. For it was the very Point in Question then, it was an Action brought against Pilkington. The Question whether he said these Words or not, and Sir Patience Ward he did come, and did swear that there was no such thing, plainly, that was to acquit the Defendant. So that it was the principal Matter that was to be considered. Now for ought I do perceive plainly — Pray do not go with any Mistake, for I would be loth to do wrong in this; but as far as I do perceive, one Side and t'other upon the Matter do agree, that if Sir Patience Ward did swear it positively, it is agreed on both Sides that it was false, it is agreed, for ought I see, there is nothing at all said to the contrary. Here are three substantial Men, Men of very good Quality, that do all say there was a Discourse of his Royal Highness in Pilkington's Presence, and in the Presence of Sir Patience Ward, they do likewise all of them swear that there were such Words. So that I say it is agreed, for ought that I see, that it is plain that it was so in Fact, that there was a Discourse of the Duke, and that it was in Pilkington's Presence, and that there was likewise mention of cutting of Throats. Now the Matter that you are to consider; I will tell you, you are to consider whether or no this was spoken by Sir Patience Ward positively, or as the Defendants would have it, that it was not spoken in his Hearing, or as he remembered, for they would qualify it, and say that the Defendant did not say it positively, but with those Qualifications, and if with those Qualifications, then it is plain he cannot be convicted of Perjury; because no Man can be convicted for saying he did not remember. This I must observe to you, tho by the Way, suppose now that Sir Patience Ward comes here, and says that it was not spoken in his Hearing, or in his Remembrance, take it that Way, there is this considerable, why Sir Patience Ward did hear it spoken, and so far heard it, that he took notice of it, and would restrain it, and put an Interpretation upon it. Would any Man that had minded his Oath, would he have said that nothing was said in his Hearing, when even he himself was present; nay, and so take away the Excuse of his not Hearing, tho he were by? He himself takes notice of it, and if I take it right, he put an Interpretation upon it, when he talk'd of burning the City; Oh, it is Hubert. It is very hard for a Man to swear it was not in his Hearing. — Pray set me right, if I mistake.

Mr. Pollexfen. No Man denies but these Words were spoken, but the going to St. James's and the Duke of York; whether that were not before he came in.

Sir Geo. Jefferies. It was one entire Sentence, my Lord.

L. C. J. I do take it the Evidence was, that Pilkington did say, he had burnt the City, and he was, or would come, to cut their Childrens Throats; that was in one Sentence: For the burning the City, Sir Patience Ward being there at that Time when Pilkington said the Words, Oh, says he, *you mean, Hubert, ask'd the Question who he meant by it, he meant Hubert.*

Mr. Williams. He did not hear t'other Part.

L. C. J. That I will leave to the Jury; that is to say, there were upon the Matter but two Clauses, *burning the City, and coming to cut our Throats.*

K k k

And

And now it is, for ought I perceive, agreed, that Sir *Patience* did hear one Part of the Sentence, and did not hear t'other. But this I will make an Observation on by and by. But surely he did not so well, if it were no more than that for a Man to say he did not hear any such Thing, when it is plain he took Notice of it at the same time. For that, Gentlemen, that they say here is no Man that hath any Harm; if a Man does commit wilful Perjury, tho' no Man is injured by it, hath not he committed a Crime? And tho' he had not injured any Man by his Perjury, it might have fallen out that he might have done it; and if so be it hath not success, it is the same Crime: For it is very plain, if so be the Jury had given a greater Credit to Sir *Patience Ward*, than they did to the other two Gentlemen, then it is very plain it had gone another Way, and that had been an Injury. And therefore, Gentlemen, that is nothing at all. But that you must lay aside, and you must come to this Matter, that is the principal Point. The Question is, whether or no Sir *Patience Ward* did give his Evidence with Qualification, as he did believe, or as he had heard, or believed, or whatsoever it was, or whether he did give the Evidence positively. At the Trial there was two, I think three, but two that were at first examined, that did prove the Words spoken by him against the Duke of York, and swore they did reprove him for it. Sir *Patience Ward* was produced by the Defendant, for to defend the Issue on his Side, and to prove him to be not guilty in that Action, that he had not said the Words. Now it is plain, if so be Sir *Patience Ward* said only, *I don't believe such a Thing, I don't remember it, or any such thing*, that certainly had not been an Evidence that had been worth the Consideration of the Jury; for that was no more Evidence than any Man that they might take up, the next Man in the Court might have said, he did not believe it, or the like. Now for the King, in this Case, there are several, I think there are eight or nine; and they all of them do say, that they remember it very well; nay, and some of the Witnesses do say, they took special Notice of it then, for they were something astonished to hear such Evidence. It is true, all of them don't come to both Parts, but either to one Part or to both; they all agree in this, that it was positive Evidence, and not as *he believed, or heard*. There was a Question about Mr. *Aston*, and he was asked himself, he says it was *positive*, if he did qualify it, it was so low, he could not hear it; and that he might do as he pleased. I think there is none of these Gentlemen, that any thing at all is to be alleged against. That eight or nine Gentlemen, and some of them of very good Quality, and all of them of very good Credit, that they should joyn together to perjure themselves, for a Revenge upon Sir *Patience Ward*, is strange. For ought appears there is not any Man appears, but is sorry for him, and some of them have a Kindness and Respect for him. That is the Evidence the former give; I can't go to every one of the Evidences, to open what they say; that will make it very long; and I think there is no Occasion of it, you have heard it well, and I believe remember it better, possibly, than I do. On the other Side, for the Defendants. They do bring you, in the first place, Mr. *Blaney*, and he does say, that he hath taken Notes, and in his Notes it was by Qualifications that Sir *Patience Ward* did speak, that

it was according to the best of his Knowledge, and that he was here, and sat here in a Place where he could very well hear all that was said, and that he took it from Sir *Patience Ward's* Mouth. This is said against him, that it is plain he did not take every thing, and whether or no this was taken truly, or not, is still a Question for you to consider on. They, when they did call him, did say he was as good as *ten Thousand*. They would have his Witnesses to be of more Value than nine Thousand that did swear upon their Memories, and they had some Reason to say so too, for to observe there is never a Man that does come positively; but he does say, as he takes it, and he was sure it was right, altho' in some other Parts it is plain he did miss. But he does say it was true. But then for the next Witness, Mr. *Beaver* and Mr. *Crisp*, they do come and say how that the Defendant did interlard his Discourse as he believed, and as he heard. But when he came to be pinched upon that Point do you swear this thing positively, or according to the best of your Memory, then every one of them, (pray correct me if I be mistaken) every one of these Witnesses did say, it was according to the best of Memory. And, Gentlemen, the nine Witnesses on t'other Side, every one of them did take it upon them.

Counsel. No, no.

L. C. J. Look you, look you, Gentlemen, one spake to one Part of the Words, another to another; but these Witnesses did swear *positively* to what they did swear.

Mr. *Williams*. They were upon their Memories still.

Mr. Just. *Withins*. Sir *Francis Butler*, Sir *Henry Lee* was not, nor Sir *Thomas Field*; and *Hatch* and *Wood* was not.

L. C. J. But did take it upon them *positively*. For your Witnesses, there was *Beaver*, and *Crisp*, and *Wright*, these three they did say that Sir *Patience Ward* did say, *as he believed*, or according to the best of his Memory; but they would not take it upon their Memories precisely, but according to the best of their Memories. And now for Colonel *Birch*, and *Northey*, and *Nelson*, and *Baker*, and *Perry*; they said that he said according to the best of his Memory, but they could not hear very well what was said: so that they could not say any one Sentence that was said, and that is, I think, the most of the Evidence, all your Evidence, *as to Words*. You have brought some Persons to testify for Credit; truly, I think, that of all the Aldermen, one that hath pass'd the Chair, should not have brought under an Alderman, at least, to have justified him. But 'tis plain there are others come and say, he was a fair Dealer, and they have known him for a great many Years. Nay, I must confess, here was one of his Brethren, Sir *Harry Tulse*, and truly he looked upon him as a fair Dealer, and did not look upon him as stain'd with any enormous Vice whatsoever. When he was asked by the King's Counsel whether he did believe he had sworn true in this Particular, he could not say so there. But, Gentlemen, for all this, I do not see any thing, whatsoever hath been said, that doth stick upon his Reputation, only this very Thing that he must be tried upon. And, Gentlemen, upon the Evidence you have heard, you are to consider the Merits of the Cause, and not the Person, one Way or other, any otherwise than doth

doth relate to it. If you believe the Witnesses that have sworn for the King, that he did swear this *positively*, then it is agreed that it was false; if he did swear it *positively*, then you must find the *Defendant Guilty*. If so be you believe the Evidence that hath been given on the Defendant's Part against the King's Evidence, if you do believe that, and not the King's Evidence, then you

must acquit the Defendant. It is a great Crime; that is the Truth of it.

The Jury withdrew, and after some Time return'd, and brought the Defendant in Guilty; but before the Day for Sentence, he thought it best to go out of the Way; having had Intelligence they intended to set him in the Pillory.



Proceedings between the King and the City of London, on an Information in nature of a Quo Warranto in the King's Bench, 1683. Hil. 35 Car. II.

Mich' 33 Car. II. in B. R. Rot. 137. Sir Robert Sawyer, Knight, His Majesty's Attorney General, against the Lord Mayor, and Commonalty, and Citizens of London.

The Information in nature of a Quo Warranto sets forth,

THAT the Mayor, and Commonalty, and Citizens of the City of London, by the space of a Month then last past, and more, used, and yet do claim to have and use, without any lawful Warrant, or regal Grant, within the City of London aforesaid, and the Liberties and Privileges of the same City, the Liberties and Privileges following, *viz.*

- I. To be of themselves a Body Corporate and Politique, by the Name of *Mayor and Commonalty, and Citizens of the City of London.*
- II. To have Sheriffs *Civitat' & Com' London' & Com' Midd'* and to name, elect, make, and constitute them.
- III. That the Mayor and Aldermen of the said City should be Justices of the Peace, and hold Sessions of the Peace.

All which Liberties, Privileges, and Franchises the said Mayor and Commonalty, and Citizens of London, upon the King did by the space aforesaid usurp, and yet do usurp.

Plea. **T**HE Mayor and Commonalty, and Citizens, appear by their Attorney, and plead,

I. As to their being a Body Politique and Corporate, they prescribe, and say,

1. That the City of London is, and time out of mind hath been, an antient City, and that the Citizens of that City are, and by all that time have been, a Body Corporate and Politique, by Name of *Mayor and Commonalty, and Citizens of the City of London.*

That in *Magna Charta de libertatib' Anglia*, in the Parliament holden 9 Hen. 3. it was enacted—
VOL. V.

ed, Quod civitas London' habeat omnes libertates suas antiquas, & consuetudines suas.

That in the Parliament 1 E. 3. that King by his Charter *De assensu Prelatorum, Comitum, Baronum, & totius communitatis regni sui*, and by Authority of the same Parliament, having recited that the same Citizens, at the time of the making *Magna Charta*, and also in the time of *Edward the Confessor, William the Conqueror*, and other his Progenitors, had divers Liberties and Customs, Wills and Grants by Authority aforesaid, that the same Citizens shall have their Liberties according to *Magna Charta*—And that for any personal Trespass *alicujus ministri ejusdem civitatis, libertas civitatis illius in manus ejusdem Domini Regis Ed. 3. vel heredum suorum, non caperetur, sed hujusmodi minister prout qualitatem transgressionis puniretur.*

They plead also,

That in the Parliament holden 7 R. 2. *Omnes consuetudines, libertates, franchise, & privilegia civitatis predict' tunc civibus civitatis illius, & eorum successoribus, licet usi non fuerint, vel abusi fuerint, autoritate ejusdem Parliamenti ratificat' fuerunt.*

Then they plead the Confirmations of several later Kings by their Charters; as of

King Henry VI. by his Charter, dated 26 Octob. 23 H. 6.

King Edward IV. by his Charter, dated 9 Novemb. 2 E. 4.

King Henry VII. by his Charter, dated 23 July, 20 H. 7.

King James I. by his Charter, dated 25 Sept. 6 Jac. 1.

King Charles I. by his Charter, dated 18 Oct. 14 C. 1.

King Charles II. by his Charter, dated 24 Jan. 15 C. 2.

Ac eo Warranto they claim to be, and are a Body Politique, &c. and traverse their usurping upon the King.

II. As to the having, electing, making, and constituting Sheriffs of London and Middlesex, they plead,

That they are, and time out of mind were, a Body Politique and Corporate, as well by the Name of *Mayor and Commonalty, and Citizens. quam per nomen Civium London.* And that King *John*, by his Letters Patents under the Great Seal of England, in Court produced, dated 5 *Julii, anno regni sui primo*, granted to the Citizens of London, that they should have the electing, making, and constituting Sheriffs of London and *Middlesex imperpetuum.*

Then they plead this Liberty and Franchise confirmed to them by all the aforementioned Statutes and Charters, *ac eo Warranto* they claim to make and constitute Sheriffs.

III. As to the Mayors and Aldermen being Justices of the Peace, and holding Sessions, they plead,

That the City is, and time out of mind was an ancient City and County, and the Citizens a Body Politique.

That King *Charles* the First, by his Letters Patents dated 18 *Octob. 14 Car. I.* granted to the Mayor and Commonalty, and Citizens of the City of London, That the Mayor and Aldermen of London, such of them as had been Mayors, should be Justices of the Peace, and should hold Sessions, *& eo Warranto* they claim to be Justices, and hold Sessions.

Respons. **T**O this Plea the Attorney General replies. And as to the Mayor, and Commonalty, and Citizens of London, being a Body Politique and Corporate,

First takes issue, that they never were a Body Corporate, and for this puts himself upon the Country. And then goes over and pleads,

That the Mayor, Commonalty, and Citizens, assuming upon themselves to be a Body Politique and Corporate, and by reason thereof to have Power and Authority to convocate and assemble, and make Laws and Ordinances, not contrary to the Laws of the Kingdom, for the better Government of the City and Citizens; and for preserving the King's Peace—Under Colour and Pretext thereof, but respecting only their private Gain and Profit, and against the Trust in a Body Corporate by the Laws of this Kingdom reposed, assumed an unlawful and unjust Authority to levy Money upon the King's Subjects to their own proper Use, by colour of Laws and Ordinances by them *de facto* ordained and established; and in Prosecution and execution of such illegal and unjust Power and Authority by them usurped; the 17th of *Septemb. 26 Car. II.* in their Common Council assembled, made, constituted, and published a certain Law, by them *de facto* enacted, for the levying of several Sums of Money of all the King's Subjects, coming to the publick Markets within the City to sell their Provisions, *viz.* Of every Person for every Horse-load of Provisions into any publick Market within the said City, brought to sell, 2 *d. per Day.* For every Dorser of Provisions, 6 *d. per Day.* For every Cart-load not drawn with more than Three Horses, 4 *d. per Day.* If drawn with more than Three Horses, 6 *d. per Day.* And that these Sums of Money should be paid to the use of the Mayor, Commonalty and Citizens: And if any refused to pay, then to be removed from his Place in the

Market. And that by colour of this Law, the Mayor, Commonalty, and Citizens, for their own private Gain, had illegally, by the Space of seven Years next after the making this Ordinance, received divers great Sums of Money, in all amounting to 5,000 *l. per Annum*, in Oppression of the King's Subjects.

And further, That whereas a Session of Parliament was holden by Prorogation, and continued to the 10th of *January, 32 Car. II.* and then prorogued to the 20th of *January* then next:

The Mayor, Commonalty, and Citizens, 13 *Jan. 32 Car. II.* in their Common Council assembled, unlawfully, maliciously, advisedly, and seditiously, and without any lawful Authority, assumed upon themselves *ad censendum & judicandum dictum Dominum Regem, & prorogationem Parliamenti per Dominum Regem sic fact.* And then and there in Common Council assembled, did give their Votes and Order, that a certain Petition under the name of the Mayor, Aldermen, and Commons of the City of London, in Common Council assembled, to the King should be exhibited; in which said Petition was contained.

That by the Prorogation, the Prosecution of the publique Justice of the Kingdom, and the making necessary Provision for the Preservation of the King, and of his Protestant Subjects, had received Interruption. And that the Mayor and Commonalty, and Citizens in the same Common Council assembled, did unlawfully, maliciously, advisedly, and seditiously, and with Intention that the said Petition should be dispers'd amongst the King's Subjects, to induce an Opinion in them, that the said King, by proroguing the Parliament, had obstructed the publique Justice, and to incite the King's Subjects to Hatred of the King's Person and Government, and to disturb the Peace of the Kingdom, did order that the said Petition should be printed, and the same was printed accordingly to the Intent and Purpose aforesaid.

By which the Mayor, Commonalty, and Citizens aforesaid, the Privilege, Liberty, and Franchise of being a Body Politique and Corporate did forfeit, and afterwards, by the time in the Information, that Liberty and Franchise of being a Body Politique did usurp upon the King. *Et hoc, &c.*

And as to the other two Pleas, *viz.* The making and having Sheriffs and Justices of the Peace, the Attorney General imparles to *Mich. Term.*

Rejoinder. **T**HE Mayor, Commonalty, and Citizens, as to the Plea of the Attorney General, pleaded in assigning a Forfeiture of their being a Body Politique and Corporate,

Protestando, That those Pleas, by the Attorney pleaded, and the matter in the same contained, are insufficient in the Law to forejudge or exclude the Mayor and Commonalty, and Citizens from being a Corporation.

Protestando etiam, That no Act or Deed, or By-Law made by the Mayor, Aldermen, and Common Council is the Act or Deed of the Body Corporate.

Protestando etiam, That they, the Mayor and Commonalty, and Citizens of London, never took

took upon them any unlawful or unjust Authority to tax the King's Subjects for their own private Gain, or did ever levy or exact from the King's Subjects coming to Markets such yearly Sums as in the Replication are alleged—For *Plea* say,

That *London* is the Metropolis of *England*, and very populous, & *Celeberrimum Emporium totius Europa*.

That there are, and time out of mind have been, divers publique Markets for Provision and Merchandize within the said City to be sold.

That the Mayor and Commonalty, and Citizens have been, time out of mind, and yet are, seiz'd of these Markets in Fee, and by all the said time at their own Costs and Expenses have provided and have accustomed, and ought to provide at their own Costs Places for the holding the said Markets and Stalls, and Standings, and other Accommodations for Persons bringing Provisions and Merchandizes to the said Markets, and Supervisors and other Officers for the better preserving and ordering the said Markets, and of the great concourse of Persons coming to the same; and for the sustaining and supporting of the said Costs and Expenses, by all the time aforesaid have had, and ought to have, reasonable Tolls, Rates, or Sums of Money, of Persons coming to the said Markets for their Stalls, Standings, and other Accommodations by them for the better exposing their Commodities had and enjoyed.

They further say, That the Citizens and Freemen of *London* are very numerous, (*viz.*) 50,000 and more.

That within the said City there hath been, time out of mind, a Common Council assembled, as often as necessary, consisting of the Mayor, Aldermen, and of certain of the Citizens, not exceeding 250 Persons thereto annually elected, called the Commons of the said City.

That there is a Custom within the said City for the Mayor, Aldermen, and Common Council, to make By-Laws and Ordinances for the Regulation and Government of the publique Markets within the City.

That these Liberties and Customs of the City were confirmed by *Magna Charta*, and the other Statutes in the *Plea* abovementioned.

That by reason of the burning of the City in *Septemb. 1666.* and the Alterations in the Market-Houses and Places thereby occasion'd, for the establishing and resetting the Markets within the City, 17 *Septem. 26 Car. II.* the then Mayor, Aldermen and Commons, in Common Council assembled, according to the said Custom, for the better Regulation of the said Markets, did make and publish an Ordinance, entituled, *An Act for the Settlement and Well-ordering the publique Markets within the City of London*, by which said Ordinance reciting that for the accommodation of the Market-people with Stalls, Shelters, and other Necessaries for their Standing in the Markets, and for the amendment, paving, and cleansing the Market-places, and for the support and defraying the incident Charges thereof, there have been always certain reasonable Rates and Duties paid for the same. And to the intent that the said Rates may be ascertain'd and made publique to all Market-people, and the Collectors restrained from exacting—it was enacted and ordained by the said Common Council, that

the Rates and Sums in the Replication should be paid to the use of the Mayor and Commonalty and Citizens; or upon refusal, to be removed out of the Market. And they aver, that these are all the Rates or Duties paid, and were reasonable Sums to be paid; and these they have demanded and received for the Use and Purpose aforesaid, as was lawful for them to do.

As to the other matter alleged by the Attorney General in assigning the Forfeiture, they say,

That within this Kingdom (*viz.*) at the Parish of *St. Michael Bassishaw, London*, there was an execrable Plot and Conspiracy prosecuted by Papists to destroy the King, and to subvert the antient Government, and suppress the true Religion in this Kingdom established.

That *Sir Edmundbury Godfrey* took Examinations of Witnesses, and Informations of the same; and also of the burning of *London* by the *Papists*.

That divers of these Conspirators had lain in wait for him, and murdered him, to the intent to suppress his Examinations, and to deter other Magistrates from acting in the Discovery.

That *Green*, and others were try'd, and hang'd for this Murther.

That *Coleman*, and others were also try'd, and executed for the same Conspiracy.

That *William Lord Powis*, *Lord Arundel of Warder*, *Lord Petre*, *Lord Bellasis*, were impeached by the Commons in Parliament of *High Treason* for the same Conspiracies, and sent to the *Tower*.

That the King, in his Speech to that Parliament had recommended to them the further pursuit and examination of that Conspiracy, declaring he thought not himself nor them safe, till that matter were gone through with; and therefore that it was necessary that the said Lords in the *Tower* should be brought to their Trials, that Justice might be done; and the Parliament having made an Address to the King, wherein both Lords and Commons declared their being deeply sensible of the sad condition of the Realm, occasioned chiefly by the Conspiracies of a Popish Party, who had plotted and intended the Destruction of the King, and Subversion of the Government and Religion of the Kingdom; and thereupon a Solemn Fast kept pursuant to the King's Proclamation, grounded upon the said Address, and divers Bills prepared to be pass'd into Laws for preservation of his Protestant Subjects.

These Impeachments and Bills being thus depending, and the Lords in the *Tower* not tried, the Parliament was upon the 10th of *January* prorogued, as the Attorney General above in his Replication hath alleged, by reason whereof the Citizens and Inhabitants of the said City, being faithful Subjects to the King, were much disquieted with the sense and apprehensions of the Danger threatening the Person of the King, His Government and Realm, by reason of the Conspiracies aforesaid, as is by both King and Parliament affirmed and declared; and conceiving no better means to prevent, than by the sitting of the Parliament; and having received a Petition from divers faithful Subjects, Citizens of *London*, to the same effect: And it being lawful to petition, the Mayor, *Sir Patience Ward*, and the Aldermen and Commons, in Common Council

Council assembled, for the preservation of the King and his Government, did cause to be written the Petition in the Replication mentioned, which is set forth in *hac verba*; and did Order, that after the same was presented to the King, it should be printed for the satisfaction of the troubled Minds of the said Citizens; and traverse the writing or making any other Petition, or making this to any other end or intent than they have pleaded.

Surrejoyn- der. **T**HE Attorney General as to the Plea of the Mayor, and Commonalty, and Citizens pleaded to the making and publishing the Ordinance about the Markets.

Protestando, That the Mayor, and Commonalty, and Citizens were not seiz'd of the Markets, nor at their charges provided Stalls and Necessaries, or Market-places.

Protestando etiam, That the said Rates and Sums were not reasonable.

For Plea saith, That by a Statute made 22 Car. II. it was enacted that Places for Markets should be set out, and 2 *d.* per Chaldron upon Coals for the Charge of that, and many other things, was given; and that they received a great Sum out of that Duty for the Purpose aforesaid; and yet for their own private Lucre took the Money by the Ordinance.

And traverseth, That the Mayor, and Commonalty and Citizens, time out of mind, *habuerunt & habere consueverunt Tolneta, Ratas five denariorum summas per ipsos Majorem, Communitatem, & Cives superius supposit. per prefatam Le-*

gem, five Ordinationem predict' Assess. & in certitudinem reduet. prout per placitum suum superius rejun- gendo placitat' supponitur.

And to the Plea of the Mayor, and Commonalty, and Citizens, pleaded to the Residue of the Attorney's matter assigned for a forfeiture, as aforesaid,

The Attorney *Protestando*. That the aforesaid Prorogation of the Parliament was for urgent Causes concerning the good of the Kingdom, and thereby the prosecution of publique Justice not interrupted.

And demurrs to the said Plea of the Mayor, and Commonalty, and Citizens by them pleaded as to the Petition.

THE Mayor, and Commonalty, *Rebutter*. and Citizens, as to the making and publishing the Ordinance for the Payment of Monies by those that come to the said Markets, say as before,

That the Mayor, and Commonalty, and Citizens have, time out of mind, had, and accustomed to have, reasonable Tolls, Rates, or Sums of Money of all Persons coming to these Markets with Victuals and Provisions there to be sold, for Stalls, Standings, and other Accommodations, by them had for exposing their Victuals and Provisions to sale. And of this they put themselves upon the Country, &c. To this Mr. Attorney demurrs.

And as to the Plea by the Mayor, and Commonalty, and Citizens pleaded to the Residue of the matter by the Attorney General, assigned for Forfeiture, they join in Demurrer †.

This great Case was only twice argued at the Bar: First by Mr. Finch, the King's Solicitor, for the King; and Sir George Treby, Recorder of London, for the City. And next by Sir Robert Sawyer, the King's Attorney General, for the King; and Henry Pollexfen, for the City.

The First Argument was in Hilary Term on Wednesday, Febr. 7.

Mr. So-
licitor. **T**HE Questions in this Case, as I think, will be,

- I. Whether any Corporation can be forfeited?
- II. Whether the City of London differ from other Corporations as to point of Forfeiture?
- III. Whether any Act of the Mayor, Aldermen, and Common Council, in Common Council assembled, be so much the Act of the Corporation, as can make a Forfeiture?
- IV. Whether the Acts by them done in making the By-Law, and receiving Money by it; or in making the Petition, and causing it to be printed and published, be such Acts, as if done by the Corporation, will make a Forfeiture of the Corporation?

I. The First of these Questions truly I should not make any Question at all, but that this Case has been a Case of so great expectation, every man hath discoursed about it, and the prejudice that some have entertained concerning it, have drawn them to assert the Negative Proposition. Therefore, my Lord, because this strikes to the whole, tho I think it hath no Foundation in Law, I will beg leave to remove this Objection out of the Case.

1. First of all, No Corporation hath any other Creation than any other Franchises have, and subsist upon the same Terms that other Franchises do.

2. There is a Trust or a Condition in Law, that is annexed to, and grows upon all Franchises, that they be not abused, and the Breach of them is a Forfeiture of the very being of the Franchise.

3. And as there is no Foundation of that Opinion in Law, so the Mischiefs would be great, if the Law were otherwise. For,

† When the Demurrer in this Case was joyn'd (*viz.* Mich. Term 34 Car. II.) Mr. Serjeant Pemberton was Chief Justice of the King's Bench. But before Hilary Term, when it came to be argued, he was removed, and made Chief Justice of the Common Bench, and Sir Edmund Saunders, who had been Counsel for the King, in drawing and advising the Pleadings, was made Chief Justice of the King's Bench.

1. First, That no Corporation hath any other Creation than other Franchises have; 'tis undoubtedly true that the King is the Original and Commencement of all Franchises; they have their beginning from him, the Books are clear and full in it: I need not quote them, tho there are many, *Kelway* 138. 17 *Ed.* 2. 530. in the Reports of those times set forth by Mr. Serjeant *Maynard*. Now, my Lord, there can be no Corporation, but by the King's Letters Patents; for even the Prescription doth suppose there was the King's Patent to create it at first. And therefore the proper Inquiry will be about the Second thing.

2. How far the Breach of Trust that is annexed to a Franchise, is a Forfeiture of that Franchise.

First of all, There is no Rule in Law more certain, than that the Mis-user of a Franchise is a Forfeiture of that Franchise. This the Statute of 18 *Ed.* 2. does very well prove, which was an Act of Grace to restore Franchises to those that had lost and forfeited them. There it was restrained *Ita quod libertat' non sint abuse.* And my Lord *Coke* 2 *Inst.* in his Observations upon the Statute of *Westm'* 1. that Chapter of it that concerns Towns that exacted more Murage than was granted, fol. 223. says, They shall lose that Grant for ever; says the *Mirror of Just.* which my Lord *Coke* there quotes, that is no more than the Common Law; for the Law wills that every Man should lose his Franchise, that does misuse it: So the Abbot of St. *Albans* Case, 8 *Hen.* 4. 18. The King seized the Franchise into his hand, because the Abbot, who had the Gaol, would not give Pledges to make Deliverance, and for detaining his Prisoners a long time without making a lawful Deliverance. And so 20 *Ed.* 4. 6. The Abbot of *Crowland's* Case for detaining Prisoners acquitted after Fees paid, the King seized the Gaol for ever. These two are cited by my Lord *Coke* 2 *Inst.* 43. And in Sir *George Reynel's* Case, 9 *Report*, *Fitzherbert's Abridgment*, *Titl' coron' placit'* 233. A Layman was taken in a Robbery, the Ordinary challenges him as a Clerk, whereas he was a Layman: It was ruled, that for his false Challenge the Ordinary should lose his Temporalities to the King, and lose his Franchise to challenge Clerks, for him and his Successors for ever. Thus far is plain, That Franchises, if misused, are forfeited; and that tho enjoyed by Persons in a corporate capacity, as appears by the Cases put. And then as a Corporation may forfeit any Franchise they are seized of in right of the Corporation, so may a Corporation forfeit the Franchise of the Corporation itself, upon the same ground and reason in Law: unless any one will say, The Franchise of being a Corporation cannot be misused; and that would be a very strange matter to assert.

Every Corporation is entrusted with a Franchise to make Laws for governing the Subject within its Jurisdiction. If that Power be exercised to the Subjects prejudice, as it may be, it were an hard matter if there were no Law to redress that Grievance. Suppose a Corporation under their common Seal should authorize a Rebellion, would any Man say that were no Forfeiture? 'Tis said indeed by *Pigott*, 21 *Ed.* 4. fo. 13. *Arguendo* upon a Case (where the Question is, Whether a Corporation should avoid a Bond entred into by the Mayor by *Durefs*) That a Corporation can

neither commit Treason or Felony; but upon the same Reason that he urges, That a Corporation cannot act at all, that is, abstractedly from all the Members of it; for so this Notion is, that a Corporation is a Body in consideration of Law only, and not Reality; and therefore the particular Act even of the head of that Body shall affect him personally only. But this is only a Notion of his arguing; but it is the best Opinion of that Book, that *Durefs* to the Members did so affect the Corporation, that it should avoid the Bond.

Now, my Lord, a Corporation may be surrendered; and surely that that may be surrendered, may be forfeited; and I shall offer you some Authorities in this case, 12 *E.* 3. rot. claus. memb. 36. a Writ is directed to the Constable of *Dover*, reciting, That the Cinque-Ports had seized divers Goods of several Merchant Strangers *Portugueses*, and others; and the Writ commands that Right should be done, or else the Franchise should be seized into the King's Hands, 6 *Ed.* 2. rot. claus. N^o. 5. The Liberties of the City of *Bristol* were seized, and the Custody of it granted to _____ for divers Contempts and Injuries done *per Majorem, Balivos, & Communitat'* to the King; and so the close Rolls of R. 2. m. 6.

There is another Case that comes further, *Pasch.* 9 *Ed.* 1. *Majus* rot. 25. I find it likewise among my Lord Chief Justice *Hale's* Collections, that he has given to *Lincolns-Inn* Library; I took it out of that Book: 'Tis in the Collection of the *Adjudicata* in the time of *Ed.* 1. fol. 28. a. Thus it was: There was the Abbot of St. *Austin* in *Canterbury* had made an Agreement with the Men of *Sandwich*, about paying Ten Hogsheds of Wine yearly to the Abbot; and there was due to the Abbot some Thirty Marks, and he had Judgment, and Execution went out; and thus 'tis in the Book, *Vic. de — mandatur, quod levare fac'* 30 *Marcas de bonis ipsius, ad opus Abbatis, pro pretio 10 Doliorum Vini annuatim solvend'*. And they made Rescue when the Sheriff came to execute the Writ, and they were sued for that; and the Judgment of the King and his Council, which was by Parliament, for it was adjourned into Parliament, was, *Quod libertas de Sandwich forisfact' sit*. And there is this Observation, tho it be written with the same Hand, which is not his, but the Clerk's that transcribed it, *Judicium illud extendit contra Barones & Portuum, & eorum libertates, ut mihi videtur*. These are the Words of that Book: And this will go a great way with the City of *London*, as to their Confirmation of *Magna Charta*; for the Cinque-Ports are confirmed by Act of Parliament, as well as they.

But, my Lord, there are many Cases of like nature, and that even in the Case of the City of *London* too, as I shall shew you by and by. Now tho these are not Judgments in *Quo Warrantos*, to out a Corporation of a Franchise of being a Corporation, yet it shews, that these things were Forfeitures of all the Franchises of a Corporation; for a Seizure is never but where there is Matter for Forfeiture found upon Record, as in Sir *George Reynel's* Case; or to ground a Forfeiture, upon which to bring a *Quo Warranto*, as in our Case. But in the Case of 9 *Ed.* 1. there it does appear Judgment was given by the Parliament, that the Liberty should be forfeited,

feited, not that it should be seized into the King's Hands only.

Now, my Lord, where all the Franchises of a Corporation are forfeited, what is the Corporation? Truly, 'tis nothing, 'tis but a Name; a Corporation without a Power to act, is nothing at all. Indeed, I do not find any Judgment in a *Quo Warranto* of a Corporation being forfeited; yet, my Lord, it doth not follow from thence that this cannot be by Law; for many *Quo Warrantos* have been brought against London, and other Places too, to out Corporations of their Franchises, but it hath always ended in Submission to the King, and so they have been at quiet. All the *Quo Warrantos* in Mr. Attorney Palmer's time, after the King's Restoration, against the several Corporations, they all submitted; and yet that was to question the very Being of their Corporations.

Now, my Lord, pray consider a little upon the Rule of Law. It should seem very strange, if a Corporation should neglect to come into Eyre, or into the King's Bench, the same Term that a *Quo Warranto* is brought against them, they must be outed of their Franchise for ever, as 'tis said 15 Ed. 4. 6 & 7. And yet, when all the Contempts and Oppositions imaginable are found upon Record, that this should not be a Forfeiture, that seems absurd that a Neglect in Eyre should do it, but all the Oppressions and Offences in the world, when found upon Record, should not do it.

3. But, my Lord, the Mischiefs that would follow from hence are very great. How many Oppressions and Offences would be daily committed, if every Corporation were a Franchise and Jurisdiction independent upon the Crown? and the Punishment truly of some particular Men for those Offences would not be adequate; where the Power of offending and misgoverning should still remain; sure that were no adequate Redress of such an Inconvenience. And to this purpose, my Lord, I shall humbly offer a Case, and 'tis that great Case between the Earls of Gloucester and Hereford, H. 1. 20 Ed. 1. in B. R. rot. Wallie 14. 'Tis likewise in Riley's *Placita Parliamenti*, 83, 86. The Case is this in short: They both claimed the Liberty of *Returna Bre-vium*, and they had incurred great Contempts in refusing to obey the King's Writs; and Judgment was given against them, that the Liberty should be seized for this Reason, which, I think, will go a great way in this Case, and for which I offer it, *Quia puniendus est Dominus libertatis in eo quo deliquit*. I think, my Lord, as I said, that will go a great way in this Case to shew the Reason of the Law.

My Lord, if the granting of too many and too large Franchises were a Mischief, as certainly it was by Law, and as appears by the Commons Petitions 21 Ed. 3. rot. Parl. N^o. 17. where they pray, That new and large Franchises may not be granted, because it tended to the overthrowing the Common Law, and great Oppression of the People. And the King's Answer was, That Care should be taken for the time to come, I say then, if this were such a Mischief, that there ought not to be granted new and large Franchises, much more would it be a Mischief, if these Franchises should not be under the Controul of the Law, when they exercise such Oppression. And so, my Lord, I shall leave that

Point; for I think it will be pretty clear, that a Corporation may forfeit their Being of a Corporation.

II. I shall next consider, *Whether the City of London be in any other Plight than any other Corporations*. I think, truly, there is no Difference at all. Now this Question doth depend upon what they have set forth by their Plea; and that is, the Confirmation of *Magna Charta*, cap. 9. *Civitas London' habeat omnes libertates suas antiquas, & consuetudines suas*. And then the Act of 1 E. 3. upon which my Lord Coke, in his 4 Inst. 253. says, that the Franchise of this City shall not for any Cause be seized into the King's Hands. And then that of 7 R. 2. which says, that the City shall enjoy its whole Liberties, *licet non usi vel abusi*. This is their Foundation, upon which they would distinguish this City from all other Corporations. Now as to these things, I give these Answers:

First for *Magna Charta*, That plainly is no more a Confirmation to them, than 'tis to other Cities and Corporations. For not only the City of London is named to have its ancient Liberties and Customs preserved, but 'tis likewise *omnes alie Civitat' &c.* and all Cities, Burroughs, and Towns, and the Barons of the Cinque-Ports, and all other Ports, should have all their Liberties and free Customs. So my Lord Coke agrees it in his Comment. And in what he cites out of *the Mirror of Justice*, and other ancient Authors of our Law, they should enjoy their Franchises which they had Right to by lawful Title of the Gift and Confirmation of the King, and which they had not forfeited by any Abuse. So that the Act which confirmed them, did not purge former Forfeitures, much less did it license other Abuses.

Then for their Acts of 1 E. 3. and 7 R. 2. I shall humbly offer this, That as they are in truth no Acts of Parliament at all, so they will not concern this Question, whatsoever my Lord Coke says concerning them. But I shall give some instances before these Acts, to shew that they never had such an unquestionable Power as they now dream of, and then some Instances in after times, that there either were no such Acts, or no such Sense at least is to be put upon them, as they have strained to make.

First it appears 15 E. 1. that the Franchise of the City of London was seized into the King's Hand, and Johannes de Britton was made *Custos Civitatis London'* who was no Freeman; and this implies, that the Franchise was seized into the King's Hands, for they had a Power to choose *de seipsis*, by Charter from King John, a Citizen to be Mayor or chief Governour; but here was another Governour appointed them.

Then Rot' Pat' 26 E. 1. *Rex pro bono servicio civit' London' reddit eis civit' suam London' habend' die' civibus ad volunt' Regis. Teste Rege*. So that both the City, and all its Franchises, were seized at that time; for he restored the very City of London to the Citizens *habend'* during his Will and Pleasure. Thus, my Lord, it stood in the time of E. 1. Then in the time of E. 2. seized again; 14 E. 2. memb. 21. of the Pat' Rolls, in 21. *Rex dimisit civibus London' officium Major' civitat' London'*. 15 E. 2. *Rex dedit licentiam eligendi Major' London'*. And in the second

cond part of Pat' Rolls 15 E. 2. m. 5. the King recites, That whereas in the Fourteenth Year of his Reign he had replevied to them the Office of Mayor, *usque quindenam Sancti Martini*, and also recites, which Office was seized into the King's Hands by the Justices of Eyre in the Tower of London, and he was willing to continue it longer to them, *ex gratia speciali* he did grant them the said Office, *quamdiu, &c.*

Then the second part of Pat' Rolls in 20 E. 2. it is recited, That the King had seized the Office of the Mayoralty, and had replevied it from time to time; and that one *Hamond de Chigwell* was made Mayor, the King had accepted of him for Mayor, *Et Rex volens eis gratiam uberiores facere*, grants him the Office of Mayor.

Now, my Lord, these Seizures shew plainly, that the Franchises of the City were forfeitable; for either they were seized upon Matter of Record found for a Forfeiture, or else upon some Matter which was to be a Ground of a Forfeiture. So then they were absolutely gone, and I do not find that these were ever taken out of the King's Hands by Process of Law, but were restored by Grace and Favour; for till the 20 E. 2. it appears, that they so long continued in the King's Hands, and he absolutely disposed of them.

Here is now a Favour to them, and a plenary Restitution. Thus it stood in the Reigns of E. 1. and E. 2.

Now the next thing will be for their Act of 1 E. 3. which they back with my Lord Coke's Observation upon it, that it was *Authoritate Parliamenti*. Now truly, my Lord, there is no such Act of Parliament that is any where extant.

or it is not in Print, neither are there any Parliament Rolls of E. 3^d's time till 4 E. 3. And he that cites it, my Lord Coke himself, cites no Roll at all for it; so that where we shall find this Act of Parliament, truly I do not know. But the Act at best amounts to no more, than that for any personal Trespass of Officers the Liberties of the City should not be seized; but that signifies nothing, for that is not our Case. There are Acts of the Corporations, not of particular Officers; tho I cannot but observe how the Law was taken to be at that time, before this their pretended Act, even for the Offence of private Officers; and that appears to be the Law too in the Case of 9 E. 1. which I cited before, which was only the Offence of the Mayor of *Sandwich*, who refused to answer for a Trespass, and a Rescue was committed, and the whole Liberty seized.

Now this Act of 1 E. 3. be it what it will, tho they would take it in that Sense, that no Forfeiture should be incurred for the Trespass of an Officer, yet I find quite the contrary thereunto, and that it hath not prevailed even in that Sense. For 5 E. 3. rot. claus. 14: there the King did discharge one from the Office of Mayor, and commands the Aldermen and Commonalty to choose another. Now this, my Lord, I take to be not so much a punishing of the Officer, as a breaking in upon the Franchise itself. But I shall shew more fully in the Reign of R. 2. that this was done.

Yet I will first take notice of the Statute of R. 2. which is the next thing that they rely upon: and this, with Submission, is no Act of Parliament neither; for tho my Lord Coke, in his

4th Inst. 205. says, this is the Statute mentioned in our Books, which supports the Customs in London to devise in *Mortmain*, and other Customs against Acts of Parliament, and cites Authorities in the Margin; yet, my Lord, I have looked, and can find none of them to speak to the purpose for which they are cited, but the Book of 7 H. 6. fol. 1. where the Custom of London to devise in *Mortmain* is in question; and there it was ruled a good Custom, because of the Statute that confirms it after the Statute of *Moremain*, but says that Book, *Quære the Statute*; so that they were not well apprized of the Statute in those Days, tho this were the Foundation of all the Resolutions of that kind.

It appears by the Roll, that it is no Act of Parliament in the Nature of it, for it is 7 R. 2. N^o. 37. 'tis a Prayer of the Commons, That there might be a Patent granted to the City, confirming their Liberties, *licet non usi vel abusi fuerint*. And the Answer was, *Le Roy le veult*; but this is no Act of Parliament, it is no more than a Confirmation of the Letters Patents, which had been *primo R. 2.* Besides further, there never was any Patent granted in pursuance of this Act: And yet 'tis plain, that if it had been so, it would only have extended to Forfeitures that were past, but could never amount to a Dispensation or License for the future. And, my Lord, this appears by these Authorities and Records that I shall now cite. The first part of Pat' Rolls 16 R. 2. membr. 36, 37. whereby it fully appears, That notwithstanding these pretended Statutes, there was no such Privilege in the City, but that for the Offences of their Officers, or themselves, the Franchise should be seized.

But, my Lord, I must a little observe, that truly the City have attempted to raise themselves above the Fear of any Judgment in any of the King's Courts; for in *primo R. 2. Parl. Roll 126.* there they petition for a Confirmation of their Charter, with a Clause of *licet non usi vel abusi*, which was that they then would have to be done in Parliament for them. But they do likewise desire in their Petition, that notwithstanding any Statute, Privilege, Charters, Judgment made, or to be made to the contrary, their Liberties might be confirmed; of this, 'tis said, the King will advise. There is in 1 R. 2. *Parliament Rolls 121.* as pleasant a Petition as the other; they there do desire, that the Interpretation of their Charter may be left to themselves; and where it is doubting, such Meaning as they should put upon it should be allowable. But to that the King's Answer was, That he would make the Interpretation of his own Charters, according as his Counsel should advise. So that I observe, they would fain have been absolute, but they could never do it; it hath always been denied them. So that from what was done at this time, and after 7 R. 2. it does appear plainly, that there was no Difference between the City of London and any other Corporation, only this is really the greatest. But as all Greatness is the King's Favour; so when Men forget their Duty in abusing the King's Favour, this great Court is the place to put them in mind of it. I come then to the Third Question:

III. *Whether the Act of the Mayor, Aldermen, and Commonalty, in Common Council assembled, be*
L 11
an

an Act of the Corporation, so as to make a Forfeiture of the whole? And with Submission, my Lord, that will be pretty clear too upon these Reasons:

1. First of all, The whole Corporation is fully represented by them, notwithstanding the Disparity of Number set forth in their Rejoynder.

2. Again, All By-laws and Ordinances made for the good Government and Order of the City, are certainly the Acts of the Corporation; but the sole Power of making those Laws is in the Mayor, Aldermen, and Common Council; and therefore sure the whole Power of the Corporation is in the Common Council.

3. They have the sole Power of the Corporation-Seal. They can bind all the whole Corporation by any Alienation to, or Charge upon their Inheritance; and by Consequence they may surrender all or any of their Franchises, and then, as I said, they may forfeit them.

4. They have pleaded that there hath been time out of mind a Common Council, consisting of the Mayor, Aldermen, and Two hundred and fifty Citizens, who are called the Commons of the City. So that it shall be intended now, that as they have prescribed for it as incident to their Corporation, it was part of their Original Constitution to be thus represented by them, and ruled and governed by their Laws: But there is another reason for it, and that is, that it is an inseparable incident to a Corporation, implied in Law without grant, that they have a power to make By-Laws to bind the Corporation, without which there were no Government in a Corporation; and therefore a misuser of that power must be a Forfeiture of their Corporation, because 'tis a breach of their Original Trust: 22 Affis. pl. 34. there is this Rule given, and a true one it is, Where there are many Franchises granted, which do not depend one upon another, there the misuser of one is a Forfeiture of that one which was misused; but where there are several parts of a Franchise depending all upon the said Franchise, if any part be misused, the entire Franchise shall be forfeited. As for instance, if a Man have a Fair, a Court of Pypowders is incident to it, the misuser of that Court of Pypowders is a Forfeiture of the whole Fair it self; for where any part is abused that is incident to an entire Franchise, that abuse forfeits the whole.

And this is the Opinion of Palmer's Reports in the Case of the Corporation of Maidenhead, where 'tis doubted whether the Market was forfeited for taking too much Toll, because the Toll was not inseparably incident to the Market, and so was not dependent upon the entire Franchise, and there the rule is taken, as I have said before, that the misuser of a part of an entire Franchise, or a power that is incident to it, is a Forfeiture of the Franchise.

Then, my Lord, if they cannot forfeit here, the whole power of the Trust of the Corporation is reposed in them, and may be misused by them, to the Oppression of the King's Subjects, and there is no remedy, if they shall not be punished at all. For it is much harder to say, that several Acts of all the particular Persons should forfeit the Corporation, than that their joint Act should do it. But this, my Lord, is an Act contrary to the trust upon creating the Cor-

poration, and may be a misuser to the prejudice and oppression of all people; and if this should not forfeit the Corporation, there is no remedy at all, but the power remains of oppressing as it did before.

Now, my Lord, I think, with submission, I have made it pretty plain; and as they are not distinguished from other Corporations in point of Privilege as to Forfeitures, so this is their Act, and shall bind them, being done by their Representatives.

IV. Then the fourth Point will be, *Whether these Offences set forth in the Replication are Forfeitures?*

1. The first is the making of that Law in the Common Council for the levying of Sums of Money upon the King's Subjects, and the actual levying of those Sums accordingly; and this they justify under their prescription to have reasonable Tolls, as they set forth in their Pleadings, from all Persons that come to their Markets to sell Provision there, and power to reduce their Tolls to a certainty by an Act of Common Council. This is their Justification; so that, my Lord, the first thing to be considered is,

(1.) What right they have to these Tolls or Sums of Money assessed by the By-law; and then,

(2.) Whether if they have no right, their taking upon them to make a Law be a Forfeiture?

(1.) For their Right, that depends upon a prescription to have reasonable Toll, as they set it forth, and this, as they have pleaded it, appears to be no Right at all: for a prescription to have Toll and Tollage, not shewing how much in certain, is void; for reasonable Toll is not incident to a Market, but the Party has it by the King's Grant, and so 'twas adjudged in this Court, Mich. 39 & 40. Eliz. cited by my Lord Coke in his Second Inst. 220. So if the King grant a Toll, if he do not in his Grant ascertain how much shall be taken for Toll, that Grant is void, and so is the Prescription too, as you may see in the Corporation of Maidenhead in Palmer's Reports, fol. 79. grounded upon 9 H. 6. 45. & 11 H. 6. 19. and so he cites the Opinion of Popham in the Case of Heedy and Weeldhouse, for no Subject can prescribe to have Toll, but by the Grant of the King.

But, my Lord, this is not properly a Toll neither, nor in the nature of a Toll; for that is always paid by the Buyer, and never paid before a Sale; but here all that comes to the Market, whether they buy or not buy, sell or not sell, they must pay by this Law. My Lord, I confess there may be a custom for Persons to pay for Standings in a Fair or Market, as that Case was 9 H. 6. 45. but yet that must be prescribed for in a certain Sum, which is not done here. And this customary Payment is in the same nature as a Toll traverse or a Toll through, which cannot be in an uncertain Sum; for they are all by Prescription, and a Grant of them now uncertain would not be good.

But, my Lord, however, Judgment upon these pleadings must be given against the City; for either the Prescription as they have set it forth, is good or it is not good; if it be good, then the Traverse that is taken, is well taken, *to wit*, that they have no

no such Custom, and they ought to have taken issue upon that which they have not done; for, my Lord, they have taken Issue thus, That, time out of mind, they have had reasonable Toll of all Persons coming to the Market to sell their Provision, without tying of it to the reasonable Toll assessed and reduced to certainty by the Law; and this is naught: For tho they had a reasonable Toll in general, taking the Prescription to be good, yet if either that reasonable Toll in the use of it were not taken in that manner, or to that Value that they assess by their By-law, then have they done wrong; and therefore our Traverse is proper to their reasonable Toll, that they had not, time out of mind, such a Toll as they set forth; for it must be such a reasonable Toll as may answer to that which is assessed in the By-law; and that they have not put in issue. For the King, when once he hath granted a Market, cannot after grant Toll to that Market, because it is a free Market, and the People have right to come to it as a free Market; neither can they, when once by Custom they have exercised their Power of assessing reasonable Toll, alter that at their Pleasure; for it being once set, all People have right to come upon such Terms: And if they increase the Toll, under pretence to reduce it to certainty, it will be void; for they may lower their Price if they will, but they can never come to increase the Penalty. If therefore they have done ill in not taking Issue upon the Traverse, which does take in the full substance of their Rejoinder; if it be good, then Judgment must be given against them upon that reason; so then, my Lord, the Question will be.

(2.) *Whether the making of a Law to raise Money at large upon the Subject be a Forfeiture of the Charter?* And truly, my Lord, that it is. For

First, It is the usurping of a Power that they neither can have, nor have by Law.

Secondly, It is a Breach of the Trust annexed to the Corporation; for 'tis a misuser of the Franchise, to the oppression of the King's Subjects; and therefore the Charter must be forfeited, and not the other Franchise; not the Franchise of a Toll, for they have none; not the Franchise of the Market, for that would be nothing. If the Market be forfeited, it must either be extinguished, or kept; if it be extinguished, 'tis a Punishment to others that did not offend; and if it be kept, tho it be forfeited, 'tis no Punishment to them that do offend: And 'tis a Question whether a Market may be forfeited for taking unreasonable Toll; and that appears in the Case of *Maidenhead*. And, as my Lord *Coke* says upon the Statute about taking Outrageous Toll, the Franchise should be seized only till it be redeemed by them.

But, my Lord, however, without going far into that matter, this Offence lies not only in taking the Money, but in taking upon them, and usurping a Power to make Laws to raise Money. They have taken upon them a Legislative Power to oppress their fellow Subjects, that is their Offence, and that is a misuser of their Franchise. My Lord, in the Case of Ship-money it was not the *Quantum* of Money that was raised, that was complained or quarrelled at, but it was the manner of levying of it without an Act of Parliament. The Logick and Consequence of that was it, which was so much debated and stood upon. So here, the Abuse and the Offence is the making

the Law, and the consequence of that; for by the same reason that they have a Prescription to lay so much, they may have a Prescription to lay ten times as much. So that upon what I offer upon this Point, I conceive it ought to amount to a Forfeiture of their Charter, and the Loss of their Corporation.

Then the next thing will be that which is the last matter, that is the Petition, and that is of a strange Nature; where the Offence is not only in presenting, but in printing and dispersing of it; it charges the King with interrupting the publick Justice of the Nation, and the making the necessary Provisions for the Security of his Protestant Subjects; for, my Lord, to say, that the Prorogation of the Parliament, which is the King's Act, who surely has alone, and none but he, the undoubted Prerogative of calling, proroguing, and dissolving Parliaments; to say that Act of His was an Interruption of Justice, is all one as to say, the King did interrupt: And 'tis done by them as a Corporation; 'tis the Act of the City in their Common Council in the Name of the Corporation; and, as we have pleaded it, the Mayor, Citizens, and Commonalty, in Common Council did do it, which sure is the Corporation, as they would have it. And that I rely upon for the Reasons I offered before upon that point.

Then the matter of this Petition is the taking upon them to censure the King and his Government by this Petition. The printing and dispersing it is now publickly scandalizing and libelling the King; for 'tis in the nature of an Appeal to the People: 'Tis unlawful to print any man's private Case, while it is depending in any Court of Judicature, before it comes to Judgment, because 'tis an Appeal to the People. And that was my Lord Chief Justice *Hales's* Opinion in Colonel *King's* Case. And the ill consequences of such proceedings are so many, and the danger so evident in these licentious Days, that I do not know indeed whither it may tend.

The Fact is confessed by them in their Rejoinder; but they say they did it to alleviate mens fears, and quiet their minds *absq; hoc*, that they did it *aliter vel alio modo*. Surely, my Lord, this is no sort of excuse in the world, nor is it capable of any. They have owned the thing, but they have excused it in the manner of doing thereof. And I may venture to say the Traverse is impertinent; Suppose a man be indicted for publishing a Libel, and he owns the Fact, but doth traverse *absq; hoc*, that he did it *malitiose*, or with an intent to defame, that surely would be an idle thing; for those are constructions that the Law puts upon it, and are not matters traversable, or to be put in issue. But if the Fact be done, the Law says, 'tis maliciously done, and with such an intention. Therefore a confession of the Fact is a confession of all the consequences that the Law puts upon the Fact.

My Lord, this can amount to no less than the Forfeiture of their Charter, not only for the greatness of the Offence, but because otherwise the Law would be unequal; for if this were the Case of a private common Person, he must be fined and imprisoned during the King's pleasure, as was the Case of *Harrison* in 1. Cr. 503. for words spoken of Justice *Hutton*. Now, my Lord, a Corporation is not capable of suffering this Imprisonment; and therefore 'tis a much greater Offence in them, as the Body is greater than any

particular Member: And then that which is a greater Offence would have a less Punishment, if the Charter it self were not forfeited, than it would if a particular Person were punished. And give me leave to apply here the Reason of the Earl of Gloucester's Case, that I cited before, *Quia Dominus Libertatis puniretur in eo quo deliquit*. So they shall lose their Charter for the Abuse of that Power that was intrusted with them by their Charter. Therefore upon the whole matter, I do humbly pray your Judgment for the King, that they may be outed of their Franchise of being a Corporation.

May it please your Lordship,

Sir George I Am of Counsel in this Case for the Mayor, Commonalty, and Citizens of London.

The Record hath been truly opened by Mr. Solicitor in all particulars, except an omission of one or two, which I shall mention.

The Information sets forth and charges, That the Mayor, Commonalty and Citizens of London, had, by the space of a Month before the Information, used, or claimed to use, without any Warrant or Royal Grant, the Liberties therein set forth; that is to say, to be of themselves a Body Politick and Corporate with such a Name, and by that Name to plead and be impleaded, to answer and be answered; and likewise to make Sheriffs and Justices of the Peace: But as to these there are only Imparances, and I suppose Continuances. But as to the first Article, the Defendants plead and prescribe, That they are a Body Politick time out of mind; and then they set forth indeed several Acts of Parliament, and Charters of Confirmation. To this Mr. Attorney General doth reply two things:

First, He takes Issue upon the Prescription; That they are not time out of mind a Body Politick with such a Name; and then he assigns a Forfeiture, which Mr. Solicitor indeed does call two Causes; but they rather seem to be but one joint Cause; but yet take them to be two.

The first is, That the City did assume upon themselves a Power to meet and make Laws for the Government of the City, and thereupon did make the Law which is now in question; and thereby did levy, and order to be levied, for one Horse Load of Provision so much, &c. and that this should be paid to the use of the City, and for Default of paying, the Persons denying to pay this Rate, should be removed from their Standings in the Market.

The second Branch is, *The Petition*, and therein are those Words which Mr. Solicitor hath repeated about the Prorogation of the Parliament.

And to all this the Defendants do rejoyn, That the City of London has, time out of mind, been seized of these Markets; and they say, That the City of London is the Metropolis of the Kingdom, and consists of above Fifty thousand Citizens and Inhabitants; and that (at their proper Costs and Charges) they are to provide, and always have provided a Market-place to sell Provision in, and also Officers for the preservation of good Order, and Regulation of that great concourse of People that comes thither, and that they have always amended and cleansed the Markets; and for these Charges of the Market-places, and Officers, and cleansing of the Markets, they have always received, and ought to receive

reasonable Tolls. They say that time out of mind there has been a Common Council in the City, and that for the like time there has been a Custom, that they should make By-Laws for the better Regulation of the Markets, for the ordering where such and such Markets should be held, and for the assessing and reducing to certainty the Tolls and Rates that are to be paid by Persons coming to the Markets, so as such Laws be profitable to the King and his People, and agreeable to the Laws of the Kingdom; and then again they set forth the several Confirmations of their Customs and Privileges by Acts of Parliaments and Charters.

And then, as to the second Branch of their Forfeitures, they set forth, that there was such a Plot, and such Proceedings in the Courts of Justice against the Conspirators, and that there were several Judgments and Executions upon it; and they set forth several of the King's gracious Speeches to his People in Parliament; amongst other things, that he did there, in His Speech therein mentioned, recommend to the Lords and Commons in Parliament assembled, to pursue the further Examination of the Plot; adding, that he thought not Himself nor them safe, till that Matter was gone through with, and that the Lords in the Tower might be brought to their speedy Trial, that Justice might be done. They set forth likewise an Address of both Houses for a Fast, wherein they desire that the King would issue forth his Proclamation, which Proclamation is accordingly issued; and in that it is expressed (I cannot repeat the words, but to this Purpose) *That the Dangers impending could not be prevented, but by the Blessing of God upon the Councils of His Majesty and the Parliament*. Then they set forth, that the Parliament was preparing several Bills for the preservation of his Majesty's Person and the Protestant Religion, and the Peace of the Kingdom; and those Bills could not be enacted elsewhere, and that they were then depending: And they set forth further, that the Parliament was prorogued before those Bills were enacted: And they set forth also, that the Lords impeached could not be tried, but in Parliament; and, that by the Law of the Land it is lawful for the King's Subjects in their Distresses, and for redress of Grievances, humbly to petition the King for Remedy in that behalf; and that for satisfaction of the Citizens, who had made their Applications to the Common Council, and for the alleviating of their Fears; and out of their Zeal for the preservation of the King's Person, add the Protestant Religion, they did give their Votes to this Petition, as is charged; and they give their Reasons for it, that is, it was ordered to be printed, to the intent that false Rumours (concerning the Citizens petitioning of the King) might be prevented, and the Enemies of our Lord the King from proceeding in their Conspiracy be deterred, and the Fears and Perturbations in the minds of the King's Subjects might be allayed, and that the Citizens and Inhabitants of the said City might better know what was done upon their application to the Common Council.

My Lord, I have taken some Notes of what Mr. Solicitor has said; but I beg your Lordships leave, that I may first deliver what I have prepared upon the Argument; and afterwards I will talk upon my Notes, and give particular Answers to the particular things he has insisted upon,

upon, for so much of them as I shall not answer in my Discourse, which I must beg your Lordship's patience in; for I fear I shall be pretty long.

I shall go on upon the same Points Mr. Solicitor has done, and endeavour to meet him, and give an answer in all particulars and shall add a Point or two which he has not mentioned; as particularly, that this Information (as it is here laid upon this *Quo Warranto*) is not brought against right Persons; for it is brought against the Mayor, Commonalty, and Citizens of the City of London. Whereas it ought to be brought against particular Persons for usurping such a Corporation, if it can be brought at all.

The first thing that I shall go upon, is, *That a Corporation cannot be forfeited*; for now we must begin as it were from the Replication; for there is disclosed all the Matter, upon which the stress of this Point lies.

And that a Corporation cannot be forfeited, I think will appear by opening the Notion and Nature of a Corporation, which you may find in my Lord Coke's 1st Inst. fol. 202, 250. he says, It is a Body to take in Succession, framed as to that Capacity by the policy of Man, and called a Corporation, because the Persons are made into a Body, and so are of Capacity to take or grant, &c. And he says, *That Persons capable of purchasing are of two sorts; Persons Natural created of God, such as private Men, as J. S. and J. N. and Persons created by the Policy of Man, as Persons incorporated into Bodies Politick.* So then if this be the true Notion of a Corporation, then all the question is, Whether there shall remain such a Person in the World as this Corporation of the Mayor, Commonalty, and Citizens of London?

And that this is a mere Personality and Capacity will further appear even by this *Quo Warranto* itself, which says, *That we did claim and usurp to be a Corporation under such a Name, and thereby to plead and be impleaded, to answer and to be answered*: So that there is no more now can be considered in this Record, but whether we have or can have the Capacity of being Plaintiff and Defendant.

My Lord, in *Brook's Abridg.* tit. *Corporation*, (I cite not what is said there as an Authority, but only as an Opinion) he joins the Titles, Corporations and Capacities together: I say, it is only the Judgment and Notion of the man, who, your Lordship knows, never uses to join any words as Titles, but what are synonymous; and there he joins Corporations and Capacities, to shew the Nature of a Corporation is a Capacity. And suitable to this is what Justice *Windham* says in *Dr. Patrick's Case*; *A Corporation is a mere Capacity, a civil Capacity*, says he, *I do call it an Ens rationis*; whether he did affect that Word because it was in the Case of a Man in the University, I cannot tell; but the meaning was, that this was the Notion of a Corporation, that it was an invisible Person and Capacity only.

Now, my Lord, I do not love to litigate about Words, I must confess that Mr. Solicitor does not speak without some Authority, when he calls a Corporation a Franchise; but I say it is not properly a Franchise to have a Power to be impleaded and to plead; for as to that they are Consequents, which belong to the Person rather than a Liberty or Franchise that is superadded to it. Therefore in *Hobart* 210. *Norris* and *Stap's Case*,

the Case of the Wardens and Fellowship of the Weavers of *Newbury*; I think it unnecessary to cite the whole Case, but there my Lord *Hobart* says, *The Licence or Power to make Law is given to a Corporation by a special Clause*, yet it is needless, for I hold it to be included by Law in the very Act of incorporating; and so is also the Power to sue and be sued: Such Body is a Person that must answer the Law as a Defendant, and sue as a Plaintiff.

But I do agree, I say, that there is one Case, and yet but one in all the World, wherein a Corporation is called a Franchise; and it is in *Coke's Entries*, tit. *Quo Warranto, Placito primo*; a *Quo Warranto* is brought against several Persons, to shew by what Warrant they claim divers Liberties, Privileges, and Franchises, as to be of themselves a Body Politick and Corporate, by the Name of the Burgeses of *Helmefley* in the County of *York*. So that under that general word I confess it may be called a Franchise; and the rather, because Mr. *Noy* (a Man of great Learning) in his great Argument of *Fulcher* and *Haywood's Case* in Mr. Justice *Jones's Reports*, says it is a Franchise, for it was called so in such a Plea.

But now, my Lord, that it is not in its own nature forfeitable, is made plain by all those qualifications that have been attributed to it, and Expressions in our Law Books about it: As, that a Mayor, and Commonalty, or Body Corporate, can never die, 1 Inst. fol. 9. b. 3 *Coke* 60. a. 2 *Bulstr.* 233. 21 *Edw.* 4. fol. 13: a Mayor and all the Officers; but the Commonalty have Succession in perpetuum, and can never be said to die: And this Notion, my Lord, has gone further than *England*: I beg your Lordship's pardon if I take the liberty to cite a very Learned Author *Grotius*, in his Book *De jure Belli & Pacis*, lib. 2. cap. 9. he says, *Cities are immortal*; and a City does not therefore cease to be a City, tho all the Citizens of it should die.

But the dissolving of a Corporation by a Judgment in Law, as is here sought, I believe is a thing that never came within the Compass of any Man's Imagination till now, no, not so much as in the putting of a Case. For in all my search (and upon this occasion I have bestowed a great deal of time in searching) I cannot find that it ever so much as entred into the conception of any Man before; and I am the more confirmed in it, because so learned a Gentleman as Mr. Solicitor, has not cited any one such Case, wherein it has been (I do not say adjudged, but) even so much as questioned or attempted; and therefore I may very boldly call this a Case *prima impressio*nis.

1 Inst. fol. 13. b. there it is said, If Lands holden of *J. S.* be given to an Abbot and his Successors; in this Case, if the Abbot and all the Convent die, so that the Body Politick is dissolved, the Donor shall have again his Land, and not the Lord, by Escheat. So that he does allow a Body Politick may be dissolved indeed; but it is not properly a dissolving, nor a dying of that Body, but a taking away of the Subjects in which it did subsist, or to which it did adhere. And therefore unless it be by such an Accident, as all of them dying, or by Violence, as in the Case of the Monks of *Bangor*, I never heard before that a Corporation was dissolved; to be sure not by a Judgment in Law. My Lord *Rolls* in his Abridgment, Part 1. fol. 514. tit. *Corporation*,

at the Letter *I*, makes it a Head of one of his Titles, *How a Corporation can be dissolved*; and therefore was led very properly to enquire into all things that might dissolve a Corporation; for that Book is in the nature of a Common Place Book. Now under that Head he cites not only the common Case, if all the Members die, then 'tis a Dissolution; but he says further, and he cites an Authority for it, If a Corporation consists of so many *Confratres*, and so many Sisters, and all the Sisters die, this Corporation is dissolved; for both the Brothers and Sisters are integral Parts of the Corporation, and it cannot subsist by halves. But he does not go further, he does not say, If they shall levy too much Money upon the Market, nay, he does not say, if they should commit Treason (if it were possible they could do so) which had been more proper to have instanced in, he being naturally led to it under that Title; for that is a thing that happens a thousand times oftner than the Death of all the Members. And, under Favour, if the Law be so as they would have it, every Penalty levied upon a By-Law does endanger the Corporation every whit as much as this of the Rates upon the Markets.

Littleton, my Lord, in his *Seck. 108.* (it is a general Rule, but commonly taken notice of, and may be in this Case) says there, upon the Statute of *Merton*, An Action will not lie against a Guardian for the Disparagement of his Ward, because it was never heard of from the time of the making of that Statute, that such an Action was brought; and yet he adds, that the Words of the Statute might very properly ground such an Action. Now, my Lord, that was a matter of Two hundred Years before *Littleton* wrote, that that Statute was made; and 'tis possible such an Action might have been brought, but not remembered, and that is an Action brought by an Inferiour against a Superior, the Ward against his Guardian; but here this Suit, if it can be brought, is brought by the King, who is supreme, and therefore there can be no reason to think, but he would have brought many of these Suits to have dissolved Corporations, if by Law it might have been done.

Besides, my Lord, Acts of Parliament can never be antiquated; because a Statute is a Law in Writing; but the Common Law is not a Law unless it be repeated and practised. And so is *Davis's* Opinion in the Preface to his Book, and in the Body of his Reports too: He says, That when People have tried and used such an Act, and found it useful and profitable to the Publick, and fit to be practised, that Act of Repeating begets a Custom, and so becomes in its Name and Nature the Common Law of the Land. But now, my Lord, if I can challenge all the Times, and all the Precedents that ever were in this Kingdom, to shew me where ever there was a Forfeiture of a Corporation, or a Judgment given against a Corporation to forfeit it, no, nor ever thought of till this last Year, I think I may assert 'tis not Law: And if it extend to this Corporation of *London*, it must have extended to all Corporations formerly, and it must do so to all still.

In the Case of Ecclesiastical Leases; in the fifth Report, and in several other Places, there is a large Discourse of what Bishops and other Spiritual Corporations might do at Common Law;

'tis said, They might grant for Years, for Life, in Tail, or in Fee. But what might they grant? Their Lands and Tenements, their Possessions and Revenues; but never one word, that they could grant away themselves, or Politick Capacity; still that which was their very Being was not in their own Power to grant away; and if it were not to grant, much less were it in their own power to forfeit: For if it should be so, there is never an Hospital in *England*, but if it have taken too much Toll, were to be destroyed; and never a Bishoprick, Deanry, and Chapter (nay, almost particular Parsonages, for they are Spiritual Corporations too, and all the Corporations of *England* are under the same Rule of Law) if they have transgressed in any of the kinds assigned here for a Forfeiture, but were to lose their very Being.

That these were in Power of these Spiritual Corporations at the Common Law, no man doubts; and if any man does tell me, that the restraining Statutes do extend to the Corporation, truly, I must deny it; for it is Lands, Tenements, and such things, that are mentioned, and there is provision made only against Grants, and not against Forfeitures. A Forfeiture, Mr. Solicitor says, must be a great Breach of Trust; and so it must indeed! and how then should they answer for it? If a Bishop, or a Dean and Chapter, have Lands in Fee upon Condition, and they break the Condition, their Lands are gone: But if that Breach of Condition should amount to a forfeiture of their being a Corporation, that were very strange; this would dissolve and destroy all the Colleges in the Universities, and all the Charity in the Kingdom: for every Breach of such Condition would be a Breach of Trust.

My Lord, there was a very proper time when this might have been thought of, if it could have been maintained for Law, and that was in the time of *H. 8.* He sent out Dr. *Lundon* and others with a Commission of Inquiry, to examine into all the Misdemeanours of the Monasteries, Convents, and Colleges. To what Purpose was all this done? Could he not have brought *Quo Warranto's* against them? He needed not have hunted much for Misdemeanours and Offences; if they had but raised Five Pounds, nay, for ought I know, if they had but raised Five Pence upon a Market, or the like, they had all been dissolved; and 'twas so much the worse in this Case then, for this Reason: In those Regular, Religious Houses and Corporations, the Body of them was dead, and the Abbot or Head was only to appear for them, and plead and defend for them. Therefore 'tis said in the 1 *Inst. 103. a.* that in a *Quo Warranto* against an Abbot, or Bishop, or a Prior, for Franchises and Liberties, if the Abbot or Prior disclaim alone, this shall bind their Successors; and if it were possible that there might have been a Forfeiture, yet, without so much as troubling himself to assign that Forfeiture, he might have gone that way by *Quo Warranto* to get a Disclaimer.

And 'tis very well known, there were Men put in those Houses to be Heads of them, on purpose to try if they could surrender them: And that they needed not to have done, nor have asked the Consent of the Members to have surrendered; for they needed only to have brought a *Quo Warranto*; for after the Renunciation of the Pope's Power and Supremacy, King *H. 8.* did

did grant his *Conge d'eslire* to choose the Heads of those Corporations; and when they were once there, and a *Quo Warranto* issued, the Abbot or Prior might say, 'This Corporation is but a Liberty or a Franchise, and I am the King's Creature, I will disclaim the Liberties, and there is an end of the Franchise: But this was not thought of *in diebus illis*.

I think, my Lord, that in case of a Town the Law is clear; tho I shall not at present much contend with Mr. Solicitor upon that Point, that *London* stands upon greater and better Circumstances than other Corporations and Towns. It is all one as to the main Points, whether it do, or not; tho I shall say enough as to the particular Reason, to answer what he says to the contrary, by and by. But yet this I will say, A Corporation in a Town is more protected in Law, than others are: For, says my Lord *Coke*, if a Town or Borough does decay, yet it shall remain a Town or Borough; as is plain in the Instance of the Burghesses of *Old Sarum*, and the like. So that it seems, that tho the Death of the Abbot and his Convent does destroy that Corporation, yet the Dilapidations and Decays of a Town does not destroy it, but it remains a Town still; nor is the Liberty of sending Burghesses to Parliament destroyed, or forfeited.

I confess, my Lord, I do not see but that at this rate a *Quo Warranto* may be brought against a particular Man, to know by what Authority he claims to have the Liberty of a Subject, to sue and be sued, to plead and be impleaded: 'Tis a Capacity that's born with him, and belongs to him as he is born in *England*, or as he is by Act of Parliament naturalized, and made a Subject; especially in the case of Denization it comes home to the Point. Why should not a *Quo Warranto* be brought against a Man, to know by what Warrant he claims to be a Denizen, and in that respect to plead and be impleaded, to sue and be sued? These are relative Capacities, that stick and adhere to the Person; and if you once constitute the Person, you shall never say he shall not have the Incidents to such a Person.

This Case indeed, my Lord, that I put last, is so gross a thing, that it was never drawn in question, tho some others have, as Dignities, Lordships, and the like; and yet no *Quo Warranto* was ever brought, or can lie in these Cases. And that is the Opinion upon that great and solemn Argument of the Case of the Earl of *Oxford*, in Mr. Justice *Jones's* Reports; where it was held, that an Earldom, or the like, is a personal Dignity, and such a one is in the nature of a publick Person, and by no means can part with or surrender that Capacity. And so your Lordship knows it was adjudged lately in the House of Lords in Parliament, upon the Petition of the Lord *Purbeck*: They all voted there, that Peerage could not be determined, nor surrendred; no, altho there was a Fine levied, and all the Instruments of Law that could be contrived to annul it; and I cannot see, but that if this Capacity of a Corporation be liable to a Forfeiture, all others must be so too.

There is one Capacity indeed, and a small one, that a Feme Covert has by the Custom of *London*, That she shall trade without her Husband, as sole Merchant, and be sued so, and shall sue: The Husband indeed is named, but only for Conformity; the Action is against her, and the Judgment against her severally, and the Debt must be

levied of her Estate; can it be thought that a *Quo Warranto* lies for such a mere Capacity? No more than it can lie to know, by what Warrant such an one claims to be an Executor, or Administrator, or an Overseer of a Will; and yet there an Action is brought against them in such a Capacity, and as such they sue and are sued, tho perhaps they would be glad to be rid of that Capacity too.

My Lord, 'tis true what my Lord *Coke* says in his 2 *Inst.* 664. there was a Custom to take Tithes of Marriage Goods within the Dominion of *Wales*, which is taken away by a Statute; and there he says, If a Custom, that was once reasonable and tolerable, become grievous, and not answerable to the Reason whereon it was grounded, yet it cannot be taken away but by Act of Parliament; for an Inheritance once fixed cannot be taken away but by Parliament. If this be so of a little Custom in *Wales*, how much more is it so of this great Corporation of *London*, and, which is more yet, of all the Corporations in *England*?

My Lord, Mr. Solicitor was pleased to say, that a Corporation might be surrendred. I must confess, I should not willingly have meddled with that Point at this time; but since it has been mentioned, I will only endeavour to say so much as may answer him in what he intended it for, as a Ground for the better proving the point of Forfeitures. I believe Mr. Solicitor (because he cited no Authority for it) might rest very much upon the supposed Surrenders in the time of *H. 8.* the Surrenders that were made of the Monasteries then; and I do believe he does presume, as others have thought, that those were Surrenders of their Corporations: Truly, my Lord, I believe they were not; and to prove that they were not, I shall rely upon the Dean and Chapter of *Norwich's* Case, 3 *Coke* 73. which is also reported in 2 *Anderson* 120. and I shall at the same time mention another Case, and that is the Case cited before of *Fulcher* and *Haywood*, in *Jones* 166. and in *Palmer* 491. where the same Question comes to be debated, *Whether the Deanry and Chapter of Norwich was given up and destroyed by their Surrender?*

My Lord, in the Report of that Case in *Palmer*, I will first remember your Lordship of what is said by *Whitlock* in his Argument of that Case; It is fol. 501. of that Book; there *Whitlock* sitting in this very Court, says, That altho the King can create and grant a Corporation, yet he cannot dissolve a Corporation; and a Dean and Chapter being a settled Corporation, by their own Act cannot dissolve themselves; being once a settled Corporation cannot be *felo de se*. But I say further, those Acts of Parliament made in *H. 8th's* time (they are all in your Lordship's Memory) that of 27 *H. 8.* gave all the Monasteries under Two hundred Pounds a Year to the King; that of the 30 *H. 8. cap. 13.* recites, that several other Monasteries had been granted, surrendred, and forfeited to the King; and it says, that the King shall have them, &c. I do allow there are the words *surrendred* and *forfeited*, and I mention them on purpose to answer them; and this is the Answer I give them:

First, For the word *Surrender*. When the Monasteries were surrendred, that was only a Grant of the Lands, and nothing else; the Word Monastery can carry nothing else in it. And so is *Wortly* and *Adams's* Case in *Plowden's Com.* 194. where there is a great Discourse of the Surrenders of

of the Monasteries, and the Acts of Parliament about them, and what ensued upon them: but in all that Book it was not by any means admitted, that the Corporation, or any of that, was by these Surrenders dissolved. And, my Lord, as to the word *Surrender*, it is fully satisfied by the words *Lands and Tenements*.

Secondly, As to the word *Forfeited*, my Answer is this: The Corporation is not named in the Surrender, and therefore cannot be presumed to be intended to be surrendered; and then there are other things, as Leets, Liberties, and Franchises, which are named, and are capable of being forfeited, and so the word *Forfeited* may be applied to them, and very properly; for they are liable to a Forfeiture, but the word *Corporation* is not at all mentioned.

But for another understanding of the word *Forfeited*, I desire your Lordship would give me leave to cite a Case in the 2d Part of Roll's Reports, fol. 101. (which is called the *Continuation* of his Reports) and it agreeth exactly with the History of those Times: There were some Abbots, as the Abbot of *Glastenbury*, the Abbot of *Reading*, and the Abbot of *Colchester*, that were stiff Men, and would not surrender; thereupon the King gets them indicted of Treason (the Story is well known how he handled those Men) and thereupon he did graft a kind of Opinion, and their Land was forfeited by this means; for a small Pretence would serve then to put people into an Act of Parliament of Attainder; and he tells you, that was the Reason why they put the word *Forfeited* into the Act of Parliament; and then dis-bottom themselves upon the Statute 26 H. 8. cap. 13. that Statute that gives to the King any Estate of Inheritance, whereof any one is seized that commits Treason: Tho I do not by any means allow it to be Law, that those Clergymen by their own Acts could forfeit so much as the Lands of their Corporation; but it was taken for a Pretence, and so they put in the word *Forfeited*.

Besides, another thing is this, the same Statute says, *The King shall have and enjoy the Things there given him, in the same manner as they the Abbots, Priors, &c. should have enjoyed them.* Now if the King shall enjoy all as they did, and in the same manner, what then must he enjoy? It may well extend to Lands, to Leets, and to Markets, and particular Franchises; all those things the King may have: But shall the King have their very Corporate Capacity? Shall the King have and enjoy the Liberty of suing, and being sued, by the Name of the Abbot and Prior, or the like? That Office, sure, he cannot execute; it is inconsistent with Sense or Reason to say, that he shall have it, or can have it. And in these Statutes they did doubtless accumulate Words to make them look the bigger; because they were to make a great Present to H. 8. by these means.

Then comes 32 H. 8. cap. 24. that relates to the Corporation of the Knights of St. John at *Jerusalem*; and it seems by the penning of that Statute, that this very Question had been taken notice of since the time of the making of the last Statute in 30; for there it is declared, That that Corporation of St. John at *Jerusalem* shall be dissolved, and that the King shall have their Lands. So that their taking notice, and providing directly to dissolve it, shews, that they had by that time considered, that neither the Surrender of their Lands, nor the vesting of them in the King,

had done any thing to the Corporation; save only they had deserted their House, and fancied themselves dissolved, because they were turned out of their Possessions.

My Lord, in the great Case of *Haywood and Fulcher*, 'tis again and again said there, That the Surrender of the Dean and Chapter (where they surrendered all their Church, and all their Franchises and Hereditaments) was no Surrender of the Corporation, no, tho the King did take it to be a Surrender, for he accepted it as a Surrender, and granted them a new Incorporation of the same Name, only adding, *Ex fundatione Regis Edwardi Sexti*. So that he did take it to be a good Surrender, but it was adjudged that it was not a good one; and so it is held in 3 Coke 73. And so says the Dean of *Wells's* Case in *Dyer* 273. the Surrender is, *Diaconatus Ecclesie Cathedralis de Wells*: One would think it impossible to have surrendered any thing by a stronger Word; but yet they say, 'tis not good without an Act of Parliament.

And whereas it hath been sometimes said, as it is there, they were dissolved, and they have been dissolved by the Surrenders, and the like: there is a very good Answer given to all that Discourse in *Palmer* 495. where 'tis said, When they speak of a Dissolution by Surrender, 'tis a Relation of Fact only, and not of Law; that is, they were dissolved in Fact, so as that they did desert their House, and did demean themselves as if they were disincorporated, but they were not so in Law; for they fancied a Corporation could not be without Lands, and so, when their Lands and Church were given up, they thought all was gone and dissolved: For (said they) a Dean and Chapter must be a Dean and Chapter of some Place, and when the Land is gone, how can they be said to be of such a Place? No, said the Judges there, that is no Reason at all; for the Corporation was before they had any Lands; and if those Lands were all evicted, or they all dis-seised of them, yet they are a Corporation still. And in *Roll's Abr. 2. Part* 185. 'tis said, the Abbies came to the King by the Statutes of Dissolution; so that they had no Opinion that the Surrender did carry even their Lands, tho I do admit they did carry their Lands; but I may say they could carry no more, they could not carry their Being of the Corporation.

There is a Case in *Dyer* 282. and 'tis the only Case that seems against us in this point; there were Two Deans and Chapters of St. Patrick and Christ-Church in *Dublin* in *Ireland*; and these both, and not one of them, were together One Chapter of the Archbishop of *Dublin*, time out of mind, and One of these surrendered, and then their House was used for a Place for the Courts of Justice, and continued so; and then a Lease is made by the Bishop, and that confirmed by the only remaining Dean and Chapter, which was that of Christ-Church: And whether that Lease was good or no was the question, and truly that was the only question that is made there in that Book; and so 'tis of little Authority as to any thing else; but 'tis true, that that Book does say in the end of the Case, that the Lease was held good, *quia Corporatio & Capitulum Sancti Patricii prædicti fuit per donum & sursum redditionem Decani & Capituli prædicti legitime dissolutum & determinatum.* My Lord, to that I answer:

First,

First, There was no occasion for this Reason, because it did digress from the main Point in the Case, as it is truly observed in *Palmer fol. 502. next*,

Secondly, It was a private extrajudicial Opinion; it was the Opinion of but Five Judges, and for ought appears Seven might be of another Opinion, and yet the Case was sent for the Opinion of all the Judges here, because the Lawyers in *Ireland*, it seems, did make a great doubt of it. And it was also an Opinion and Judgment of the favourable Side, for it was to confirm a Predecessor's Lease. But,

Thirdly, Certainly, my Lord, the Case is mistaken, for the Surrender could not be good without the consent of the Bishop, which is also added in the end of the Case there: He is the Patron, and must necessarily confirm their Acts to make them valid, especially they being instituted, and given to him for his Advice in the Government of the Church, and the Disposal of its Lands.

Fourthly, my Lord, I have this further Answer to give it, that my Lord *Coke* says in 1 *Leon. 234.* (and 'tis not denied) that this Surrender was by Act of Parliament, or else it had not been good. And beyond that,

Fifthly, I have by me a Manuscript of my Lord *Dyer's* Reports, the most Authentick one, which was my Lord *Coke's*, and has his own hand to it in sundry Places; and by that he does often correct the Prints of *Dyer*, and so also he might have done in this Case; for there all these Latin Words are left out, there is not one of them, nor any space left to put them in, nor any blot for their being rased out, it is an Addition of the Publisher, and printed in another letter than the rest of the Case is; 'tis not in that Book, which I take to be the truest Original of *Dyer*: Besides, my Lord *Coke's* Answer, that it was by Act of Parliament, makes an end of all. And truly, my Lord, that the Determination of such things should be by Act of Parliament I shall cite you one Authority, and I borrow it from Mr. Solicitor, who has mentioned it before, 'tis *Rot. Parl. 8. R. 2. num. 11.* and it is taken Notice of by my Lord *Coke*, who cites it in his 4 *Instit. 228.* To which I add also, that the Liberties were seized, and the Case determined in Parliament: There the Case was this, the Mayor, Bailiffs, and Commonalty of *Cambridge*, had committed a notorious Uproar and Tumult; they had assaulted the Colleges of the University, they had imprisoned the Vice-Chancellor, and some of the Scholars, they had extorted from them two Releases, and a Bond of 3,000 Pounds; and after all this great Uproar and Tumult a Writ went out, but whence? From the Parliament, and there they are summoned to appear, and there they are to shew cause why the Liberties should not be seized as forfeited; and there upon full hearing it was adjudged by the King, with the full Consent of the Lords and Commons in Parliament, that the Liberties should be seized as forfeited: All this is taken notice of by my Lord *Coke*. But yet, as if he thought it not enough to have said all this in the Body of the Book, he puts down in the margin of that Book these words, *Nota*, It was done by Act of Parliament. And that it was taken, that a Corporation cannot be dissolved but by Parliament, I shall cite your Lordship *Davis's* Reports, *fol. 1. b.* where he says, that neither by the Surrenders, nor by the Acts of Parlia-

ment that gave their Possessions to the Crown, were those Corporations dissolved; the Surrender did not do it, and the Acts of Parliament did not intend it.

But, my Lord, I shall dismiss this Point, for indeed it will not conduce to the Question, which is not, *Whether a Corporation be Surrenderable, or no*; but *Whether it be forfeitable*?

Now there are many things that are renounceable, that yet are not forfeitable; an Annuity *pro Consilio impenso & impendendo* may be surrendered, and so is *Empson's* Case in *Dyer, fol. 2.* but it cannot be forfeited for Treason; 'tis a Thing that adheres to the Person, and there is a Privy in it that makes it not forfeitable; so a Guardianship in Soccage, a Man may renounce it as well as he may Executorship, but they are neither of them forfeitable; and so is the Trust of a Freehold, and several other like things.

My Lord, as to what Mr. Solicitor has said, *That a Corporation may be seized, and therefore it may be forfeited*; I think certainly that is no good conclusion at all. Those words of Seisures of the Liberties, and seizing into the King's Hands, he has with great Learning collected a great many Records about them, and they make a great sound at first, but when they are narrowly looked into, they make nothing of Argument at all; they have slept a long time, and are but imperfectly remembered; they may serve to amuse People, but when they are considered they will signify very little. *Vet. Nat. Br. fol. 161.* He distinguishes there (and every Body must) between the Causes of the Seisure of a Franchise into the King's Hands, and the Causes of a Forfeiture; and there he sets down several things, and then adds *stude differentiam istorum*; so that there is a Difference, and that Difference ought well to be advised upon. In 2 *Ed. 3. 28 & 29. Scrope* gives the Rule; says he, in some Cases a Franchise ought to be taken into the King's Hands, and in some Cases it ought to be seized till a Fine be made to the King; and in some Cases it ought to be forejudged; and so he makes Three distinctions. Now, my Lord, this will answer (as I shall observe by and by) all that Mr. Solicitor has produced about Seisures, either by Act of Parliament, or for a Fine, or for a Distress for want of an Appearance. If a real Action, there goes out a *Grand Cape*, and there the Lands shall be seized into the King's Hands, and that looks big upon Record: but if you come to know the meaning of it, 'tis only that the Sheriff should return Issues upon it, and that is a very little thing; the King has no Pretence to the Title of the Land, nor is the Suit His Suit, but the Party's: So the seizing of a Bishop's Temporalities, and the Lands of Priors Aliens, and the like. But Words must have a reasonable and legal construction; as when a Statute is made, that if a Man does so and so, his Body shall be at the King's will, and he shall do with him at his Pleasure, as in the Statute of Maintenance, and the Statute against transporting of Money, that is nothing but that he shall forfeit the Use of his Body, and the Liberty of his Body, and shall be imprisoned for the Offences.

All this I shew, to distinguish about this word Seisure, and by that distinction to answer the weight of all the Records that Mr. Solicitor has cited. Those Seisures that were of any Towns, I say they were only till they had made a Fine to the King and when the King had so seized them, what did he do? He put in a *Custos* upon them, which was

to keep them in good Order ; he put them into a safe Hand, but it was never intended to suspend or destroy the Corporation : For the Corporation went on as it did before, it might sue as it did before, and was as liable to be sued as before ; it was to put a Guard upon them, not for their Destruction, but for their Preservation ; to quell Insurrections, to keep Peace and good Order among them ; the Seizure of the Liberties was not a seizing of the Corporation, because a Corporation is not a Liberty, it cannot be seized ; for the King cannot exercise the Liberty of a Corporation ; the King may seize the Mayoralty, and the King may put in such a Deputy, that may be a *Custos*, he may seize the Sherifalty, he may seize a Leet, or a Market, or he may receive the Profits of them, and execute by Deputy the Purport of them : But what can he do when he has seized the Corporation ? can he himself be the Mayor, Commonalty, and Citizens, of the City of London ? or can he put in any one to be such Corporation ? it is not a Thing manurable, 'tis not a Thing seizable, nor ever was seized ; for the King can seize nothing, but what he can have and use when he has seized it. And therefore all those *Custodes* that were put into London, upon the seizing of the Liberties, were only in the Nature of the Lord Lieutenants, that were to keep Order in the City, and prevent Breaches of the Peace ; but still the Customs, the Courts, and the Usages of the City went on as they did before ; I cite not any Record indeed for it, because there is no need, 'tis so well known ; but if there be any doubt of it, we will make it appear, that during all those times Mr. Solicitor speaks of, who has cited a great many Records, and if he can find as many more, yet still all along the City was in *Statu quo*, as to their being a Corporation ; they did sue and were sued, and they did all manner of Acts as a Corporation, which shews that it was not so much as suspended, much less forfeited. This is without Contradiction very plain, during all the time of those Seizures. If it had been forfeited at all, it must have been extinct ; and if there could have been a Judgment given against it, it could not have been taken into the King's Hands, but it must have been an *Ouster* of the Liberties.

In *Yelverton* there is a Case of the King against *Staverton*, a *Quo Warranto* is brought against *Staverton* for keeping a Court Leet, and a Court Baron, within the Hundred and Manor of *Warfield* ; the Defendant disclaims the Court Leet ; as to the Court Baron, the great doubt is whether a *Quo Warranto* can be brought for it, it appearing that he had a Manor ; for that is inseparable to a Manor. For he that has the *Demesnes* and *Copyholds*, must call his Tenants together to do Suit and Service ; and 'tis agreed indeed a *Quo Warranto* will lie. But *Fleming* Chief Justice, and *Fenner* doubted of it. And in that case Judgment must be, that he shall be ousted of the Liberty and not that it shall be seized ; for the King cannot use it, and therefore 'tis impossible, that it should be taken into his Hands : And so 'tis, as I said, of a Bishop's Temporalities, and the Lands of Priors Aliens, and the like ; it is a mere Personality, and cannot be seized.

But Mr. Solicitor says a Corporation can commit a Crime : Truly I do very much question that, nay, I shall deny it by and by : But if they do commit a Crime, the Punishment must be by other means than a Forfeiture ; and I will

cite your Lordship a parallel Case : For as I said before, a Corporation is an Ability or Capacity like that of a Denizen, and so can no more be forfeited than a Denizenship can. There is *Verseline Manning's* Case in *Lane's Reports*, 58. and the same Case is in *Rolls I. Abr.* 195. in an Office of intrusion, it is there found, that *Verseline Manning* was a Denizen by Letters Patents, and in the Letters Patents there was a Clause, as is usual in Patents of Denization, Proviso, that *Verseline Manning* the Denizen should do liege Homage, and that he should be obedient and observe the Laws of this Realm. The Office finds that he never did Homage, nor was obedient to all the Laws of the Realm ; and if it was urged that consequently he had lost his Denization, for Breach of the Condition. No, says the Court there, by no means, this must have a reasonable Construction, not to take away his Capacity of being used as a Subject, and so suing and being sued ; but the Proviso is to be interpreted thus, for his Non-obedience of the Law he shall forfeit the Penalties appointed by the Law : So, I say, a Corporation, if they do offend the Laws, shall forfeit and undergo the Penalties appointed by the Law, but not be disincorporated, any more than a Denizen undenized.

My Lord, the next Point that I go upon is, what I at first mentioned, and that is this, That this *Quo Warranto* is not well brought, and there can be no Judgment given against us upon it, if we should admit (which I do not) that a Corporation is forfeitable ; or if I should grant (which I do not neither, but shall come to that afterwards) that the Particulars assigned are causes of a Forfeiture.

Now this *Quo Warranto* is brought against the Mayor, Commonalty, and Citizens, of the City of London, that is to say, against the Corporation (for that is the Corporate name, and no Mansure is so vain as to think that can be the Christian Name or Surname of any natural Person) therefore I say 'tis brought against us as a Corporation, and charges us, that we have usurped the Liberty of being a Corporation, under such a Name, for a Month before the Information brought. Now, my Lord, I say this is impossible, and this is repugnant ; for the Question is here, whether we are a Corporation, and that is a Liberty to be Plaintiff and Defendant ? and then comes Mr. Attorney, and admits us to be Defendants ; for he sues by that name, and yet the very question that he does bring us to dispute on, is, whether we are capable of being Defendants, or no : That is just as if he should have said, I have brought you into Court, and you must be Defendants, or else I have brought you here for nothing ; for there is no cause depending without Parties, Plaintiff and Defendant, and then I will assign for the cause of my Suit, that you are no Defendants ; nor is it possible for you to be Defendants.

My Lord, this is plain reason ; but I shall strengthen it with great Authority, and that is the Case upon a Writ of Error, out of Ireland, to reverse a Judgment given in a *Quo Warranto* against the Corporation of Dublin : It is in *Palmer* the first Case, and 2 *Rolls fol.* 113. & 125. A *Quo Warranto* is brought against *Cusack*, and other Aldermen of Dublin, who pretended to have Privileges, and a Guild, and to be a Corporation, and this I presume is for their being a Corporation ; for there is a *Curia advisare* writ as

to the Corporation, and so 'tis not put in the Case, but 'tis also brought for several Liberties that they did pretend to claim; as that they only, and none others, should sell and buy all Merchandizes, and no Body should buy of another, or sell to another, but to them; that all Merchandizes should be brought to their Common Hall, &c. now, as to these Liberties they are forejudged, that Liberties should be seized, and they ousted; as to their being a Corporation, *Curia advisare vult*; so the Case is in *Palmer*: But in the other Book in 2 *Rolls* 115. it is agreed, if a *Quo Warranto* be brought to dissolve the Being of a Corporation, it ought to be brought against particular Persons, for the Writ supposes that they are not a Corporation; and 'tis to falsify the supposal of the Writ to name them as a Corporation. Now here this Writ, it supposes them to be a Corporation, or else they could not be Defendants; and then it comes and falsifies that supposal, by assigning that they are no Corporation, nor ever were, or if they had been, they had forfeited it; and so all the Foundation that this Writ stands upon is destroyed.

In this Case of *Cusack* I am assisted further with a Report of it in my Lord Chief Justice *Hales's* Book: A Report of very great Authority with all Men of our Profession, and there he says expressly, if a *Quo Warranto* be brought for the usurping a Corporation, it must be brought against Particular Persons, because it goes in Disaffirmance of the Corporation, and Judgment shall be given that they be ousted of the Corporation; but if it be for Liberties claimed by a Corporation, then it must be brought against them as a Corporation.

Lord Chief Justice. What Folio is it in my Lord *Hales's* Book, Mr. Recorder.

Mr. Recorder. It is my Lord *Hales's* Common Place Book, which is in *Lincolns-Inn* Library, fol. 168. *placito* 7. and this is our Case directly. If you go about to say, our Corporation is forfeited or must be dissolved, nay more (as you say here) we never have been a Corporation; or by Forfeiture our Corporation is lost long ago, then there is nothing can come before the Court properly, but that *J. S.* and *J. N.* particular Persons have usurped to be a Corporation, when they are none. This Information is brought in Disaffirmance of their being a Corporation; and therefore there must be set up some Body capable of being a Defendant in such a Suit; and who can that be but Particular Persons, which ought to have been named, as they are in that Case of *Cusack*? For as Judgment of ouster of particular Liberties, given against particular Persons, will not bind the Body of the Corporation; so the Judgment, that they are not a Corporation, will not be good, unless it be given against those Particular Persons that usurp the Corporation. And I do say further, that individual Freemen of *London* cannot possibly be bound by this Judgment: For they are not here before you, nor were they ever so; for it is the Corporation here that is made the Defendant. And I do not now consider the Number that make up that Body (*London's* being so populous doth not alter the Case) for the Case is the same, if it were the Corporation of *Queenborough*, or any other petty Corporation. Suppose Twenty Men be a Corporation, or pretend to be a Corporation, and you come to enquire by what particular means these

Twenty Men pretend to be a Corporation, or, as the Words of this *Quo Warranto* are, *usurped* to be a Corporation; you must not say that they are one, and then say that they usurped it, for 'tis not the Corporation that usurps to be a Corporation, that is impossible; but it is the particular Persons that usurp to be a Corporation, when indeed they are not one. A Corporation may usurp a Market, they may usurp a Leet, but they cannot usurp themselves. In *Townsend's* Book of printed Precedents (which is a laborious thing, and wherein he has collected all the Precedents, he could meet with, of *Quo Warrantos*) there is but one in all that Collection, that was brought against any Persons upon the Score of being a Corporation: And what is that? How was it brought? Not against a Corporation that was, but against a Corporation that never was, that is to say, a Parcel of People, that took upon themselves to be a Corporation, when they were not, and that is the same single Precedent in *Coke's Entries* 527. tit. *Quo Warranto*. The King against *Helden*, and other Burgesses of *Helmshley*, for usurping to be a Corporation, by the Name of The Burgesses of *Helmshley*. And how does the Attorney General there bring the Writ? He brings it against particular Persons. My Lord *Hobart*, who was then Attorney General, never thought he could have maintained his *Quo Warranto*, or expected Judgment against them, if he had brought it against the Burgesses of *Helmshley* generally, and then have said, that they were no Corporation; but he brings it against those particular Persons, and thereupon they come in and disclaim their being such a Corporation, and the having the other Liberties; and the Judgment is, That of those Liberties those particular People should be ousted, and should not intermeddle with them.

Now, my Lord, what Judgment can be given in this Case, that the Mayor, Commonalty, and Citizens, shall not intermeddle with the being of Mayor, Commonalty, and Citizens? 'Tis a very reasonable Judgment that *Helden* and those particular Persons should not intermeddle with such a Liberty, or be in such a Corporation; but if such a Judgment be given against the City here, that would be as much as to say, That you have never been what you are, or you shall never be what you are, that is the English of it.

And, my Lord, I am sure as there never was but one *Quo Warranto* that we can find any printed Precedent of against the Being of a Corporation, so that very Precedent is not against those that really were so, but particular Persons that usurped to be so. And if you search all the Records of this Kingdom, and all the Books in all the Offices, you will never find any that is brought against a Corporation, for being a Corporation, upon pretence that they might be made none by a Forfeiture; and no Prerogative of the King shall extend to excuse this, but his Action shall abate, if it be not right brought, as well as the Subject's, and so is *Plowd's Com.* fol. 85.

Further, my Lord, I have another Authority in this point; and that is in the Case of the Corporation of *Maidenhead*, which hath been so often cited by Mr Solicitor, and it is in *Palmer*, 80, 81. where it is said. When the Attorney General hath supposed them to be a Corporation, it is not usual to plead them to be a Corporation; otherwise if he had questioned

them as Inhabitants of such a Town, then they ought to enable themselves: Those are the Words of that Book; and what can be more plain? Here the Attorney General supposes us to be a Corporation, his Replication flies in his own Face; and he having supposed it at first, he is bound not to question us for our being a Corporation at any time after. As to the business of *forisfecerunt*, it is a strange and a new word that never came into any *Quo Warranto* before, that I know of; but we will accept the new Word, but not the Thing, and that they have forfeited by such and such Acts: This sure will be very hard upon us; for if it be a Forfeiture, it must relate to the time of the Thing done, to the time of the making the Act of the Common Council, to the time of the Toll levied, or to the time of the Petition; and if it do so, it must relate like a Forfeiture for Treason; it must reach all mean Acts, all the Leases that we have made since are gone; all the Judgments that we have given in any Cause are *coram non Judice*, and void; all the Acts of the Corporation are overturned by this Forfeiture, and we have been under a vast mistake all this while. We have had no Mayors nor Sheriffs, no kind of Officers, no manner of regular and legal Proceedings; but we have been under a great mistake ever since this Money was ordained or levied. We have forfeited all; and that it is so, is plain, because in all *Quo Warranto*'s wherein Persons are convicted for usurping of Liberties, there is a Fine set upon them for continuing that Usurpation, and reason good; then if it be an Offence for continuing the Liberty, we must be fined for doing it ever since the Forfeiture, when, if Mr. Attorney General's Rule be right, there has been no such Corporation; but we ought to have discontinued all our acting as a Corporation, and laid it down; and so every Step that we have taken since hath been irregular, and every Act void.

If so be an Action be brought against Baron and Feme, and the Plaintiff should in his Replication say, they were divorced several Years before, has he not undone all his pleading? Here then is our Case, Mr. Attorney General admits us to be sueable, and yet charges us to have no capacity to be sued. I do implead you, but you have no right to be impleaded; here he brings us into Court, and when he has brought us here, he quarrels with us for being here; he makes us Defendants, and then questions whether we ought to be so: and so his great Charge against us is, that we are what he would have us to be, and what he hath made us to be; for if a Month before the Information, the Corporation was not, but the very Being of the Corporation was usurped, how come we at the Month's end to be Defendants? Here comes a new Creation interposed in that time, and makes us Parties sueable in the Court, when by the Charge in the Information we were not so a Month before.

And then, my Lord, the Information is not quite so bad, but the Replication is worse: First he takes issue, that we never were a Corporation at all; and the next thing is, if ever you were a Corporation, you have ceased so to be, because you have forfeited it so and so several Years ago. This is just then, to put a common Case (and I confess, a very familiar one it is) if I should bring an Action against a Man, and when he hath

pleaded, I should by way of Replication set forth there never was any such Man as the Defendant, and take issue upon it; or, if there were, that he was dead Ten Years ago: And yet this is the Substance of Mr. Attorney's Issue, and his Replication.

My Lord, the Authorities before cited in *Palmer*, *Coke's Entries*, *Rolls*, and my Lord *Hale's* Common Place Book, are not all; for I have some other that never saw the Light in Print yet; and that is the Case of the King against *Bradwell* and others, *Trin.* 18 of this King. A *Quo Warranto* was brought against them for usurping to be a Corporation or Company of Musicians; it had been a strange thing, if the *Quo Warranto* had been brought against that Corporation, and then the Attorney General had said they were no Corporation, nor ever were; there they did think best and fittest to go against *Bradwell*, and the rest, and that by Name, and only so, not against the Body Corporate. So in that Case of the Corporation of *Worcester*, which was lately tried before your Lordship in this Court; when the *Quo Warranto* was brought against such Men for usurping to be all Aldermen and Common Council-men, if the Attorney General had once called them Common Council-men, it had been a great Repugnancy for him afterwards to say that they were none, or if they were, that that Privilege of theirs was lost so long ago. So in the Case of the *Quo Warranto* against the *Bermudas* Company; it was against a Corporation, and against particular Persons by Name both. These things have been considered, and doubtless they have gone on in an ordinary way. I must confess, I was not privy to that particular Case; but by the Report of that Case, which I have seen, I have been informed that the Corporation never appeared; for they said, 'tis not Sense for us to appear; for it being a Question by what Warrant we are a Corporation, it is not we, supposing us a Corporation, that do usurp, but the particular Persons that do usurp, if it be at all usurped. Now, my Lord, if that had been a regular Suit, no doubt but there would have been Judgment against the Corporation, which there was not; and certainly the Replication of Forfeitures was not good against the Corporation, but against the particular Persons only.

All Mr. Solicitor's Authorities for seizing hold true, if the Corporation would never appear: And what is the Reason it should be brought against *J. S.* and *J. N.* but because Corporations do never appear in such a Case, in regard it were not congruous they should appear? for the *Quo Warranto* must intend it so, that they were not a Corporation in Being, by implying a Forfeiture. Then say I, no Judgment at all can be given upon this score; *Non admittitur exceptio ejusdem rei, cujus petitur dissolutio*; a Man shall never be admitted to controvert that to be in Being, which he himself desires should be destroyed, and so has allowed it to be. Shall Mr. Attorney be admitted to deny the Supposal of his own Writ? And truly I think I might very well leave this Part of the Case, and this Point, to Mr. Attorney General himself; for if he will have any thing to be answered by us, he must maintain us to be a Corporation capable of answering; and so I have reason to expect, that against his own Replication he will be pleased to support the Being of our Corporation, and so dismiss us hence.

My Lord, I have done with this Point, and now I come to the Replication, which indeed is a kind of a new *Quo Warranto*; for it brings in new Matter, and therein they do charge Two Forfeitures; the one is, by reason of the Abuse of the Market, the other is, by reason of the Petition. My Lord, I shall answer both of them. That we were seized of the Market, that is pleaded, and that is agreed: That we were seized of Tolls, and were to have reasonable Tolls, that is agreed too: That there is a Custom in *London* to have Common Councils, and that this was by Common Council, is agreed; all this is agreed by the Demurrer: That this Toll (tho by the way I must confess, and will agree with Mr. Solicitor, that it is not properly to be called a Toll; for a Toll is only for Goods sold; and when they are sold, in Recompence for the Officer's Attendance for the Testification of the Contracts, and the Entering them in their Books; but I agree, this is not such a Duty for Goods bought and sold, but it) is for the Accommodation of Persons repairing thereunto for their Stalls; and, if I would call it by any particular Word, I had rather call it Stallage than any thing else; it is for those Accommodations, which we have been at vast Charge in preparing and providing, and for the Maintenance of requisite Officers, and for the cleansing of the Markets. Now Mr. Solicitor objects, That we cannot prescribe for a Toll uncertain, and he cites the Case of Murage, and the like; and so I must confess, where Murage is granted, 'tis commonly a thing certain; so is Pontage, and the like; but I believe (if I had thought that it would have been a Point insisted upon) I could have brought you Instances where Murage, and such like things, have been granted in general, and they would have been antient ones indeed: And there is a Necessity for it in some Cases; for when a Town will repair its Walls, the Charge may be greater or less, as the particular Accidents may be, and so perhaps a certain Duty would not do it. When a Wall is to be built, there the Duty may be certain; but when it is built, to keep it in Repair the Duty of Murage may be uncertain, according to the Charge; and if the Case be not so, it will come little to our Purpose, which is a Duty upon a great and a continuing Charge. I will name him some things that he must agree, and I know he will grant, are uncertain, as Pickage and Stallage, which are Duties for picking in my Earth to dig Holes for the Posts of Stalls to be fixed in: Now there can never be, nor ever was, any circumscribing in those matters; for Circumstances in every of those cases must govern it. If I have Occasion for my Stall to use a Foot of Ground, one sort of Sum is necessary; if ten Feet, another Sum; it ought to be equal indeed, but it could never be good, if it were limited to a Sum certain; and in all Grants that ever were of Pickage and Stallage, they were never reduced to a Certainty; and those are things too that relate to a Market.

And so I take it to be for Keyage, Anchorage, and the like; for when there are Posts or Places for Ships, to which they may be fixed, the Owner of the Port may have a Compensation for that, but that must needs be uncertain, according to the Circumstances; if a Ship be bigger or lesser, if a Ship stay a Month or a Day, it is not fit the same Rate should be paid; nor is it usually grant-

ed by particular Words, *Co. Entr.* 535 & 526. *Placit.* 4. The King against the City of *London* for the Water-Bailage, and other things. They pleaded only a Right in general, and do not say what the Particulars were; and yet one of the things demanded in the *Quo Warranto*, was, as I said, the Water-Bailage; which, sure, if any thing ought to be certain, that ought. In that Case it was good Pleading; tho I think I could say more against it than this thing, that is in the nature of Stallage; so that all that Mr. Solicitor hath built upon that must, I think, needs vanish.

My Lord, I do not think but *London* ought to be, and is as much under the Obedience and Correction of the King, as any City; but yet I believe, in these Cases of their Customs, you will give that Allowance and Indulgence to it, that all your Predecessors have done, which is greater than they have given to any other Corporations in the Kingdom, and that because it was *London*. That there should be such a thing as a Foreign Attachment, I think, is hardly allowed in other Places; I am sure, I have known it denied in some, that a Contract in Writing should be equal to a Book-Debt; that a Feme Merchant should sue or be sued without her Husband; or if he be named, he should be only named for Conformity. You take Notice, that *London* is a Port Town, and that Men that trade there, sometimes go beyond Seas, and in their Absence their Wives trade by themselves, and perhaps carry on distinct Trades while they are here; and so they may do in other Places, may be; but only for the sake of *London* do you take Notice of these things there, and not elsewhere. Their Penalties, that are sued for in their Courts, a great many of them are such as would not be well maintained in other Courts, or in any other Place; and yet they are maintained there, as namely, That their Penalties should be sued for before the Mayor and Aldermen, when the Benefit of them goes to their Use; and yet that is allowed in the Eighth Report, notwithstanding the grand Objection, that they are in some sort Judges and Parties, *Rolls* 2. p. *Abr.* Tit. *Prescription*, Letter H. Fol. 266. N^o. 2. & 3. The City of *London* may prescribe to have a Court of Chancery in *London*, of matters tried in the Sheriffs Court, tho such a Court cannot be granted by the King's Letters Patents; but the Mayor and Citizens of *York* cannot prescribe for such a Court, because it were very dangerous that such petty Corporations should have such Courts. And, whatsoever is said by my Lord *Hobart* in his Reports, 63. I do affirm, there is no Act of Parliament that erects a Court of Chancery in *London*, or the Cinque-Ports. If Mr. Solicitor had strugled with me about the Being, or not Being of that Act of Parliament, I would have agreed with him, that there was no such, sooner than some that he says are none. The Customs of *London* have been upheld, and, I must confess, I think that is very strange, even against the general Words of an Act of Parliament, 2 *Inft.* 20. A Gaoler in *London* may permit his Prisoner, that is in Execution, to go at large with a Battoon in any Place within their Jurisdiction, and it is no Escape. And so is *Plowden's Com.* 36. A Citizen of *London* may set up one Retail Trade, tho he was bred to another, notwithstanding of the Statute 50 of the Queen. And for a general Rule take that that is said in *Palmer* 542. those of *London* may

may prescribe against a Statute; and the Reason is because their Liberties are confirmed by Statute, and other Towns are not. In *Rolls Rep.* 1. p. 105. *Spike against Tenant*, my Lord Coke being then Chief Justice, says, We take notice of the Customs in our Courts, and other Courts in *Westminster-Hall*, and in *London*. *Fleetwood*, Recorder of *London* says a very strange thing in 1 *Leon'* 284. *Hollinshead's* and *King's Case*, and in 4 *Leon'* 182. that the King's Courts ought to take Notice, that those of *London* have a Court of Record; for if a *Quo Warranto* issues to the Justices in Eyre, it does not belong to them of *London* to claim their Liberties; for all the King's Courts have Notice of them. And truly I have been informed, I mean by Copies of Records, that when the Justices in Eyre came to the *Tower*, this was a Privilege allowed to them, they were not bound to set forth their Liberties as others were.

My Lord, I think this, as it is pleaded, is a Duty very justifiable, and very well payable, by virtue of this Custom. I do agree, as I said, a Toll is properly for Goods sold, and this is a Custom for the Accommodation of those that brought Goods to be sold; and it is like that 1 *Leonard* 218. my Lord *Cobham's Case*, a Duty paid for the standing in the Cellar; and there that is held to be good. In *Rolls* 2 p. of the *Abridgment*, 123, Letter B. *Hickman's Case*, the Lord of a Manor may prescribe to have the Eighth Part of a Bushel of Corn in Four Bushels that are brought to the Market within the Manor, in the name of the Toll, and that is for Stallage only, for it is said there, whether it be sold or not. And in the same Book, fol. 265. the City of *Dublin* set forth, that they are Owners of the Port of *Dublin*, and that they maintained Perches in the said River, to direct the Ships in the deep Channel, and that they kept the Key and the Crane; and therefore, in Consideration of that, they prescribed and demanded Three Pence in the Pound for all Merchandizes in the said Port, and it was held good. Now I agree Toll-through, that cannot be prescribed for simply and generally; but by Toll-through I mean, as you know, for passing and repassing thro' only, and not for staying. But yet even that may be prescribed for too, in Consideration of repairing a great Highway, or a very foul Way, or maintaining a Bridge, and the like. And therefore, if our Considerations here be as good, then we maintaining those great Places may prescribe for this Duty, as for passing thro' the Streets, tho it were no Market.

There is a famous Case reported in *Rolls* 1 p. Fol. 1. & 44. and it is in 2 *Bulstrode*, and also in *Moor*; it was the Case of the Bell-man of *Litchfield*: A Prescription is made, that the Corporation of *Litchfield* hath a Market, and they ought to repair the Way to it, and to appoint a Bell-man that should sweep the Market-place; and that for this the said Bell-man, time out of mind, had taken of those that brought Corn to the said Market, and opened their Sacks to sell, a Pint of Corn, if but a Bushel or under; if more, a Quart. So that if it were opened and not sold, yet he was to have that Duty, and that Prescription was adjudged to them by all the Judges, and yet it does not appear there, whether the repairing that Way cost them 5 s. or 5,000 l. and yet by Intendment they would not account it un-

reasonable, tho it might have been urged it was very unequal; if they could take a Pint for that which was under a Bushel, perhaps they would take, by that means, half of what the Party brought; but if there were Fifteen Bushels, they had but a Quart, and this was objected as to the inequality of it; and yet they all passed over that by a reasonable Intendment, and would not deny the Prescription to be good. And the Case of *Crane* in *Dyer*, and the Case of 21 H. 7. 16. are admitted to be good Law, where the Town of *Gloucester* prescribed for a Toll of Boats passing by the River near the Town.

Now, my Lord, for ours, there was very great reason to induce it, the great Alterations that were made in *London* by the Fire; and it was not the first Time that *London* was burnt: And if there should be War, and so great Alterations and Confusions, there were great cause, that the City, that lays out great Sums, and must be at such a publick Charge, should not be Losers by it.

And we do set forth more than they do in the Case of *Litchfield*, that we provided the Market-places at our own charge; and if they will use them, they must expect to pay some compensation for it; that we do keep Officers, and pay them for cleansing and keeping Order in the Markets: And above all that, we provide Standings and Stalls, and such Accommodations, and that I am sure is a Provision no Lord of a Market is bound to make, unless he will; and therefore the Market-people, that are accommodated by it, have great reason to pay for it; and we pay all the Taxes for the Market-places, for the Ground is ours; and that is not alleged in the Pleading indeed, but it must be implied, because we pay the Taxes, and they that have the Standings are not liable to pay the Taxes: And so is the Judgment in *Rolls*, 2 p. 238. and the 2d *Abr.* 289. And in the Case of *Cusack*, Justice *Dodderidge* says, that the redeeming of one Fair from the Abbot of *Westminster* cost the City of *London* 8,000 l. for he had a Fair at *Westminster*, and a Market for Forty Days, and that during that time no Sale should be in *London*, or the Places adjacent; and a great Rate it was, if it were so. The Measure of a Toll is according to my Lord Coke 2 *Inst.* 58. when the thing demanded for Wares or Merchandizes does so burthen the Commodity, that the Merchant cannot have a convenient Gain by trading therewith; and thereby Trade is lost or hindered, then it is an evil Toll. But here indeed the Market-people are better accommodated than ever they were; and Trade is so far from being discouraged, as that it is increased, as is implied in the Replication; for it is said, we receive 5,000 l. a Year, which if it were so unequal, would not certainly be paid, nor could be, if there were not great Trade there. So that the Increase of Trade is the thing complained of in this *Quo Warranto*. And the Truth of it is, I have examined and looked into the Fact of these things, and there is nothing in this By-law, but what was really anciently paid, except only in one Instance, whether it were 6 d. or no, that was paid when a Cart was drawn by Two Horses, which now is but 4 d. and if we have increased the Toll, which I doubt whether it be so or no, it is only in a very trifle.

Now, my Lord, this Case, I think, is a stronger Case than that in 5 *Rep.* the Chamberlain of *London's Case*; there is no Consideration of Stalls,

Stalls, or cleansing the Place, but only they had an Officer to search and view, and that was a new Appointment of their own; they could not prescribe for it, but it was thought a Penny was a reasonable Recompence, and the Subject had a Benefit by it; and if he would bring his Cloth to *London* to be sold, he should come thither to have it viewed, and give a Recompence for it. Now *London* is all Market indeed, every Shop is a Market; and it hath been well said of the Judges several times in *Westminster-Hall*, that *London* is the Market of all *England*; and there is never an Acre in *England*, but is the better for that.

As to the Imposition upon Coals, that is but an Inducement; and an Inducement is never to be relied upon; it is not to be stood upon; and Mr. Solicitor did very honourably decline it, and did not make any thing of it, nor trouble the Case with it.

When the City did make this Act of Common Council, they did consult with their Counsel for matter of Law, and with their Officers and Fellow Citizens for matter of Fact, and did adjust these Rates, and enacted them to be paid, they being reasonable ones, and according to the ancient Usage; but if they were mistaken, it will be no cause for you to give Judgment against them, for many other Reasons: As first, you cannot judge this to be unreasonable. I have not heard one word said, that this is an unreasonable oppressive Toll. Here is Money levied; what then? If it be a reasonable Sum, it is not so great, it does not deserve the name of Oppression. I say, it is not so great an Oppression, if they should have been mistaken in the Form of instituting the levying of it; if they might have done it under their Common Seal, and now they have done it without that by Act of Common Council. Nay, it does not deserve that you should judge it unreasonable; you cannot do it here, for the Considerations are meritorious, and equivalent to it, the great Charge they were at in building, and they still daily are at in cleansing and repairing, and providing Stalls. But however, the Case is not so disclosed here, that you can judicially determine this to be an unreasonable Toll; according to the Rule in *Coke's Magna Charta* 222. the Toll of a Market need not be certain, only it must be reasonable; and what shall be deemed reasonable the Judges must determine, if it come judicially before them. So shall reasonable Customs, and reasonable Fines, and reasonable Services, and reasonable Time to remove Goods, and the like, they must be judged by the discretion of the Justices upon the true state of the Case before them. Now this Case must have all its Circumstances stated and agreed by Demurrer, or found by Verdict. And so is 4 *Rep.* 27. b. and *Hobart* 135. and 174. as in the Case of Copyholders Fines, the Quality and yearly Value of the Land must appear, or else there cannot be Judgment, whether it be reasonable or no. In the 13th *Report fol.* 3. & *Croke Car.* 196. where the Question was, Whether the Lord of a Manor might assesse two Years and an half Value of Copyhold Lands, according to the Rack-Rents for a Fine upon Surrender and Admittance, and upon Non-payment to enter for the Forfeiture; as suppose Land, it be rented at 20 *l.* a Year, here is 50 *l.* demanded for Admittance; there it appeared

judicially that it was unreasonable; and so it was adjudged, because the Value was certain. But who can here say, whether the providing of Markets costs 5 *s.* or 500 *l.*? it is not estimable. Perhaps we have overbought all these Tolls that they call unreasonable; we aver it to be reasonable, the Demurrer agrees it to be so, and you must intend it to be so, unless the contrary be set forth clearly in its Circumstances; for he that will have a Forfeiture, must shew the Circumstances to make it out.

My Lord, another thing is this, to answer Mr. Solicitor in that point: I say, an unreasonable By-law is no reasonable Cause or Colour for forfeiting a Corporation, admitting it to be unreasonable, tho I grant it not. My Lord *Hobart* in *Norris and Stap's Case*, *Hob.* 211. says, that the power to make Laws is given by special Clauses in all Incorporations, yet it is needless; for that is included by Law in the very Act of Incorporating. For as Reason is given for the natural Body for the governing of it, so Bodies Corporate must have Laws as a Politick Reason to govern them. Reason is a Faculty in them as 'tis in a man, and may err; and therefore says he, If the King do grant Letters Patents of Incorporation to Persons, and he doth thereby make Ordinances and By-laws himself, they are subject to the same Construction and Rule of Law, as if they were made afterwards by the Corporation. For the King can no more make an unreasonable By-law than a Corporation; but if the King do, shall that affect the Corporation, and make the Corporation void by way of Repugnancy, or an instantaneous Breach of Condition? No, it shall not. And therefore as they may receive unreasonable Rules from the King, without defeating of the Corporation, or having their Being thereby vacated; so they may make unreasonable By-laws without the same Danger of destroying the Corporation. The Cases are very many, wherein By-laws have been judged unreasonable; the truth of it is, there is a great Misfortune in the penning and making of those By-laws; by some Means or other there is something discerned that still proves an Exception to it, as we see in the Case of the *Carmen* and the *Woodmongers*; their By-law was made, and re-made, and corrected again and again, before it could be made to hold Water in this Court. So in the *Taylor's of Ipswich's Case*, and *Bradnox's Case*, which was here lately. All these have been adjudged void; but what then? In all these Cases it was never said, Hereby your Corporation is destroyed, you have erred in making a By-law, and therefore you have lost your being of a Corporation. Besides, if there were but a Colour for it, and it were any thing tolerable, surely that were enough to make us excusable in such a matter. If it has been received, as we agree it has, the Officers are Trespassers, every individual of them are sueable, and any man may bring his Action against them. But they that come to the Market, think not fit to complain; if they did not like the Market, they would not come at all; and if they did not like the Payment, they would not come neither; and there is no levying of any thing unless they do come.

Now, my Lord, I will admit the levying and the receiving, and yet I say this is no Forfeiture; for here is a Mistake of Law, or a Mistake of Fact, by Colour whereof Money is received:

This

This by no Means will work a Forfeiture of a Corporation; for at that rate every Penalty that has been levied by a By-law will be adjudged a Levying of Money without Law, and so forfeit the Corporation; which has not been done in other Cases of By-laws, and those much worse than this; because most of those By-Laws were made for levying Money upon Men for exercising a Trade; and 'tis much more to say that you should levy such Sums of Money upon every stroke of honest industry, whereby a Man gets his Livelihood, than that you shall lay so much for your Accommodation in my Ground for the better vending your Goods. This hath been held good in some Cases, but in others it hath been held naught; and this hath all been received and levied to the Use of the City too, and so 'tis a levying of Money, whereby they have a great Advantage; nay, 'tis worse still, because it is imposed by Force, and recovered by Force: but here 'tis a voluntary Penalty, no Force, no Compulsion, only the being removed from their Standings, no other Penalty, no Imprisonment, or the like; but if you do not like the Conditions, you may be gone: I desire you to walk out of this Market, if you don't like the Price of the Provisions; and to be gone from the Stall, if you don't like the Price of the Standing. We were not bound to provide these Stalls for you, but having provided them, if you don't like them, you may leave them; in other cases, the Man is imprisoned, and sued by Action for the Penalty; here at any time, if you don't like, you may be gone.

My Lord, I am very confident, if this be so, that all Monies levied by a Corporation without Law are Forfeitures, or where the Law is mistaken; then I dare boldly affirm, that we never were a Corporation two Months since *London* was *London*; but by virtue of some old sleeping By-law or other, that has been set on foot, Monies have been levied, which perhaps will not be in strictness allowed good: And if all these had been Forfeitures, we had been in a strange Condition, not one Month or two should pass over us, but we had forfeited it, and never can there be perhaps a Month to the end of the World, but we should still be forfeiting. And what is said of us, may be said of any other Corporation that happens to make By-laws. And I am sure in former times there were Monies levied with a witness, I mean not the late times of Rebellion only, but an hundred years ago, strange Exorbitances of that nature were committed by *London* and other Corporations; then they went by way of Information, but never was it thought that it could affect the Being of a Corporation: If it should do so, I do not know whether it will go at last. The greater or the lesser Sum is not that that will difference the Law. Is it a Forfeiture to receive 5,000 *l.*? Why is it not a Forfeiture to receive 500 *l.*? Why not to receive 5 *s.*? Why not to receive 5 *d.*? No bounds can be set for that, if it be a Transgression of the Law; here is a Tort and a Wrong done by your By-law, that you have levied 5 *d.* and therefore all this great Inheritance of *London*, this, that is the greatest Inheritance of the Kingdom, is forfeited for a Trifle, upon three half pence, or a Basket of Eggs.

Nay, my Lord, to go further, I say, if this be a Forfeiture, I say 'tis only a Forfeiture of the

Market; nay, not so much neither, 'tis only a Forfeiture of the Toll: my Lord, I cannot but once more mention that excellent Notion of my Lord *Hobart*, That the Power of making By-laws is included in the Act of the Corporation; for as Reason, says he, is given to a natural Body to govern it, so a Politick Body must have Laws, as its Reason, to govern it. Now then the making of these Laws is but the exercise of that Reason, declaring the Mind of the Corporation, for the direction of the Officers of it, what to do, and what to take; and 'tis but like the Mind of a Man that directs his hand what to do. For this is not like the Duty of Stallage, that relates to the Publick, and relates also to something that before they had no Interest in; but only relates to the Administration of a private property, and directs the manner of that Administration. They are Lords of the Market, and that is casual to them, it is not necessary for them so to be. If any Corporation bid their Officers levy so much Money; suppose they bid them take more Toll than is due, or levy more Money for Rent than is due for the Land, why this might be looked upon as a great Breach of Trust and Encroachment: They should have had but 6 *d.* and they took 7 *d.* and this done by Act of Common Council, which is their way of expressing their mind; yet surely it would be no Forfeiture, because the Land is their own, and the Administration of it belongs to them only in point of Interest and Property. Suppose a Gentleman has a Market, and his Reason, which is his By-law, as my Lord *Hobart* says, puts him upon taking of Toll, but he does a little mistake the Law or the Custom, he bids his Servant take so much, which perhaps may be too much for Toll; does this destroy his Capacity of suing and being sued? You may as well say such a particular Person shall not plead, or be impleaded, if he do so and so. Nay this, if he were a Denizen, does not forfeit his Denization, and yet a Denizen is as perfectly a Creature of the King's as a Corporation is. It is *Basilicon Doron*, it is the Bounty and Kindness of the King to one born out of his Dominions, to give him the capacity of a Subject, to sue and be sued, and the like, which cannot be forfeited, even for breach of Conditions in the Letters Patents of Denization. For this is within *Verfeline Manning's* Case, if he does not observe the Laws of the Land, 'tis true, he must be punished for it, but he shall not be undenizen'd.

My Lord, there is a Statute, which I think is a most plain Declaration of the Law in this Case, and 'tis the Stat. of *West. 1. cap. 31*. Some call it the 30th, because they differ in the numerating and heading of the Chapters. 'Tis the Statute concerning those that take outrageous Tolls in Market-Towns. The Statute says, *Le Roy prendra la Franchise del' March en sa Maine*. The King shall seize the Franchise into his own Hands. My Lord *Coke* in his Comment upon that Statute says, he shall seize the Franchise of the Fair or Market, till it be redeemed by the Owner, that's all. But this is intended, says he, upon an Office to be found; for in Statutes all Incidents shall be supplied by Intendment.

Now in the *Quo Warranto* that was brought against the Corporation of *Maidenhead* in *Palmer's Reports*, there is this very case. That Corporation took an outrageous Toll, too much Toll,

Toll, or that that was not justifiable, for going over their Bridge. Yet it was so far from being imagined that this should be a Forfeiture (and yet the Case is the same, let any Man distinguish it that can) that it was a Question whether the Market was forfeited, or no, as you may see in that Book, fol. 82. And there 'tis said by *Doderidge*, and at last it was agreed by all the Court, that it should be a Forfeiture only of the Toll, and not of the Market. And I desire that that *Folio* may be noted by your Lordship, and that you will please to look into what is said in that Case; for 'tis debated before, and it seemed as if they would have forfeited the Market by it, but not the Corporation; and yet that was not forfeited neither. And to this I will apply that Rule that Mr. Solicitor himself did mention, *Puniatur in eo quo peccat*. You have offended in the Toll, therefore you shall suffer in the Toll, not in the Market, to be sure not in the Corporation. For if it were that, it should affect the Market, it would be because it hath some relation to a Market, as a Toll hath; but how can this possibly affect or touch the Corporation? The Statute indeed goes thus far, and says, Whosoever shall take outrageous Toll, shall forfeit the Market; but then shall we come and add, Whoever shall take outrageous Toll, shall forfeit his Capacity of holding a Market, or any thing else? Do they complain of us for taking the Legislative power upon us, and therefore we shall forfeit our Corporation, when the Statute it self has appointed the Punishment, and says only, the Market shall be forfeited, and so make a new Law themselves? Statutes are supposed to be penal enough of themselves, and all penal Statutes are to be taken equitably as to the Penalty, and not stretch'd beyond the Letter. And wherever a Statute inflicts a Penalty, and says you shall forfeit so much, as my Lord *Hobart* says, the Common Law shuts up the Negative, that you shall forfeit no more. How then is it possible we should forfeit that, which if it were forfeitable at all, is not within the provision of this Law?

'Tis true, as Mr. Solicitor hath said in the Book of Assizes that he cited in *Vet. Nat. Brev.* 161. it is said you shall forfeit in the case of a Mis-user (where the Liberties are not depending one upon another) only the Liberty that is abused; but how that can be applied for him I understand not, for nothing can be more flat and plain against him: If so be we should forfeit our Toll or our Market, be it so; nay, if we should forfeit our Liberty of having a Common Council, what then? how is it possible to bring it up to a Forfeiture of the Corporation? You shall forfeit a Court of Py-powders, if you forfeit your Market, because 'tis incident to it, and dependent upon it, and subject to what Dangers the Market itself is subject to; but the Being of a Corporation, nothing can transcend that. To be sure what is incident to it, cannot transcend it; 'tis but a Subject to that which is superior.

For example sake, my Lord, I will cite you a Case, which is the Case of the City of London too about the Measurage of Coals. It is Sir *Julius Caesar's* Case, 1 *Leon* 106. And I choose to cite that Book; for tho it did not come out with your Lordship's Authority, yet my late Lord Chancellor gave this just Account of it, That it was one of the best of our later Reports. Sir *Julius Caesar* libelled in the Admiralty against the

Officer of the City for measuring Coals upon the *Thames*. *Fleetwood* came to Bar, and prayed a Prohibition, and *Edgerton* the Solicitor on the other side complained, that the Mayor of *London* did take a Fine for this Measurage, and made an Office of it; and this he conceived was Extortion (which is the thing complained of here in so many words) and being upon the *Thames*, should be punished in the Admiralty. As to that the Judges replied, By no means; and *Wrey* and *Gawdey* said, If it be Extortion in the Mayor, there is no remedy for it in the Court of Admiralty, but in the King's Courts, and it shall be redressed here in a *Quo Warranto* says *Gawdey*. 'Tis true, a *Quo Warranto* might well have been brought for redressing that Extortion, but it could not mean thereby that the Corporation should be dissolved: And that it was so understood is most plain; for accordingly a *Quo Warranto* is brought. You have it in *Coke's Entries* fol. 535. and 536. *placit* 4. And the City of *London* appeared and pleaded, and prescribed to it; and thereupon the Attorney General that then was, my Lord *Coke* himself, was satisfied, and confessed their Title, and Judgment was given for them; and since it hath been held good, and they have enjoyed it in peace; and this I hope is a good Example for Mr. Attorney to follow in this Case.

My Lord, I come now to that part which I come least willingly to, I mean that of the Petition; and that which I have to say in it, is this, my Lord: First I say, That this Petition is justified in the Pleading, and I hope it is very justifiable; if it were but excusable, 'tis enough. That it is justifiable to petition the King in our Necessities and Extremities, is plain from what my Lord *Hobart* says, fol. 220. He says it was resolved by the Court in *Renham's* Case, that it was lawful for any Subject to petition to the King for a Redress, in an humble and modest manner: For as 'tis there said, Access to the Sovereign must not be shut up in case of the Subjects Distresses. Now the Common Council are not less privileged than any other sure, but rather more in this kind of Addressing and Petitioning: I cannot tell what Crime to make of this, there is so much alledged against us.

I did very well observe truly, and would always observe and remember in all such Cases, what my Lord-Keeper here said to your Lordship, *That Counsel should not so much speak, as if they would abet the Guilt of their Client, rather than advocate for their Innocency.*

My Lord, if the Words themselves that are alleged are not Words that are unlawful to be delivered or spoken, then all this that they are dressed up with of the Intention to censure the King, and to bring him into dislike with his People, all that must go for nothing, and are not to weigh in the Case. Now the Words are these: *That there was a Provocation, and by means of this, there being depending so many Impeachments of Lords and others, and Bills in the Parliament in both Houses, which could not be perfected any where but there, the Prosecution of the publick Justice, and the making Provisions necessary for the Preservation of his Majesty and his Protestant Subjects, received an Interruption.* Now, my Lord, I conceive these Words are not Words that in themselves are unlawful, and for that your Lordship will be pleased to consider our Plea; I need not repeat it, you have it before you: If they are in Sense and Substance

the same Words that have been spoken by the King, and the Lords and Commons in Parliament; he that will not be satisfied with that Authority, will not be satisfied with any. Then what do we say? We say that the Prosecution of the publick Justice received an Interruption: Does not the King say so, and more, in his Speech, we have set forth, wherein he recommends it to both Houses, that Justice may be done? What is the meaning then but this? If the further Prosecution of the Offenders goes not on, Justice is not done? and so we speak but the King's Words. We say they are not tried, or they were not tried, they themselves complain of it to this day; and therefore Justice did receive an Interruption. I am confident, without reflection, that Honourable Person my Lord *Danby* in this point hath said Words much more liable to exception, tho truly Words that I believe deserve no Rebuke. He has complained that Justice was not done in his Case, because he was not tried, and that when he desired to be tried too; but his Liberty taken away, and he forfeited that which was dearer to him than Lands or Honours, his Health, whereby he endangered his Life, and lost all the Comforts of Life. If it were lawful for him to say, as certainly it was, That Justice was not done in his Case, why might not the City say so? Either these Lords ought to be condemned, or they ought to be acquitted; 'tis hard to say Justice is done, when they lie so long in Prison, and are not either acquitted or condemned.

Then we say this, That the making Provision for the Preservation of the King's Person and of his Protestant Subjects received an Interruption. To this part we give this Answer: We set forth, That there were Bills depending in the Parliament for this Purpose, and that is agreed to us by the Demurrer; and that these Bills could not pass into Laws, any more than the Lords could be tried but in Parliament. Why then if it be so, that the matter cannot be done, nor provision made, but (as that Proclamation, that issued for the Fast, said, and as the Addresses of both Houses for the Fast do say) by the Blessing of God upon the Counsels of King and Parliament; if these Counsels, or the King and his Parliament, are interrupted, this is not done. To make such an high Crime of this I do not understand; I would not be thought to speak any thing to justify that which is really a Crime; but this is that I say, 'Tis not in Law unlawful for us to petition the King, or address to him: But, my Lord, to take off the edge of this Business, I shall beg leave to read to your Lordship a Speech of the King's, made the 6th of March following, and therein there are these Words, *The further Prosecution of the Plot.*

My Lord, let any man read, and spell, and see how in substance the Words in our Petition differ from the Words of the King, making those Laws necessary for the Security of himself and the Kingdom, and this spoken the 6th of March, when this very Petition now complained of was presented in January or February before, and there was no Parliament between. No Man will say, that there were Laws sufficient for the Security of the King and Kingdom, when the King himself speaks of the Necessity of making such: So then, those Laws that were preparing received an Interruption. The Lords were not tried, is not

that an Interruption of Justice? since they could be tried no where else, as must be granted; and the King recommends it to them as not done, but necessary to be done. So the King said before. And so it is implied here. There is no such thing said in the Petition. *That the King did interrupt Justice, and the Proceedings of the Parliament:* It is an Inference and a Consequence made by Wit and Art; not that the King did interrupt or intend to interrupt Justice, but it says, by the Prorogation of the Parliament the publick Justice received an Interruption.

My Lord, suppose at that time there had been a Pestilence here, and the King had been as much resolved to meet his two Houses as they him, but by reason of the Pestilence he were necessitated and forced to make a Prorogation; then there comes such a Petition from the City and says, That by reason of this Prorogation those Bills that were depending did not pass, and the publick Justice received an Interruption: What is the Offence of this? 'Tis all true. If there be Bills depending, and Impeachments, that can no other where be tried, they do receive Interruption by a Prorogation. Can any Man say this is false? The Charge in the Replication is, *That we did falsely and maliciously say, what? that which is true, and that which the King had said before, and that which the Lords and Commons said after him, That till those things were done they were not safe; and those things as yet were not done.*

My Lord, there is this further in it, the Petition is set forth in *hæc verba*; and therefore I may take any thing out of it to explain it, and restore it to itself; for this indeed is a very restrained construction of the Petition.

It says, when this Interruption by the Prorogation was receiv'd, *that the King for urgent Causes, and very good Reasons, did prorogue the Parliament.* It is his Prerogative to do so; and God forbid but he should have it. I think, without doubt, we should be more at a loss for want of that Prerogative than we can by the use of it: it is mine, and I believe every good Man's Opinion, that that Prerogative is very necessary and profitable for us all; but it is the consequence of it that this Interruption of Justice is received; nay, we are so far from saying that the King did interrupt Justice, or intending it, that we say, we do hope the King's gracious Intentions were only to make way for the better Concurrence of his Majesty and his Parliament. The King does, *for great Causes, and best known to himself, who has the Prerogative, prorogue the Parliament;* whereby, as a mere Consequence, not as the King's Intention, *the publick Justice is interrupted:* Nay, this we affirm was with a good Intention in the King, *that he might the better be enabled to concur with his Parliament,* as is set forth in the Petition. Can there be any thing more properly said? 'Tis the greatest Justification of the Prorogation that can be. The King has prorogued the Parliament: What to do? Why Justice hath in View received an Interruption, but not in the Intention of the King. We know what the Meaning of it is, and so we set forth in our very Petition, *it is to gain time, that he may the better concur with his Parliament.* It is a great Commendation of the King's Purpose, instead of charging him with Injustice, that he did resolve to concur with his Parliament for such Ends, and accordingly did prorogue the Parliament.

Now the Attorney General hath put in, that it was *ea intentione*; there is the Sting of the Business to put in those Words, to make that which we may lawfully speak, of itself to be an Offence; but truly that signifies just nothing: It can never hurt a thing that is true; it has Great Authority in it, if it be applied to a thing that is unlawful; but if in substance it be true, and the thing itself justifiable, those Words make nothing in the Case; and I think I need not argue that Point, but refer myself to the great Case that was in *Westminster-hall*; and that is the Reversal of the Judgment given in this Court against my Lord *Hollis*, which was a Reversal in Parliament; and is printed in the last Impression of Mr. Justice *Coke's* Reports by order of Parliament, and there they explode all the Notion of *ea intentione*, and this Business. A man speaks Words that he might speak in Parliament (tho I know not whether he might, or no) but the great thing is, if words, that in themselves are tolerable to be spoken, be spoken, you shall not come and say they were spoken with an ill Intention; tho, as I shall shew by and by, this hath a kind of Fatality in it, and that is this, that it is done with an ill Mind by a Corporation that hath no Mind at all.

Mr. Attorney General. Just now you said it had a Mind, and Reason was its Mind.

Mr. Recorder. I said as my Lord *Hobart* says, that a By-law to it is a Mind as Reason is to a Man, but it hath no moral Mind. My Lord, then I say, the Citizens of *London* were indeed at that time under great Consternation, by reason of the Conspiracies that had been discovered in Parliament, and in the Courts of Justice; and it had been declared by the late Lord Chancellor, at the Trial of the Lord *Stafford*, which your Lordship may very well remember, That *London* was burnt by the Papists; and therefore it was no wonder that they were desirous that themselves and the Kingdom should be put into great Security against those Enemies. This, my Lord, I confess is a tender point, and I would not speak a Word in it without a Law-book to back me. I remember that my Lord *Hobart* says, that Zeal and Indignation are fervent Passions. The City of *London* had great Indignation against the Papists for this Conspiracy against the King and Kingdom, and the Religion established by Law. There was no Disaffection in the City at this time, when this Petition was made sure, and I wonder that any Man should say, that knows *London*, and was acquainted with it then, and looks upon this Petition, which passed *nemine contradicente*, that they had such an Intention as is insinuated; and pray let him read the Names of the worthy Aldermen that then sat upon the Bench, and the other Names of the Common Council-men then present, and then let him say, if, without Reflection, the King have more loyal Subjects in the City of *London* than these Men were. And do you think if there had been in it any Sedition, or any of those ill Qualities that make up the ill Adverbs, which are joined to it in the Replication, not one of all those loyally disposed Men would have spoken against it? But alas, all of it passed *nemine contradicente*.

My Lord, I say, that if the matter of it be justifiable, as I think it is, then all these Words will signify nothing, if there were never so many more of them: And the presenting and carrying

of it to the King, that is no Offence, that is not so much as pretended to be one. And, my Lord, I think it a very harsh Translation of the Word into *Latin*, when the Petition says, That the Parliament's Proceedings, of the publick Justice, received an Interruption, to put that word of *Obstructionem* in; truly I think a better Word might have been found to express the soft Expression in the Petition; and they need not have put that hard violent Word *Obstructionem*, when to make *English* of it they translated it *Interruption*.

But, my Lord, they do admit, I say, that the making and presenting of it to the King is not the Offence so much as the publishing of it, by which it is exposed to many others besides. Now to excuse that, the answer we give is this; and 'tis that which will carry a very reasonable Ground of Justification in it: Certain Citizens, that were private Men, had petitioned the Common Council, and thereby they were importuned to make known the Desires of the City to the King, and it was reasonable to make known to those Citizens what the Common Council had done, to prevent false Rumours, which we knew were rise enough in those Days; and to shew that there was nothing ill in it, we did print it. And 'tis also all driving at the Common Interest, at the King's Safety, the Preservation of the Church and the Government established: All this they did desire might be known to these Citizens, and all others that enquired about it; and therefore they printed it, to evidence that there was nothing of ill intended in it. And I do wonder, I must confess, that this Objection of the publishing of this Petition should be so much insisted upon; for they say, that the Mayor, Commonalty, and Citizens of the City of *London* did it; and say not any thing of the Common Council, that they did print it: Now they that did vote it, knew it without printing; and 'tis alleged in the Pleadings, and confessed by the Demurrer, that the Mayor, Commonalty, and Citizens of *London*, that is, the Corporation, consists of above 50,000 Men, which cannot well be intended otherwise. Why then, here is a Petition that is agreed to be well enough lodged as to the Persons that voted it, it being the Liberty of the Subject to petition; and if this had been only presented to the King, tho it had been by those 50,000 Men, nay, if it had been by 100,000 Men, who had been the Corporation, it had been well enough, so it had not been printed, but only kept private to themselves: Why then 'tis very strange, that what is known to all *London*, so great a Part of the Kingdom, should be lawful, but it should be heinously unlawful to send the News of it further. It went further than the City of *London*; and therefore 'tis such an Offence as shall be a Forfeiture of the Corporation. My Lord, there is the Case of *Lake and King*, the Petition to the Parliament was scandalous in itself, yet it stood protected, being presented to the Parliament; and it was lawful to print it, provided it were delivered to a Committee of Parliament, or only to those that were Members; tho 'tis said there, that the printing of it is a great publishing, for the Composers, Correctors, and other Persons that are concerned in the Press, read every Letter of it. But it was answered, that Printing is but a more expeditious way of Writing; and if he had employed 20 Clerks, it had been a greater publishing

ing than three or four Printers. Possibly the Printers might not read it, or not be able to read it well, or not all of them read it at that time.

Now here, my Lord, sure it was lawful to acquaint the Citizens what they had done, if you take it to be the Act of the Common Council, and the Common Council to be the Representative of the City. It was always agreed by the House of Commons, that any Member might send the Votes to those that sent them thither, and whom they represented; they have blamed indeed Men for sending the Debates, but never for communicating the Votes: And what they may do by Writing, that they may do by Printing. Why then might not the Citizens of London, who by Custom choose those Common Council-men, well desire to know, and might well know what they had done? And then what they might do by Writing, they might by Printing: for that is but another way, tho a more suitable and compendious way of exhibiting any thing that you would have go to many. And if it be lawful to impart it to all the City, and all the City does know it, tho it does go further 'tis no matter; for what is known to London, may very well be known to all the Nation besides, without Offence, if it did go further. Besides, it shall never be intended it was published further, or that any others knew of it; for 'tis said to be published in the Parish of St. Michael Bassishaw, in the Ward of Bassishaw, and that is in London, to the Citizens of London; and so they only talked of it amongst themselves. Besides, the main thing which I go upon, is, if there be no ill in the thing itself, the *ea intentione* can make no Crime by a bare Affirmation, which we deny; and if it might be well said or done, it is lawful to print it, and the Publication is no Offence neither.

My Lord, the next Point I come to is this, That a Corporation cannot possibly commit a Capital Crime, or any other Crime against the Peace: And I shall offer this Dilemma, Either it was done seditiously, or not; if not, then there is no sufficient Assignment of a Cause of Forfeiture; if it were, then 'tis a Crime for which the Offender is indictable; and that I say is absolutely impossible for a Corporation to be guilty of. And here I will throw in also that Business of the Toll; and I will, for Argument's sake, admit the taking of a wrongful Toll to be Robbery, and then let the argument go on. I have heard it said within the Bar occasionally, that a Corporation is intrusted with the Government; and that they may commit Treason, and raise Sedition, as Mr. Solicitor hath said; I suppose it must be under their Great Seal: But I confess, I believe it is rather spoken to amuse, than to satisfy: But I really think it is no ill nor unjustifiable thing for me to say, nor against the Government to affirm, That 'tis impossible a Corporation can commit Treason, or that it is intrusted with the Government in any such Kind.

But first, my Lord, I shall shew you what Opinion former times had, and that because such an Opinion as this hath been broached of late Days.

Lord Chief Justice. Mr. Recorder, will you be much longer? Because I must sit here at *Nisi prius* this Afternoon, and yet I would fain hear the Argument, if it would not be too long.

Mr. Recorder. No, my Lord, I have almost done, and will cut short.

In 21 E. 4. fol. 13 b. 'tis said by Pigott, That a Mayor has two Abilities; the one to his own use, to take and to grant, and to do as another natural Person does; and then the Mayor, as Mayor and Commonalty, hath another Capacity to their Common Use and Profit; and that is but a Name, an *Ens rationis*, a thing that cannot be seen, and is no Substance; and for this Name or Corporation, 'tis impossible they can do or suffer any wrong, as to beat or be beaten, as such a Body; but the Wrong is made to every Member of the Body, as to his own proper Person, and not as to the name of Corporation; nor can the Corporation do a personal Wrong to another; nor can they commit Treason or Felony as to the Corporation, nor against any other Person. And if a Writ of Debt be brought against the Mayor and Commonalty, or other such Body, upon an Obligation, and they plead it is not their Deed, and it is found their Deed, they shall not be imprisoned as another single Person shall. The same Law is if they are found Disseissers with Force, they shall not be imprisoned; nor in a Writ of Ravishment of Ward shall they either be imprisoned, or abjure the Realm; for such a Body is but a Name, to which such an Act cannot be done. So says Catesby in the same Book, In a Writ brought against them no *Capias* shall issue, because they are but as a dead Person in Law; and the Appearance upon a *Capias* cannot be otherwise than personal. And so to this purpose says the Chief Justice there, If this Body will do any thing, it must be done by Writing. And all along it is the Tenor of the whole Case, that a Corporation cannot commit Treason, or any other Crime. But the Reason of the thing is above any Authority. Suppose that they under their common Seal should commit Treason, and you bring an Indictment of Treason against the Mayor, Commonalty, and Citizens of the City of London, what Judgment shall be given against them in their corporate Capacity? What? It shall be, that *Suspendatur per collum Corpus politicum*. And then, what Execution shall be done upon that Sentence? What? must they hang up the Common Seal? Nothing else you can do can affect them; but in their private Capacity, there they may be punished as single Persons.

A Penal Statute says, that he or she, that offends against the Law, shall forfeit so much, or incur such a Penalty: Is a Corporation Male, or Female, that it should come under such a Provision? but the real reason of the Law is this, it is a civil Being, it is *Ens civile*, it is *Corpus politicum*; it hath civil Qualities, but it hath no moral Qualities; and all Offences consist in the Immorality of them, and there must be Malice to make that Immorality. No Words or Acts are Treason or Felony, unless there be a traitorous Mind, or a felonious Mind; and therefore a Madman cannot be guilty of Treason, or Felony. Serjeant brought an Action for these Words, that he had spoken Treason; it was moved in Arrest of Judgment, that this cannot be actionable; for he might speak Treason in putting a Case: Ay, that were well, said they, if it could be understood so; but we must intend it that he spoke Treason, as his own Words *ex corde suo*, which makes it Treason; for Treason consists in the Immorality of the Mind.

Another reason is what Pigott said, as I said before, That a Corporation is but a Name, an

Ens rationis, a thing that cannot see or be seen, and indeed is no Substance, nor can do or suffer Wrong, nor any Thing where a corporal Appearance is requisite. What my Lord Dyer says in *Moor* 68. that he never saw, is, I believe, true in general, what no Man ever did see, that a Corporation could be bound in a Recognizance or Statute Merchant: and why? because it must be acknowledged in Person: And so in this Case, the Guilt follows the Person, but cannot a mere Capacity. In all Crimes the Offender must appear in Person, and plead in Person, and suffer in Person; but you can never bring the Mayor, Commonalty, and Citizens into Gaol, to appear and plead to an Indictment to receive a Judgment, or suffer Execution. Can a Body Politick, that is invisible, appear in Person? But then there is this great Objection, by this means, they say, if there be no Punishing of them, there is no Government, and they may commit Treason under the Great Seal, they may raise Armies, and instigate a Rebellion, and all with Impunity. My Lord, I say no, and I give two Answers to it, that are not to be replied to; and the first is this:

1. All these Persons, that are met together, tho they are met *corporaliter*, in their corporate Capacity, for the Acts of the Corporation at that time; yet when they go out of their corporate Business, and commit Treason or Felony, the Crime does not *egredi personas*, every one of them is a Traitor or a Felon; and notwithstanding they appeared there under the Pretence of a Corporation, yet they are all liable in their private several Capacities, every one of them must be indicted personally, and suffer personally: For when they go about to do such a thing, it is out of the Business of the Corporation; and they must answer for their own particular Offences. But,

2. I have another Answer to give to it. This Objection is to be retorted on the other side, that if a Corporation authorize the levying of War under their Common Seal, they shall be affected by it in their politick Capacity, and are liable to the Law in that Capacity only, and must suffer in that Capacity only: And the Consequence of that is, they are discharged in their private Capacity; and this is a Law of Indemnity and Protection for all Crimes: for a Man cannot be liable two Ways for Treason, or Felony, or any other Crimes: If he be not liable in his private, he is in his publick Capacity; if not in his publick, he is in his private. And what is the Consequence of that? This is a Dispensation for a Corporation met together in a Body, to do any illegal thing, or to commit any enormous Crime; for the King's Counsel say this, we are responsible for it in our politick Capacity; and what Execution can then be done to punish that Corporation with such a Punishment as the Law inflicts, that is, Imprisonment, or Death, any more than upon an Action of Debt brought against them upon a Bond, and *Non est factum* pleaded, and found for the Plaintiff? can they be imprisoned? and the like. So that this shall protect and shelter them in the Commission of any Capital Offence; for if they are to suffer for it as a Corporation, you must take Judgment against them, as the Law gives it; and how will that be done against an invisible Body? What will be the Execution against the

Corpus Politicum, that can neither see nor be seen?

I think this mighty plain; and I must confess, I wonder how it could ever enter into the Mind of any Man, that a Corporation could commit a corporate Crime. I have, as it became me, in regard of the Duty of my place, and before that, for my own Learning, read *Stamford's Pleas of the Crown*, my Lord Coke's 4th *Institutes*, *Poulton de Pace Regni*, my Lord Hale's *Pleas of the Crown*, *Dalton's Justice of the Peace*, and other Books on that Subject, but I defy any Man to shew me in any of those Treatises concerning criminal Matters, any Resolution, that ever a Corporation could be so concerned, that they should be brought before a Justice of Peace, or proceeded against upon any Law for Treason, or Felony, or be hanged in their political Capacity.

My Lord, I shall conclude all my Discourse of this kind (and I have almost done, because I perceive I incroach upon your Patience) with an Observation I have made upon the 19 H. 7. c. 7. and it is the Statute that makes Provision against Corporations, that made By-laws against the Prerogative. That Statute says, that some Corporations did so; now an higher Offence than that, sure cannot well be described; and there that Law says, that those that do so, that make such By-laws against the Prerogative, shall forfeit for so doing, for every Offence, forty Pounds, unless they are confirmed by the Chancellor and Treasurer, and Chief Justices, or any Three of them. Now to what purpose was this Statute made; if the making of an ill By-law (and worse cannot be than a By-law against the King's Prerogative) should be a Forfeiture of the Being of a Corporation? How vainly did the King and Parliament employ themselves to make a Statute that a Corporation should forfeit 40 *l.* for such an Offence? No Man will say they had rather take that Penalty than another, when they might have a greater, if a greater could be had by Law. If they might have had a *Quo Warranto*, and thereby destroyed the Corporation, surely they would not have stood for the Penalty of 40 *l.* for they might easily have got more Money: No, they might have said, We will never pass it by, unless you will give us 4,000 *l.* or a far greater Sum; nor shall you have your Corporation again, without you give us a considerable Recompence for it. And when the Process and the Proceedings were so expeditious and easy to come at in a *Quo Warranto*, as it was easy in those Days, why should they put the King to the Delays in an Action of Debt for so small a Penalty as 40 *l.*? So that I take it to be a direct Judgment of the Parliament in that Case, that no Corporation should or could be forfeited for the making of any By-law that was irregular, tho it were even against the King's Prerogative.

But to hasten to a Conclusion, I have all this while, my Lord, supposed, that the Mayor, Commonalty, and Citizens of London have done this, but it is not so; this is not the Act of the Mayor, Commonalty, and Citizens, 'tis not the two hundredth part of the Corporation, 'tis but the Act of the Common Council; and we have distinguished our selves by pleading, that it does not consist of above 250, when the City contains above 50,000. I must confess, the Council is not taken notice of much in Law; as is seen in *Warren's*

ren's Case, 2 Crook 540. & 2 Rolls 112. Warren being one of the Common Council of Coventry, and displaced, sued out a Writ of Restitution, and upon that Writ it was returned, that by Custom the City might place and displace *ad libitum*; they thereheld that the Custom was good: But it is not so of a Freeman or Alderman, because he hath a Freehold; but a Common Council is a thing collateral to a Corporation, and the Office of a Common Council is nothing but only to give Assistance and Advice, which they may refuse at their pleasure. In *Estwick's Case* in *Style* 32. & 2 Rolls 456. it is said, That 'tis a place merely by Custom, and that the Common Council is properly but only a Court of Advice; and, my Lord, you shall never intend more than that they were a Court of Advice: All the Rise of their Power is but by Custom, and that Custom is pleaded to give Advice for the Benefit of the City, and make By-laws for the good of the Corporation, and that is confessed by the Demurrer, and you shall intend no more than what is opened in the Pleading.

And then 'tis evident this was done by a very small Part of the Citizens of London; and that does no way affect the whole Corporation sure. In *James Bagg's Case*, 1 Rolls, fol. 226. it is said, That if a Patent be procured by some persons of a Corporation, and the greater Part do not assent to it, that shall not bind a Corporation. And if so be a Charter sealed, and sent by the King, because not accepted *in pais*, by the greater Party, bind not, shall an Act done by a few, and an Act done, that tends to a Forfeiture, bind the whole in point of their Being? There is no ground to say that the Common Council represents the City, no more than a Council does his Client, or an Attorney his Master, only as far as is for the Benefit of the City, they are chosen and intrusted to make By-laws; if they offend, they are but Ministers and Officers, and so they are within the Statute of *Ed. 3.* which I mention, tho I think we have no need of that in the case to help us; if they make an unreasonable By-law, it is void, and every man that is aggrieved by it may have his Remedy, may bring his Action. Shall you supply this by an Intendment, that they have such a Relation? that they are the Representatives of the City of London? that they have a Power to forfeit the Corporation? No, my Lord, by Law they are Part of the Corporation, but they have no such Power to forfeit the Corporation. A Custom shall never be construed to enable a Man to do a Wrong; and a great Wrong it is, that they that are trusted, and trusted but for a Year, and trusted but for the good of the Corporation of which they are part, should give up the Being, or what is worse, forfeit the Being of that Corporation. The Custom of *Kent*, that makes an Infant capable of making a Feoffment, shall never enable an Infant Tenant in Tail to make a Feoffment, so as to work a Discontinuance of the Estate Tail, and put the Heir to his *Formedon*. Every illegal Act of theirs is beyond their Commission, and a Nullity of that is all in respect of themselves; and it is as if they had never done it as to the Corporation, for they are by no means the Corporation; for tho they use the Common Seal in some Cases, at some times, so do the Court of Aldermen in other Cases; but it is only in other Cases wherein they are particularly intrusted. If an Act of Com-

mon Council say, that I shall have such and such Lands of the City's, that Act signifies nothing but as a Direction and Advice; when it is under the Common Seal, it is an Act of Corporation, and proceeding by Advice of Common Council, it binds.

Now, my Lord, this is the more unreasonable, because we know that the Practice of the Common Council in London, being to advise for all the Inhabitants, they are chosen by the Unfreemen as well as others; and it is a strange thing that they should have a Capacity to give away the Liberty of the Citizens, when they are chosen by others as well as them. They had no such Trust for them; nay, all Trust they had was to keep their Liberties, and not to destroy them. Has any Man a Trust to destroy himself? sure no Man is trusted by God himself to be *felo de se*. And certainly then you can never understand it to be in the nature of a Trust to destroy another; and the least Citizen, my Lord, has as much and as true an Interest in the Corporation of the City of London, as the greatest: And therefore 250, if they had been much the greater Number of the Citizens, would signify nothing to the rest of the Body.

My Lord, I shall only say this little more, here is no Crime charged relating to them as a Corporation: Here is indeed a fine Word used, that we did this *contra fiduciam in corpore politico repositam*; but all this is but an imaginary Trust, the King never gave them a Power or Authority, or intrusted them to make By-laws that were unreasonable; he gave them a Power to make reasonable By-laws, and so he does every Corporation. And the same Law that gave them the Power, limits that Power, and says, if they go beyond that Power, it is a Nullity. And these Acts relate not to them as a Corporation; the Petition is not so much as said to be against any Trust reposed in the Corporation; certainly there was never any such Trust. Did ever the King intrust them to advise him about the Matters contained in the Petition? and if not, then it is not *contra fiduciam*; therefore it relates to particular Persons: If it be an Offence, I hope it is none of the Corporation's.

But then the levying of Money, that is *contra fiduciam*; they took upon them an illegal and unjust Power in the Common Council. Suppose it so, how does this belong to the Corporation? it is an Inroad upon Property, it is the most arbitrary thing in the world. Whether they have the Market, and the Dominion of it, or not, is matter of Fact, and being pleaded, is confessed by the Demurrer: And then for the Power of making By-laws, that is a thing that cannot possibly be taken from them while they are a Corporation; it is that which must be in them as a Corporation, like the Faculty of Reason in a Man to express his Resolutions by. And it is no more, than if a Man, that has a Marker, bid his Servant go and remove such as have Stalls there, unless they will pay so much. That Direction is as good a Law as this, and as bad a Law as this, and no more. There is nothing else in it but the Direction of the Officers, what they shall do in the ordering of the Markets, and disposing of the City's Property.

Then as to the formal Method of expressing themselves, whether it be by Act of Common Council, or under the Common Seal, or by their natural Voice, it is all one, it is not a thing that

concerns them as a Body Politick: but if it were illegal and mistaken, I say, the Penalty is only, that it shall be void. What the Common Council, nay, what the Corporation does within the Limits of its Authority, is good, what beyond that it does, is void. If I command my Servant to distrain for Rent, and he kills a Man in the doing of it, this, as to me, is void; but as to himself, that is chargeable upon him. And what I say of the Common Council, I say of the Corporation itself, That it is a Capacity, and a limited Capacity; it is the Act of the Members, not of the Corporation, if they do wrong. The Common Council can act for the good of the City, and the City can do no more, if they themselves should meet. *Crooke, Eliz. fol. 85.* the Queen makes a Lease for Years of Lands to the men of *Chesterfield*, by the name of Aldermen, and they by that Name grant all their Interest to Clerk; says that Book, This is void; for the Queen granting them a Lease as to the Aldermen of *Chesterfield*, this makes them a Corporation, and gives them a Capacity to take, but not to grant. And so *Rolls Abr. 1. p. 513.* And therefore no Corporation is to be considered as a Corporation, but only when it acts according to the Capacity allowed to it; and as to the rest, it all turns into their private Capacity, but it affects not the Body, nor hath any such Relation as to bind it.

My Lord, all the Question here is, Whether there shall be such a Person *in esse* as this Corporation? Whether the City of *London* shall subsist as such a Person, to sue and be sued, to plead and be impleaded? There is nothing of Government or Misgovernment in the Case; but it is all about our Capacity, and nothing else, whether we shall be Defendant or Plaintiff in any Court.

My Lord, *Magna Charta*, and all the other Acts, that have gone in Confirmation of it, shew the great Care of the Government in all Ages to preserve the City of *London*; and I look upon them as so many Declarations of the Immortality of it, and of all other Corporations. I shall use a strange Argument perhaps at first hearing, but it is to me a great Evidence for us, that *Magna Charta* does not confirm our Being, but our Liberties and Privileges; it says, That the City of *London* shall have all its Liberties, it confirms its Leets, its Markets, and all those things, that is, it confirms all that it has; it has not saved indeed, if a Corporation indeed be built upon a Corporation; but that particular Liberty may be destroyed, as that of *Bridewell*, and the like, but it does more than confirm its Being, for it does implicitly declare, that that was impossible to be forfeited: They confirm what needed Confirmation; but for their Being there was no need of that; it only confirmed the supervenient Liberties, without which it might be a Corporation; but as to its Being, it meddled not with that. And if it were not so, it were an unreasonable thing that we should have so many Acts of Parliament, that give such particular Powers to the Mayor and Commonalty of *London*; and scarce any Act of Parliament that relates to the Publick, but *London* is mentioned, and taken care of in it. Are not all these Declarations, that *London* should stand for ever? Would not any one have said else, Pray what do you put such Confidence in *London* for? There is not such a fickle Thing upon the Earth as the Being of the Corporation of *London*. If they lay but 6 d. upon a Joint of Meat, they are

gone, and there is not a Month in the Year but they forfeit their Being.

The Act for Administration hath a Proviso; that says, it shall not extend to *London*: Why does any Man think that this Law was not intended to be as perpetual for *London*, as for other Parts of the Kingdom? They did not question but *London* would be a Corporation as long as *England* was *England*. It would be a strange Thing in the Example of it, that the World should be taught by one Instance, that a Corporation can be ruined, when so many People put their Trusts in those Corporations, and so many vast Inheritances depend upon them. And I think the King and the Government, or those you call so, are more concerned to preserve *London*, than all the Persons that are in it. I would not speak it in this place by way of Argument for my Client, but I think I could maintain it in all Places; only I hope and believe I shall have no Need for it.

My Lord, all Innovations (as this must certainly be a very great One) are dangerous; this Frame of Government has lasted, and been preserved for many hundreds of Years, and I hope will be so as long as the World endures.

My Lord, I am sensible I need your Patience; but I have just done. Here is a Charge that has very little, indeed there is nothing in the Matter of it: but the Weight and Consequences are fitter to be meditated upon, than spoken of. And therefore for these Reasons I do pray, that these Liberties may be adjudged to us, and we may be dismissed out of this Court.

Now, my Lord, if your Lordship please, I will give an Answer to Mr. Solicitor's Authorities.

Lord Chief Justice. I suppose you intend to argue it again, and therefore there will not be so much need of that now; besides, it is late, and I cannot stay.

Mr. Attorney General. My Lord, I think it may be very proper to have one other Argument, the first Week in *Easter-Term*.

Lord Chief Justice. Take what day you will, Mr. Attorney.

Mr. Attorney General. Let it be the first Friday in the Term, if you please, my Lord.

Lord Chief Justice. Let it be so. Look you, Mr. Recorder, I perceive you do agree, that the *Petition*, setting forth, that the King having prorogued the Parliament, and thereby Common Justice having received Interruption; you have justified in your Plea (I took it always to be so) and now at the Bar, That the King by the Prorogation did interrupt the Justice of the Kingdom.

Mr. Recorder. No, no, my Lord: then I have Reason to speak again to make myself rightly understood.

Lord Chief Justice. Why, look you, you do agree that the King had prorogued the Parliament, and thereby that publick Justice was interrupted; if that were so, by whose Means, and by whom did the publick Justice receive interruption, if not by the King? I did take it to be so really, and that you had justified it.

Mr. Recorder. My Lord, I do agree, as we say, and as the King himself said, that these Acts were not passed, nor the Lords tried, and so Justice was not done: and I would ask your Lordship, or any other indifferent Person, whether Justice were done, or necessary Provision for these things

things made, if those Bills were unpassed? If it were so, it is a natural Truth, that thereby the Trial, and Acquittal, or Condemnation of the Lords was interrupted, and so was the Security of the King's Person, and the Protestant Religion. the Bills not being passed. For the King calls upon the Parliament to pass them the next Session, therefore they were not passed in the former Session. This is by no means a charging of the Interruption of Justice upon the King; every great thing that is done by the King may have a prejudicial Influence, it may be, as to some Particulars; but to say that thereby Justice is interrupted, is not to charge any Blame upon the King; because, tho it may be prejudicial in one Particular, yet it may be useful to the Publick. No doubt, if the King do prorogue the Parliament for never so great Ends, and necessary Causes, yet if I have but one Bill passing there, suppose it be a private Bill about Naturalization, or the like, if a Prorogation comes, it is naturally true that that is interrupted, but that is not laying a Blame upon the King.

Lord Chief Justice. May it be said that the publick Justice is interrupted, if a Bill for Naturalization, or the like, pass not before the Prorogation? I speak it for this only, that they that argue next may think upon it. The Petition does say that the publick Justice was interrupted; did they mean it was true? or did they mean it was not true? If they did mean it was true, then you have done well to justify it, to say it was so, and the King had done amiss in proroguing the Parliament. Yet it seems, the Common Council of *London* (neither by Charter nor Prescription) had any Right to controul the King, nor to be of the King's Council neither; and therefore it was a matter purely *dehors*. If the matter were not true, why do you put in your Petition? If it be true, justify it, if you can. But here is the matter, I would have a good answer given me to this Point: The Petition was to the King; if so be the Petition had been delivered to the King (as it may be it was) it was but one single Petition to the King; that might be well enough, if there had been no more in the Case, it is very possible it might not have been a Question at this time: But pray, I would know of them that argue next, by what Law or Authority it was, and what was the Meaning of it, that that which did not require two Clerks to write, in order to its being presented to the King, must be printed? By what Law is it to be justified, the printing and publishing of this Petition, and sending it all over the Nation, whereby the Mayor, Aldermen, and Common Council of the City of *London*, do let all the Nation know, that they do look upon the King as one that by the Prorogation of the Parliament had given the publick Justice of the Nation an Interruption? Pray by what Custom or Law is this published? In the Case *de Libellis famosis* (even in the Case of a Subject) it is adjudged, that if you print a Libel, tho the matter of it be true, you shall be punished for it: Now when it is argued again, I would desire some good Satisfaction in that, what Reason or Ground there was for printing or publishing this Petition, unless it be to that Intent which is set forth by Mr. Attorney General in his Replication?

Now for the other Point, as you have ordered the Matter, you hold that a Corporation cannot be forfeited. Mr. Solicitor did take some Pains to argue, that there was no Statute that did protect

you from a Forfeiture, he was not aware of what you did insist upon: You say, that by the Common Law Corporations cannot forfeit their Being; if so be they cannot, there is an end of the Question. But I pray you, do you take it that a Corporation can commit any corporate Act, or no? For according to your Definition of the Matter, if nothing will serve but the Act of the Mayor, Aldermen, and all the Citizens, I believe I may safely say, and so will every one else, that never any Corporate Act was done by the City of *London* since it was a City.

We know on the other side, and you, when it makes for your turn, told us, that the Mayor, Aldermen, and Common Council could make By-laws, and they were good, and binding, that is, when it lay in your way. For you make a Prescription in your Plea, and so also you have said at the Bar, that they may make By-laws to bind the Corporation. So that it seems when it is for your Conveniency, then the Mayor, Aldermen, and Common Council can do as much as all the Corporation; but when you come to be touched with something that you have done, in which you have gone beyond what you should have done, then the Citizens are 50,000 Men, and these are but 250 Persons, that have done these Things. Either the Mayor, Aldermen, and Common Council are the governing Part of the Corporation, or else they signify just Nothing: If they be, then whatsoever they agree upon binds the Whole, and must be taken as a corporate Act; or otherwise you will bring it to this pass, that the Corporation can do Nothing at all. For if the whole Corporation be not bound by such an Act, then it is impossible for you ever to do an Act that shall be an Act of the Corporation; so that that will be pretty hard for you that are for the City, I think, to maintain. Then I have but one Word more (I give no Opinion, but only tell you what I would have you apply yourselves to) is the Trust of making By-laws annexed to the Lord of the Market? or is it annexed to the Lord Mayor? or is it annexed to the Corporation? Surely the Power of making By-laws is annexed to the Corporation, and I cannot see how, as Owners of the Markets, they have that Power. Now by your Distinction, where there is a Franchise that does necessarily depend upon another, there the Abuse of any part does forfeit the whole Franchise. If then this Power be annexed to the Corporation, as sure I think it is (but I reserve myself till I have heard a further Argument about it) then consider, whether or no, when they have abused that Power, in making this By-law, that is knit to them as a Corporation, it does not affect the Being of a Corporation? For it is strange a Corporation should commit a Fault, and not be punished for it. I tell you, I deliver no Opinion in any thing now, but these things I would have you give me some Satisfaction in; and there are indeed several other things that will require consideration, I only hint these now.

The Second Argument was in Easter Term on Friday April 27.

Attor. Gen. THIS Case between the King and the City must be acknowledged to be a Case of Importance, both as it refers to the general Government of the Kingdom, and that of the City in particular. As it concerns

concerns the particular of the City, it doth not bode such dismal Consequences, as some Men endeavour to frighten their Neighbours with; as if it were hereby designed to demolish at once all their Liberties, and to lay waste and open the City of *London*, and to reduce it to the Condition of a Country Village; than which nothing could be more maliciously suggested of so excellent a Prince, who hath given such large Demonstrations, not only of his general Care of all his People's Welfare, but of his more especial and particular Kindness to this City of *London*. This *Quo Warranto* is not brought to destroy, but to reform and amend the Government of the City, by pruning off those Excesses and Exorbitances of Power, which some Men (contrary to their Duty, and the known Laws of the Land) have assumed to themselves under Colour of their Corporate Capacity, to the reviling of their Prince, the Oppression of their Fellow Subjects, and to the infinite Disturbance of their Fellow-Citizens. I shall not recount the Mischiefs which those Exorbitances have of late wrought within the City, both as to its Peace and Profit, as likewise to the Obstruction of the free Course of Justice, that few Causes escaped the Crime of Maintenance from a divided Party. These Exorbitances committed by the City, calling so great an Influence over the whole Kingdom, make the King's Interposition in a Course of Law necessary, by gently laying his Hands upon them for their Cure. Herein the Politick Body of his Subjects resembles the natural, that the diseased Members are best cured by laying on the King's Hands upon the Body. It hath been observed, that the City of *London* was never better governed, nor flourished more, than after it came from under the King's Hands. The Reason given by *Edw. 1.* at his Parliament in 18 *Ed. 1.* of Denial of the Petitions of the Citizens of *London*, to be restored to their former State, *scil.* To have a Mayor and their Antient Liberties, is this: *Quia sunt in bono Statu, & omnia bene, & in pace, & nullum Commodum apparet* to change it then. The City was in as good Plight, both as to its Quiet and good Government and Profits too, whilst in the Hands of the King, under the Common Law Government, as it would be in the Hands of the Corporation. Neither did the City suffer by being in the Hands of the Crown, as it was in the Reigns of *Edw. 1.* *Edw. 2.* *Ed. 3.* and *Rich. 2.* nor their antient Customs and Privileges destroyed; but they were thereby indeed restrained and held within the modest Rules of Government, in Subordination to the General Government of the Kingdom: And therefore the danger threatened by this Suit will not be so fatal to the Being, or well-being of the City, as was suggested. Nay, I may with great assurance say, That if the City receive the least harm hereby, their, or their Managers obstinate and final Impenitence must draw it upon themselves. For tho the Conclusion of the Replication upon the Assignment of the Forfeiture be, That the Liberties be seized, and they *ab iisdem penitus excludantur*, that is but the formal Conclusion upon Assignment of Forfeitures, it shews what the Judgment of the Law may be, if demanded by the King's Attorney, and necessitated by the City's Obstinacy, but doth not exclude the King's Grace. But the Importance of this Case, to the general Government of the Kingdom, is of ano-

ther Nature; and the Consequences thereof, both to the King, and his Subjects in general, appear now far greater than before, from the manner and grounds of the Defence made for the City at the Bar: *viz.* from the general Topicks of Corporations, That they are immortal and indissoluble; That no Treasons or Seditions against their Prince can be committed by the Members of a Corporation, even tho those Members meet, and act jointly in the same manner and method, as they do all other corporate Acts; no, tho they should vote raising of Men against their Prince; and should give Authority (under their Common Seal) to levy Money for that Purpose; that Murders, Felonies, and Oppressions of their Fellow-Subjects, either by unjust Imprisonments, or levying Money upon them; that none of these Crimes committed by the Majority of the Members of any Corporation, and authorized under the Common-Seal, will affect the Corporation, or the Government thereof, in Point of Forfeiture: But a Corporation once constituted, is out of the reach of the Common Law, to determine its Being, or its Governments, for any Causes whatsoever. If such Notions as these could be true, or should receive the least Countenance in a Court of Law, it would be unsafe, either for the King or any of his Subjects, to live in or near a Corporation. And the Complaint made by the Commons in Parliament 21 *Ed. 3.* that the Increase of Franchises tended to the Extinguishment and Overthrow of the Common Law, would soon be made good to the purpose, when such great Bodies of Men, as the Corporations within *England* consist of, shall jointly have a Power allowed them, *Quidlibet impune audendi*, without being capable of Separation. The Distinction between the Politick Capacity and the Natural, to subject the one to Punishment, and not the other, was framed in the *Jesuits* School, to encourage Subjects to rebel against their Princes; but they never yet so far improved the Distinction to apply it to Corporations, which (if they had thought of it) would have been more efficacious to their purpose, than as they applied it; Assurance of Impunity being the strongest Argument for a Commission of any Crime. The Case being of such Consequence both to the King, and his Subjects in general, I shall endeavour to examine it by the Rules and Precedents of Law, that I may sever what is mere notional, from what is of substance in it. I forbear to trouble the Court again with opening the whole Pleadings, but shall take the Case as it hath been opened: Wherein the General Question is, *Whether by any thing disclosed upon the Pleadings, it appear to the Court, that the Mayor, Citizens, and Commonalty of London, have forfeited their Right of being and acting as a Body Politick, and subjected that Right to be seized into the King's Hands?*

In stating of the Question, I forbear to style it a Franchise or Liberty, that I may not by anticipating preclude the Force of Mr. Recorder's Argument, That it is no Liberty or Franchise; but may reserve the entire Consideration thereof to its proper place. And therefore I shall call it a Right, for such most certainly it is; and it includes both *Jus agendi*, & *Jus habendi*. Before we can arrive at the main Question, certain preliminary Points have been moved and debated; some to the Form of the Suit and Pleadings, others relating to the Matter thereof.

To the Form Mr. Recorder took three Exceptions:

1. That the Information is not well laid, because not brought against particular Members by Name, which ought to be in all Cases, where the Right of Corporations is questioned or struck at.

2. That the Replication is worse, importing a Contradiction both to the Supposal of the Information, and to itself; because it denieth *London* to be a Corporation, which the Information allowed, and admitted it too, to be a Corporation, by assigning Causes of Forfeiture.

3. That no Judgment can be given upon these Pleadings, either of *Seizure* or *Ouster*; not of *Seizure*, because the King cannot seize what he cannot hold when seized: And the Body Politick, by which Name it is sued, cannot be ousted of itself.

The great Triumph Mr. Recorder erected upon the strength of these Exceptions, as for an assured Victory already obtained, makes it necessary for me to give a more particular Answer to them than their Weight would otherwise require. For the Authorities cited by him argue very little to this purpose: And indeed he hath been so unfortunate in quoting of Authorities, that how little soever they seem to make for him, as to the Point he produceth them, yet they flatly make against him in some other material Point. Not only his Authorities, but his Objections themselves to the Form of the Information, admit, that a Corporation is in its Nature separable by Judgment of *Ouster* against the particular Members by their Natural Names. The Opinion of my Lord *Hales*, in his

Common Place Book, *Quo Warranto* fol. 168. pl. 7. argues, he did not think of the Indissolubility of Corporations; but it is no Opinion, that

the only way to impeach them was by a Suit against particular Persons; for it is only a short Reference to the Cases of *Cusack*, and others of *Ireland*; and *Farrer*, and others of the *Virginia Company*; which Cases (as also that of *Fisher*, *Helden*, and others of the Borough of *Hebmerley*; the Case of the *Musicians*, and the *Bermudas Company*; and the other Cases cited by Mr. Recorder) do fully prove, That Corporations are Franchises, and may be questioned and impeached in the very Point of being Corporations, by Suits of *Quo Warranto*. And they do prove, that the Suit may be brought against some particular Members by Name, and against the rest of the Corporation by the General Words; as, *Et alios Liberos homines, & alios Burgenses, & alios de Fraternitate*. And these general

Words are material and operative; 1. Rot. 2.

for a Judgment thereupon binds the whole. In the Case of *Cusack* against Particular Members by Name, *cum diversis aliis Civibus Civitat' Dublin'*. Judgment was given to out not only the particular Men, but *alios Cives, & Successores suos*. Upon the Writ of Error, it was assigned upon Record as one of the Causes of Error, that Judgment was given to out the Corporation of those Liberties; yet no Parties by their Names of Incorporation; but Judgment was affirmed.

And the *Quere* that is made in Mich. 21. Jac. *Rolls* 2 Report, in the Case of *Farrer*, and others of the *Virginia*

Company; whether the Corporation were barred? probably did arise from the Nonobservance of the Records, where Judg-

ment was given, as well against the *alios Plautatores*, as the particular Men made Parties. In both these Cases the Suit was as well against the rest of the Corporation as the particular Men: The Appearance by Attorney was entred for both, and the Plea as well in the Name of the rest, as the particular Men, and Judgment against both. And the Judgment against the *Virginia Company* discharged that Company.

These, and the other Precedents produced by Mr. Recorder, do prove that the King's Suit may be brought against particular Persons by Name and against the Residue of the Corporation, by a General Name of *& alios homines*; or against particular Persons, and also against the Corporation, by the very Name of Incorporation, as the Case of the *Bermudas Company*: But they do not argue the King hath not a further Election, either to bring his Suit for questioning the Corporation, by the proper Name of Incorporation, without naming of particular Persons, or by some other General Name, which sufficiently describes the Persons. I shall therefore apply these Answers to the Objection warranted by Precedents of Law; that where-ever many Persons are jointly concerned in Charge or Discharge, and the King hath Cause of Suit against them, he may sue them, either by naming some particular Persons, with a general Reference to others; or he may sue only by a Common Name of Description, without admitting them to be a Corporation, especially where the general Name sufficiently describes the Persons, who took this Corporation; and this as well for Offences at Common Law, as against Statute Laws. Where Murder is committed in the day time in a Walled Town, *tota Villata oneratur*; and so for Repair of Highways, or Nuisances in Highways, Repairs of Bridges, and for levying of the Hue and Cry. The King's Suit, either by Indictment or Information, hath been used both ways, either naming some few particular Inhabitants, but then always with a general Reference *& alios Inhabitantes*, which is essential, otherwise both Indictment and Information would be naught; or they are frequently only by the general Name of Inhabitants, within a Parish, Hundred, or County, as the Case is, without naming any particular Inhabitants at all; to produce Instances of this nature would be infinite, the Cases frequently falling out both at the Assizes, and in this Court. It is so in Cases of *Quo Warranto*. Rot. 15. 23. R. A *Quo Warranto* against the Inhabitants of *Denbigh*, Mich. 27. Eliz. for using several Liberties; as to hold a Court of Pleas before the Bailiff, and choosing two Aldermen, &c. upon Plea and Co. Ent. 537. Demurrer, Judgment of Seizure is given, *& quod Inhabitantes capiantur*. A *Quo Warranto* brought by *Gerrard* the Hil. 40 Eliz. Queen's Attorney, against *Homines* R. 38. *& tenentes Manerii de Kings Hauston* in Com. Bedford, for claiming to be discharged of Knights Wages, &c. they pleaded the Manor to be antient Demesne; and their Plea was confessed, and Judgment for the Tenants, without naming any particular Tenant. These general Names of Inhabitants and Tenants were sufficient Descriptions of the Persons whom the King sued; and yet this Suit, by those Names, works no Conclusion that they were a Corporation. So *Cives, Burgenses, & Communitas* of such

a Place, are general Names to describe the Inhabitants of the Place by, antecedent to their being a Corporation. The like of *Mayor, Bailiff and Burgeses, Mayor and Citizens, and Pontenarii*; where *Burgeses* is but an Addition of the Name of an Officer to the Common Name of the Inhabitants, and properly describes the Persons whom the King sueth. By these Names of general Description they are capable to take this Right of Incorporation by the King's Grant. The Grant doth not enable them to take this Right; and if by such general Names in the King's grant they may take, there can no Reason be assigned why they may not be sued by the same Name they took, when they are questioned for this Right by the Name of Corporation the same, or any other. Upon Pleadings in the Case of a common Person, *Major & Cives* shall not necessarily be intended a Corporation, without it be especially set forth.

Inter Jerem & Neal 20 Eliz. B. R. 1 Leonard 106. in Trespas and Battery, the Defendant pleads *Salisbury* an antient City, and a Custom there, that if any Affray be committed upon any Officer, upon Complaint to the Mayor, he, as a Justice of Peace, might send for the Offender, and Justifies, under the Commandment of the Mayor, to bring the Plaintiff before him: And on Demurrer joined, and Judgment against the Defendant, one of the Grounds thereof was, that it did not appear that *Salisbury* was a Corporation, altho it did appear that *Salisbury* was a City, and had a Mayor; much less shall it conclude the King, who is not so strictly bound in his Suits as common Persons are. It is true, that in the Case of *Maidenhead* there are three Judges against Palmer. *Mountague*, of Opinion, that they need not set forth they are a Corporation, because they are not questioned for it by their Information, but supposed to be one, and questioned only for a Market, which claimed by the King's Grant. In the same Case it is agreed, if they had been sued by any other general Name, but the very Name of Incorporation, they should not be intended a Corporation, according to the Case of the King against the Corporation of *Denbigh*. And whoever looks into the Record, must conclude *Mountague's* Opinion to outweigh that of the other three Judges. The Suit against them was by the Name of the *Pontenarii*; the Grants which they plead recite the Corporation of the *Pontenarii* to be dissolved, and the Grant is a new Grant to the Bridgemaisters: So that there was no room for any Intendment, that it was a Corporation before the Grant, against their own Plea; but that which seems in the Case to have preserved the Bridgemaisters, is, that the Judges inclined to an Opinion, that it being for Maintenance of a Bridge, which was of necessary and publick Use, the Grant itself might amount to a new Incorporation, which was a Plain Waiver of the former Opinion; and if the three Judges had continued their Opinion, Judgment would have been entred for the Defendant; but no Judgment was ever given in that Case: So that *Mayor, Citizens, and Commonalty of London* being a general Name, sufficiently describing the Persons against whom the Suit is brought, may be used in the King's Suits without any manner of Conclusion to the King. But in the next place it is yet stronger,

where one of the Articles of the Suit is for usurping the Corporate Right, that prevents all colour of Pretence for any Conclusion; herein this Case differs much from that of *Maidenhead*, as to the Form of the Information. And in such Cases, where the questioning the Right is a Special Article, the Form of the Information is the same against all Corporations, whether by just Title, or altogether usurped, and by wrong; the Suit supposeth them all to be by wrong, and usurped; and whether by right or wrong cannot be known, till the Title by Pleading be disclosed and discussed; and many times not then neither, because the Liberty may be lost by Default of Pleading, upon *Nilil dicit*, or Misdemeanor, by pleading a wrong Title, or insufficiently Pleading a right Title.

A *Quo Warranto contra Prapostum & Burgeses burgi five villa de B.R. 5 Car. Card.* for claiming to be a Corporation, and divers other Liberties: 1. Rot. 28.

They plead, that they claim nothing but under the Bishop of *Bath and Wells*. It appears by the Plea, that they had no good Incorporation, and Judgment might have been entred against them: But the Bishop obtained a Grant from the King of a new Incorporation, which I have seen and perused, and thereupon a *Noli prosequi* was entred.

A *Quo Warranto* against the Commonalty of the City of *Canterbury*, Hil. Cat. 1. for claiming to be a Corporation, Rot. 25. and divers other Liberties: They plead to all, and several Issues taken in several Parts of the Plea, and Breaches assigned to others for a Forfeiture. *Quo Warranto* against the Bailiff and Aldermen of *New Radnor* is of the same nature; and Multitudes of others I could produce, where the Suit is brought in the same Form as ours, to question the Right of a Corporation against them by their Corporate Name.

My last Answer is, That where the King proceeds for a Forfeiture upon Breach of Condition, the Right is not determined till Judgment of Seizure; for it is a mistaken Ground, that Forfeitures to all purposes relate to the time of the Forfeiture: For as to Copyhold Estates, Offices, and Liberties in case of the King, which may be determined by Breaches of Fact, they are not avoided till the Fact, which causes the Forfeiture, be found upon Record: So that the Suit is well grounded against them, by the Name of *Mayor, Citizens, and Commonalty*: for they continue such till Seizure, and till then are a Corporation *de facto*.

2. I shall be short in my Answers to the Objections to the Replication, because they are in effect already answered by what I have said. The Traverse of the Title by Prescription is pursuant to the Supposal of the Information, which supposeth they have usurped that very Liberty, and puts them upon shewing their Title by that Name; even put the Case they have a good Title by that Name, by this Patent, or by Act of Parliament and they will wave it, and set up a Title by Prescription. And this was done in the Case of *Canterbury* before, and in the Case of *New Malton*; where, upon the very same Information as ours, against Trin. 6 Jac. 1. Rot. 3.

the Bailiff and Burgeses of *New Malton in Com. Ebor.* they pleaded their Title to their Corporation by Prescription, and Issue taken; and it proved fatal to them; for Verdict and Judgment went against them.

Then for the Contrariety of the Replication to itself, none appears; for the traversing of the Prescription by such Name, is no Denial; but it may be a Corporation by Prescription by another Name, or it may have that Name also by Grant. And the farther Replication is, That assuming upon themselves to be a Corporation by that Name, they committed the several Acts, which are assigned for Breaches. And that is the only Advantage the King hath. By Informations of *Quo Warranto* he may go upon the Title, and take Advantage of any Defect therein, or of the Pleading thereof, and may also assign Breaches for a Forfeiture, as is held in the Case of *Maidenhead Bridge*. In the Case of *Canterbury*, Issue was taken upon some Liberties, Breaches assigned to others. The King may plead several Pleas, and take several Issues, and demur to part, as he shall be advised.

3. The Objection, that no Judgment can be given upon these Pleadings, ariseth principally upon two notable Errors, against plain and express Authorities of Law:

(1.) That nothing can be seized into the King's Hand, which the King cannot hold and enjoy when it is there.

(2.) That every Judgment upon a Forfeiture ought to be a Judgment of Ouster.

These mistaken Grounds having been so often made use of by Mr. Recorder in other parts of his Argument, for supporting a Supposition, That a Corporation cannot be forfeited, I shall (to avoid Repetition) leave them to be considered when I come to his main Argument; and therefore shall proceed to consider the preliminary Points moved relating to the Matter, *viz.*

First, Whether the Right of Incorporation of being a Body Politick may be forfeited, or seized into the King's Hands.

Admitting it may be, then,

Secondly, Whether the Acts of Common Council, or the Members assembled in Common Council, which is all one, may work such Forfeiture, or Cause of Seizure.

First, As to the first Point, I must confess the Weakness of my Understanding, that upon what hath been offered from Reason or Authorities of Law, I cannot apprehend it rendered in the least doubtful to a Court of Law, whatever it may be in a Common Hall, and Publick Assemblies of the City, where strong Lungs have a Preference before a rational Head, but that the Right of being a Body Politick may be forfeited, or suspended.

It was moved as a Doubt by Mr. Solicitor, but as a vulgar Error obtruded from publick Prints upon the unthinking and unwary Citizens; which possibly gave encouragement to the many Exorbitances committed within the City, and particularly to those now laid to their Charge; and, I thought, sufficient had been spoken by Mr. Solicitor to have prevented the Growth of so mischievous an Error. But for that Mr. Recorder did *ex animo* espouse that Opinion, as if no man were in his right Wits, that did not concur with him in Opinion, and as if there were something in it in-

deed, hath laid his main Strefs upon it, and erected it as his *Palladium* to defend the City by. And probably this Image (for, if examined, I fear it will prove no other than a Work of Imagination) may make that Impression upon some Men, that, conceiting themselves to be Citizens and Aldermen of an invincible and immortal City, incapable of Dissolution, they may dream of being an Independent Commonwealth within a Kingdom, and unaccountable to the King, or his Laws. It is therefore made necessary for me (with your Leave) to mispend some of your Time in speaking again to this Point; which I shall do,

1. By briefly stating what this Right is, whence it ariseth, and for what Purpose it was framed or introduced.

2. I will examine the Reasons and Grounds produced by Mr. Recorder, why it cannot be forfeited.

3. Then I shall offer the Reasons and Authorities of Law, that it may and hath been forfeited and seized into the King's Hands.

In speaking to all which I will not so far distrust the Memory of the Court, as to repeat what hath been so well urged by Mr. Solicitor from Reason and Authorities, but shall endeavour to avoid it what I can.

1. As to the first thing proposed, This Right of a Corporation, aggregate of many (to which I shall confine my Discourses, being the only thing under Consideration) is a Right granted to many natural Persons to be, have, enjoy, and act as one Body and Person. It confers *jus Persona*, & *Personam efficit*, which our Law Books express by the Names of *Persona Politica*, and *Corpus Politicum*, and, as such, is capable of all Civil Rights, both *habendi* & *agendi*. The Instruments of Creation of this Right, and the Claims thereof upon Pleadings, do best declare the Nature of it, *viz.* *Quod homines Inhabitantes, Cives, Burgeses*, or such other general Name, describing the Persons who are to take, *sunt unum Corpus Corporatum, re, facto, & nomine*. And when Prescription is made for a Body Politick, &c. *Quod Homines & Cives, or Homines & Burgeses sunt, & a tempore cujus, &c. fuerunt unum Corpus Corporatum re & facto per nomen*—So that it is something more than a Notion, or mere Name, *Corpus Corporatum* fully expresseth it, a Body made up of several visible Bodies *in unum collecta, & vinculo Juris unita*. And a Corporation is every whit as visible a Body, as an Army: For tho the Commission or Authority be not seen by everyone; yet the Body, united by that Authority, is seen by all but the Blind; and if the King or the Law demand the Authority, it must be produced and shewn, and is as visible in the Eye of the Law, as any other Right whatsoever, whereof natural Persons are capable. It seems strange, and almost beyond all Excuse, that the Recorder of *London* should never have seen that great Body Politick assembled; unless he will excuse himself, that he is the Mouth of the City, and not the Eyes. Sir *James Bagg's Case*, Co. 11. b. allows it to be such a Right, that every Co. 11. b. f. 29. Member, separately considered, hath a Freehold therein; and all, jointly considered, have an Inheritance which may go in Succession. It is the same Right which the Civilians stile *Collegium*, or *Universitas*, and so stiled here in *Bracton's* time; Lit. 250. Bract. 28. f. 56. Co. 10. b. f. 14. scil.

scil. Si Rex concesserit alicui—Universitati, sicut Civibus vel Burghensibus.

Natural Persons, as such, are capable of taking and holding this Right. It is neither taken nor held in their Politick Capacity, but their Natural; for many Men, as Men are capable of Union, which is evident by the Charters of Creation, and the Pleadings in all such Cases; it is *Homines & Burghenses, Homines & Civēs*, who are constituted *unum Corpus Corporatum*. And as the Natural Persons are an essential Part constituting the Body Politick; so all the Operations and Exercise of this Right are only per-

21 Ed. 4. fo. 14. formed by the Natural Persons, 21 Ed. 4. fo. 14.

That Book, and other Authorities, are express in the Point; tho in a Case so evident, there needed no Authority. And therefore when the Question is of *Non-user*, or *Abuser* of Franchises by a Corporation, it must of Necessity be intended for some Acts or Negligence of the Natural Persons, or those Officers that are employed by them. And the Question will rest only upon this, what Acts, or what Omissions of the Natural Persons, will affect this Right, wherein all the Members of the Body have an Interest?

This Right is merely of human Institution; and therefore as to its Birth, Form, Extent, or Limits, is directed and supported by the municipal Laws of each Country, and therefore for that Reason is styled by our Books *Political*. By the Constitution of our Laws, this Right, as all Jurisdictions and Franchises, is lodged in the Crown, and thence only is derived. *Bracton* upon the Question, *Quis concedere possit libertates, & quibus, & qualiter transferuntur?* thus resolves it: *Dominus Rex habet omnia Jura in manu sua, quæ ad Coronam & Regalem pertinent potestatem, & Regni gubernaculum; habet etiam Justitiam & Judicium, quæ sunt Jurisdictiones; habet etiam ea quæ ad Pacem pertinent. Ea quæ dicuntur Privilegia, licet pertineant ad Coronam, possunt ad privatas Personas transferri, sed de gratia ipsius Regis Speciali.* And then sheweth, that such Grantees as *Usufructuaries* may enjoy them, *donec amiserunt per abusum vel non usum.* The whole Current of our

Books to this Day concur with this
49 Ed. 3. 3. antient Author in this Point, That none can make a Corporation, but the King; such Power cannot be prescribed for, it is so inherent to the Crown. The principal Case was of the *Whitelawes* in *London*, who prescribed, That by the Custom of *London*, the Men of any Art or Mystery might act as a Guild or Fraternity, and were capable of a Devise; and plead their Custom confirmed by several Charters; and, no doubt, would have pleaded some of the Acts of Parliament now pleaded, if the learned Counsel had then thought there had been any thing of Force in them. Judgment was given against them, for that none had such Power but the King. In that Case it appears, that the Abbot and Prior of *Westminster* were one entire Corporation, and divided by the King, and, after the Severance, a *Quare impedit* maintained by the Prior against the Abbot.

Some Corporations are by the
Bro. Corporat. King alone, as Dean and Chapter,
34. Mayor and Commonalty; some by the Pope alone; some mixt, by the King for their Temporal Possessions, by the Pope

for their Spiritualities. Whether the King grant them by Charter out of Parliament, or in Parliament, or by Act of Parliament, the King is still the Donor, and the Fountain and Spring from which this and all other Liberties flow. A Title by Prescription always supposeth a Grant in or out of Parliament, and is allowed by Law for supporting long Possessions, grounded upon antient Grants before, time out of Memory; but by what Title soever these, or any other Rights are derived down, whether Grant or Prescription, their Natures remain the same, and they are governed by the same Rules of Law, and are equally subject to the like Civil Accidents; the one as well as the other.

The last thing inquirable into this Head is, To what End and Purpose such Corporations were erected, and allowed by the Policy of our Laws.

The general Intent and End of all Civil Incorporations is in order to better Government. Government relates principally either to Persons or Things: That which relates principally to Persons may be properly called General Government; because, properly speaking, Persons only are the Subjects of Government. That which relates to Things is called Special Government, because limited to the Managery of particular Things, as Trade, Charity, and such like; for the Government whereof several Companies and Corporations for Trade were erected, and several Hospitals and Houses for Charities. Of this Nature are the *Trinity-Houses* for regulating Navigation; and so the College of *Physicians*, the Corporation of *Parish-Clerks*, and a multitude of other Special Corporations in *England*. The only End of erecting these Special Corporations was, for the better Order and Government of the several Matters specially committed to their Care.

The Corporations for General Government only, are those of Cities and Towns, Mayor and Citizens, Mayor and Burghesses, Mayor and Commonalty, and such like. The Corporations, as they are for the Government of Men only, having nothing specially committed to their Care upon the Incorporation, so they are erected for no other End or Purpose than Government. And if either at the Time of the Incorporation, which very few are, or afterwards, they have any Special Matter committed to their Care, it is purely collateral to the Ends and Design of erecting these sort of Incorporations within Cities and Towns. This appears by the Charters of Creation both antient and modern; the Form is much the same, which is after this manner: *Nos volentes, quod de cætero imperpetuum in eadem Civitate, Burgo, aut Villa [as the Case is] Libertat' & Preconet' ejusdem habeatur unus certus & indubitatus modus pro custodia pacis nostræ, ac pro bono regimine & gubernatione Civitatis, Burgi, & Villa, ac Populi ibidem inhabitantium, & aliorum illic confluentium; & quod Civitas, Burgus, aut Villa, pace, concordia, & quiete sint, ad formidinem & terrorem malorum delinquentium, & in præmium bonorum; ac etiam ut pax nostra cæteraque facta justitia & bono regimine ibidem melius custodiri valeant & possint.* These are the Grounds upon which Corporations are erected.

The Limits and Extents of their Corporations, and Jurisdiction, are limited by their Charters; and there is a plain Difference made in many Charters

Charters between this and other Liberties, as to the End of granting; this being erected only *pro bono regimine*, being a Burden, and chargeable in the Execution of that publick Trust. Many other Liberties and Privilege's both of Ease and Profit, are granted to them *pro meliore sustentatione* of those Charges, which the Government would necessarily require. Since the Statute of Mortmain they cannot purchase without a special *Non obstante*. They cannot engross Trade, by excluding Foreigners; *Norris* and *Hob. 211.* *Stap's Case, Hob. 211.* So that no private Benefit can be assigned to be the End of erecting them. The Power of making By-laws, which is incident to a Corporation, is only for better Government; and by that Rule they must be judged.

Having considered the Nature of a Body Politick aggregate, whence it flows, and for what Purpose it was erected,

2. I proceed to examine the Grounds and Reasons produced, why it cannot be forfeited, or seized into the King's Hands.

Many things were produced by Mr. Recorder, to make good his Assertion, more *ad captandum populum*, than to persuade a Court of Law. I will not mispend your Time in perusing the jocular part of the Argument, which may make the Citizens smile one way, and the Learned in the Law another way; but I shall collect together what seems to have any Force of Argument. The Grounds the Argument went upon seem to be these:

- (1.) That a Corporation is no Liberty or Franchise, but a mere Capacity of suing, and being sued.
- (2.) That a Corporation, in its Nature, is not capable of being forfeited or dissolved.
- (3.) That it cannot be surrendered.
- (4.) That the Forfeiting or Dissolving of any Corporation was never put in Practice, nor so much as ever came within the Compass of any Man's Imagination.

(1.) As to the first, *A Corporation is no Liberty, but a Capacity*. Now it is proved, even just as all the rest will appear to be proved, by strong Averments, and Quotations of Books that prove no such thing. The Authorities were *1 Inst. 250.* *Bro. Title Corporation and Capacities*. In the Institutes the Words are, *A Body Politick is a Body to take in Succession, framed as to that Capacity by Policy*. The Authority is exprest against him, that a Body or Person Politick hath a Capacity to take in Succession, and is not a mere Capacity; and the other Words of the same Author are, *And made into a Body and Capacity to take and grant*: So that this Authority fails; it neither proves it no Liberty, nor to be a mere Capacity.

That of *Bro. Tit. Corporation*, proves less; for Capacity is of larger Signification, and incident to Natural Persons, as well as Corporate Persons; and such Instances are set down under that Title of *Alienees*, &c. and it is a great Imputation to the Memory of so learned a Person, that he should think that *Corporations* and *Capacities* were synonymous, or that he should tautologize in a Title in an Abridgment.

The Definition Mr. Recorder gives of a Corporation, that it is a *Capacity of suing and being sued*, which served him for many a Jest in his Discourse, is no better than to define a Man to be *Animal bipes*, or, which is nearer, a mere Capa-

city of walking with two Feet. Altho the Authorities fail, and prove not the Matter, yet it is of that Importance to the Cause, that a Corporation be no Liberty, that something must be thought upon to make it out. For if it be admitted to be a Liberty, the Authorities will be too strong, that every Liberty and Franchise carries with it a Condition, that it be used, and well used, the Breach of which will amount to a Forfeiture. And therefore, when nothing else can be found to prove it no Liberty, recourse must be had to the negative Argument, backed with strong Averments, that it was never so stiled in any Authority of Law, except in one Case, in the Town of *Helmshy*, *Co. Ent. Q. W. Co. Ent. Quo Warranto*, and Mr. *Noy's* Opinion in *Hayward* and *Fulcher's Case*, grounded only upon the Case of *Helmshy*. But one Swallow makes no Spring; and it was well Mr. Recorder spied it in that Case, otherwise the Averment had been without any Exception.

If the Point had rested upon that Precedent, and Mr. *Noy's* Opinion, it would have better Authorities for it, than any could be produced against it. But there are Multitudes of Authorities, whereby Corporations are not only called, but appear to be Liberties and Franchises; several have been cited by Mr. Recorder, but not seen, or overlookt by him.

In the Case of *Cusack* and others, in all the Parts of the Record it is stiled a Franchise or Liberty; and particularly in the Continuance, *Curia advisare vult*, and time taken to advise upon it as a Liberty. So in the Case of *Farrer*, and others of the *Virginia* Company, throughout the Record stiled a Liberty and Franchise, even in the Judgment itself. Mr. *Noy* knew of these Cases, and many more before this time; but knew it to be the Guise of learned Men, in clear Cases, and of daily Experience, not to repeat many Authorities.

The Records of the Cases cited by Mr. Recorder, of the Borough of *Hebmerley*, the Case of the *Musicians*, and *Bermudas Company*, &c. do all call it a Franchise or Liberty. The Cases I have already cited do so too; against the Bailiff and Burgesses of *New Malton*; against the Mayor and Commonalty of *Canterbury*; against the Portreeve and Burgesses of *Chard*. Many more I have perused, but conceive it too much to trouble the Court with them at present. It is certainly true in all the Records of *Quo Warranto*, wherever there is a special Article against a Corporation for being a Body Politick, it is always impeached by the Name of a Franchise and Liberty; and Multitudes there are of that Nature. And in so clear a Case I omit to mention the Writs of *Non omittas*, for entering into Corporations, and the Returns of their Bailiffs; which make out evidently, that Corporations are Franchises, and the Limits of the Corporation, and Limits of the Franchises are all one.

(2.) The next Argument is drawn from the Nature and Qualities of Bodies Politick, That they are invisible, immortal, impeccable, and therefore impatible, with a large Jargon of *non ens*, & *ens rationis*. Certainly this Argument was fetched from the Clouds at the City's Charge; and

and it cost them dear: For I cannot believe it could enter into the Reason of any Man, much less of learned Men, that a Body framed by the Policy of Man can be immortal; or that a Body, compacted of many bulky visible Bodies, can be invisible; or a Body, whose very Parts and Members are mortal, is in its own Nature immortal. Mr. Recorder admits, that the Death of all ends the Corporation; and therefore if any learned Men have used such hyperbolical Expressions, most certainly they never intended the Citizens of London, or other populous Town or City within England, of whom the Question is, but of some Corporation in *Eutopia*, where the Citizens neither eat, drink, nor die, or at least of some Corporation, that never had other Existence but in the Brain.

The Authorities cited were *Co. 1 Inst. 9. Bull. 233. 21 Edw. 4. 13.* and many others; and many more might have been cited, and to as much Purpose; as *Co. 10. fol. 32. Sutton's Hospital*, brings in a whole Regiment of Authorities speaking to the same Purpose. I do not remember that Book was cited, and there was Reason for it; for in Conclusion it spoils the Argument, *viz.* that these Expressions are of Corporations in Abstracts, not coupled with particular Men of this or that Town, where the Men act all, and the Corporation doth nothing otherwise than what the Men do. If it be considered abstracted from particular Men, it is but a bare Right, and coupled in the Notion of it with Men in general, who are the proper Subjects of Government, and remains only in Notion, and may well enough sustain these Epithets which have been given it, as all other Rights and Notions may; but whilst it remains such, it can no more sue or be sued, than commit Treasons, Felonies, Riots, or other Trespases, either against the Government or particular Men; neither hath it any Existence *in re & facto*, but in the Brain.

The Case indeed that is cited *1 Inst. 9.* is applicable to any particular Corporation; the Case is thus put: If a Man gives Lands to a Mayor and Commonalty, or other Body aggregate, consisting of many capable Persons, without naming Successors, the Law construe it a Fee Simple, because in Judgment of Law they never die. If this be any Authority, it is from the Immortality of many Persons capable, for they are the Persons who are said in Judgment of Law not to die. Where my Lord Coke's Sense is plain, that these natural Persons, tho capable to take in their natural Capacities jointly, which the Law would adjudge an Estate for Lives; yet the Grant being made to them by their Corporate Name, they take in that Capacity, and the Grant is not determinable upon their Death, but shall continue with the Corporation whilst it continueth. That my Lord Coke never dreamt of Immortality of a Body Politick, fully appears in his Writings: *1 Inst. 13.* where he puts the Case insisted on by Mr. Recorder, of a Dissolution by Death of Abbot and Monk. He after puts the Case generally of other Corporations, as Dean and Chapter, Mayor and Commonalty: If Lands be given to them, and the Corporation be dissolved, the Lands shall escheat to the Donors, upon a Condition in Law: in the first Grant, if the Law raise such Condition upon Grant of Lands, much rather doth it upon the Grant of the Incorporation, where the Intent of the Donor is as special, and upon a great

Trust. That my Lord Coke understood it of other Dissolutions than by Death only, he refers in the Margin to the Case of the Knights Templars, which was not dissolved by the Death of the Members. That Corporations were dissolved many Years before the Statute *De terris Templariorum*, 17 Ed. 2. the Statute recites, the Corporation was dissolved, and that the King and several other Lords had entred upon all their Lands and Escheats: The Judgment of the Parliament was, they were well dissolved, and the Lords well intitled by Escheat, as the Law stood; and therefore by Act settles them upon the Hospitallers. This Corporation was dissolved by the Pope, and upon the Ground of *Non-user*. The End of their Corporation was for guiding Christian Pilgrims to the Holy Land and Jerusalem, which the Saracens and Turks having over-run, and possessed themselves thereof, the Members of the Order never came there, but disposed of themselves in several Parts of Christendom. The Order was erected by Pope Honorius, 21 H. 1. Anno 1120. and was dissolved by Clemens Quintus, 4 Ed. 2. Anno 1311. thirteen Years before the Statute; and their Spiritual Corporation, which was the Principal, being dissolved, the Power of holding Lands, conferred by Temporal Princes, determined, 2 Inst. 431. & H. 432.

1 Inst. fol. 102. the Case is put where the Tenant held by Homage Ancestrel of a Body Politick dissolved; the Homage is gone, tho a new Corporation be founded by the same Name. That my Lord Coke never entertained such an Opinion, appears by his Argument in the Case of the Dean and Chapter of Norwich, when Attorney General. His Mistress's Heart was much upon that Case to preserve their Lands; and it was well argued by Mr. Attorney, and no doubt well studied; but this Topick, from the Indissolubility of Corporations, never came into his Head. Besides the Statutes of Confirmation, he insisted upon these things: *First*, That the Words of the Surrender were not sufficient to surrender the Corporation; *Secondly*, That they were the Bishop's Counsel, and in some sort one Corporation with him; *Thirdly*, From the great Mischiefs which would ensue. This new Invention alone would have done the Business, if he had been so fortunate to have found it out; or if any of the Judges had thought of it, they would not have gone about it so long, as at length to ground their Resolutions only upon the Points which did arise upon the Statutes. *Fitzherbert* is of the same Opinion, That if an *Fitzh. N. Brev. fol. 33.* Abby be dissolved, a Presentation shall escheat to the Lord of whom it was held.

(3.) The next Argument produced by Mr. Recorder was, That a Corporation could not be surrendered; upon which Head I will not entertain your Time, for these Reasons: *First*, Because it was not to the Question, and that Mr. Recorder admits, that many things may be forfeited, which cannot be surrendered; *Secondly*, Because the Point may come judicially into Debate, some Dislike having been taken to Surrenders lately made; and I choose to refer myself to that Question which comes properly in Judgment; *Thirdly*, But my last and principal Reason is, that he hath produced no Authority of Law to make good his Assertion.

The Authorities of the Cases of the Dean and Chapter of *Norwich*, Mich. 146. 41 Eliz. and *Hayward and Fulcher's Case*, Hil. 3 Car. 1. which both relate to the same Surrender, and are in effect the same Case, only in the latter Case the Surrender is disclosed to the Court to be larger than did appear in the former Case; and tho many Books are cited, yet they all contain but these two Cases, which make strongly against him. For thro'out these Cases, both in stating the Question, Arguments of Counsel, and Resolutions of the Judges, it is plainly admitted that a Corporation might be surrendered. Otherwise the stating of the Question in the first Case, upon the Effect of the Words in the Surrender of *all their Possessions and Cathedral Church*, Whether sufficient to surrender the Corporation? and the Arguments thereupon, and the Resolution of the Judges was needless; but it was plainly admitted, that a Corporation may be dissolved; and it was the Common Law Point they did resolve, that they were all idle and illusory. And so in the second Case,

Palmer 501.

Jones 168.

Palmer 503.

Whether the Dean and Chapter, without the Bishop, could surrender the Corporation? it is all along admitted, both by the Counsel upon the Grounds they went upon, and by the Judges in their Resolutions, that it might be surrendered, *concurrentibus his quæ in jure requiruntur*; and therefore, by the Resolution of the Judges, it could not be done without the Bishop, because he had an Interest in them. And when *Whitlock* in his Argument had recourse to a more general Reason, which was, That the Surrender could not be good, because then they should be *Felo de se*, which is against Nature; *Jones* takes him up, and flatly denies it, and saith, That a Dean and Chapter might dissolve themselves by *Cesser*; or if all die, or resign, the Corporation is dissolved; but concurred with him, that the Surrender did not dissolve it, because the Bishop was no Party, nor consenting; and in the end *Whitlock* concludes his Argument, that it could not be done without the Bishop. And the Saying of *Whitlock* in that Case, *That the King may grant, but not dissolve a Corporation*, is certainly true in the same Sense as it is of Lands, and all other Rights whatsoever; the King may grant, but cannot resume without Cause; yet all may be forfeited upon due Cause, and by Judgment of Law returned to the King.

(4.) The last Topick of Argument, by which Mr. Recorder concluded a Corporation cannot be forfeited, is a *Non-user*; because never any Corporation was forfeited, nor did it ever enter into any Man's Imagination, that it could be forfeited. This indeed doth put the Proof upon me; and Mr. Solicitor hath already made it out with great Learning, by several Instances of Corporations seized into the King's Hands for Forfeitures committed by them; some by Judgments, others by Inquisitions finding those Forfeitures. But Mr. Recorder with one Blast hath blown them all away, that they are but mere Sounds, and look big with Seizure, and seizing of Liberties into the King's Hands, but, when strictly examined, they are of no Substance; and the Fruit of all the Examination ends in a Difference he hath found out between *Seizures* and *Forfeitures*; much such another Difference as was that between a *Liberty* and a *Capacity*, upon which

the whole Weight of the Argument turned, *That a Corporation was no Liberty, but a Capacity*. And if so little a Distinction be enough to answer the Weight of Mr. Solicitor's Arguments, it will be in vain for me to attempt further Instances, unless I can reconcile this little Difference, and shew it to be as ineffectual as that between a *Liberty* and a *Capacity* was before; and therefore I crave leave, in the first place, to examine this short Answer to so many and so great Authorities.

It is objected, That those are Precedents of Seizures, but not of Forfeitures; for Seizures in the Case of the King's Suits, and of the Bishop's Temporalities, are of the same Nature as Seizures upon the *Grand Cape's* and *Distringas* in Suits between Party and Party, only to answer Issues. And when Liberties of Towns are mentioned to be seized, the Towns only are seized, and not the Corporation, which remains *in statu quo*; but where a Forfeiture is, there must be Judgment of *Ouster*. Every Sentence almost of this Answer is contrary to all the Books and Records of Law, that I know of. The Authorities cited to prove the Differences are *Nat. Brev. fol. 161, 162.* which saith, Inquire into the Causes of Seizures, and Causes of Forfeiture; but what these Causes are, which may be Causes of one, and not of the other, are not disclosed. But my Lord *Coke* in the Countess of *Shrewsbury's Case*, determines the Difference, and makes them all one. There are, saith he, three Causes of Forfeiture or Seizure of Offices for Matter of Fact, *Abuser, Non-user, and Refuser*. He makes the Causes of both to be the same, Forfeiture is but the Fact upon which the Seizure is grounded, where the Subject hath Title of Entry for a Forfeiture, in the Causes of the Entry, different from the Causes of the Forfeiture. So in the King's Case, where Liberties are seized for an *Abuser*, whether it be by Judgment, or upon an Inquisition, or Presentment, finding the Abuse; can it be a Question with any learned Man, but the Seizure is for the Forfeiture? The King cannot seize without Cause, and the Cause must be some Fact in Breach of the Condition in Law annexed to the Liberty. The other Authority produced is of the *Quo Warranto* against *Roger Mortimer*, cited 2 Ed. 3. 29. in *Strata Marcella, Co. 9. fol. 28.* where upon Denial of Aid, and the Defendants not answering over, Judgment was given of Fore-judger of the Liberty, and Error brought; where *Scroop* saith, That in some Cases Franchise shall be put into the King's Hands, in some Cases seized in the Right of the King until Fine; and in some Cases it shall be fore-judged, which holds for ever. I do admit this Case to be good Law, but it makes nothing to the Purpose to prove the Difference; or that Seizures by the King for Misusers are not for Forfeitures, or that Judgment of *Ouster* are only Evidence of Forfeitures, or to prove a Seizure in the King's Suit, is of the same Nature as the *Grand Cape* or *Distringas*, upon mean Process in the Suits of common Persons. And because neither the Book-Cases, nor Mr. Recorder have given any light into the Cases, which may vary the Judgment in a *Quo Warranto*, I will endeavour to state the Matter, how it stands upon Seizures of Liberties:

(1.) Liberties may be seized into the King's hands by Award of the Court, which in that Book

Book is stiled, *Put into the King's Hands*; and that in two Cases principally:

Where the Defendants are summoned to appear at the King's Suit, and make Defaults.

Where a Contempt appears upon Record, in returning or executing the King's Process.

I shall give Instances of each. For the latter, 2 *Ed. 4. fo. 5.* in case of Bailiffs, upon Error, the Bailiff appeared, and prayed a Day to bring in the Record; they failed at the Day: The better Opinion is, their Franchise shall be re seized. And *Vavasor* there saith, If a Lord of a Franchise do any Trespass, or Contempt to the King's Court, it is Cause in the same Court to re seize the Franchise. For the former, 15 *Ed. 4. 6. in Quo Warranto*, if the Defendant appear not at the Day, the Liberties shall be seized; and if he do not replevin them, as in *Eyre*, they shall be absolutely forfeited; for the Statute of *Quo Warranto* directs the King's Courts to proceed in *Quo Warranto* as in the *Eyre*.

Trin. 16 Jac. 1. Briggs's Case, in *Quo Warranto*, the Defendant appeared not at the Day; the Liberties were seized, *Roll. Rep. 2 part. fo. 46.*

Trin. 17 Jac. 1. Roll. 2 part. 92. Quo Warranto against the Mayor and Burgesles of *Wygmores in Com. Lancast.* upon Default made at the Day; it was agreed by the Court, That if they shewed not good Cause to excuse their Default, their Liberties should be seized into the King's Hands: This being in the Case of a Corporation, the *Capias in manus* should be of the Politick Person which made the Default. Where Seizure is by Award of the Court for a Contempt in Court, the Court may admit the Parties to affix and order Restitution; so where by Award of the Court on Default of Appearance at the King's Suit a Seizure is made, which is in Nature of a Distress, to bring in the Party, by putting him out of the Possession of the Liberty, till he appear and replevy; the Court (if the Defendants come in time, and pray it) may deliver them the Possession upon Replevin; and this by the new Statute *de Quo Warranto*, 30 *Edw. 1.* Before that Statute the general Writ of Summons to answer to Liberties, as also the particular Writs of Summons upon the King's Special Suits, superseded the Use of any Liberty till the Justices met on the Day of Return. Which Mischief was remedied by that Statute; if they appeared not at the Day, the Liberties were to be seized in nature of a Distress, to enforce their Appearance. And upon Appearance, if they demanded to replevy them, the Judges might deliver back the Possession of the Liberties, upon Security to prosecute their Claim, and answer the mean Profits, if any, in case Judgment were against them; much in the same manner as the Practice is in the Court of *Exchequer* upon all Seizures to this Day, by the Seizures the King is in Possession: But if the Party appear and plead, and put in Security, he is by Rule of Court permitted to receive the Profits. But the Statute not limiting any time for his Appearance, or to reply, that remained as it did before upon the old Statute of *Quo Warranto*, 18 *E. 1.* which refers to the Practice in *Eyre*: So that if the Party did not Replevin in time, the former Seizure would amount to a Seizure after Judgment by Default, which is final.

2.) Again, Liberties are seized into the King's Hands by Judgment of Court in the King's Suits, whether the Judgment be by default, or *Nilil di-*

cit; upon Demurrer, or Issue tried, this Judgment is final, and the Court cannot admit to a Fine, or award Restitution, unless upon Error brought. This Court is to set the Fine upon the *Capiatur*, but not the Fine for Redemption, that is purely in the King's Breast, & *ex gratia Regis*. There is no such formal Judgment of Seizure until Fine; but this upon Judgment and another Seizure upon Inquisition, or Presentment, which I shall mention, are the Seizures in the King's Right, represented in *Mortimer's Case*, but frequently entred *quousque Dominus Rex aliud preceperit*. What was intended by a Judgment of *Ouster* in that Book, and in what Cases by the course of the King's Courts it ought to be, will best appear by an antient Rule, taken and agreed by the Judges in *Edward* the fourth's time, before they were promiscuously used. The Rule is thus: Where it clearly appears to the Court, that where a Liberty is usurped by Wrong, and upon no Title, either by the King's Grant, or otherwise, there Judgment only of *Ouster* shall be entred: But where it appears, that the King or his Ancestors have once granted a Liberty, and the Liberty be misused, Judgment of Seizure into the King's Hands shall be given. These Rules carry their own Light with them: That which came out of the King's Hands, as *Bracton* useth the word, is properly returned there again by Seizure, or (as our antient Books phrase it) by Re-seizure. But that which never came thence, but merely usurped upon him, shall be vacated; and by Judgment of Law declared null and void.

There is another Case, which is there likewise resolved, and that is, where it is doubtful to the Court, whether the Liberty commenced by Grant, or by Wrong; that for the Uncertainty the best and safest Course is, that Judgment be given of Seizure. This last Case was the principal Case in that Book, the Question arising upon a Default, What Judgment should be given? and by that Rule Judgment was given of Seizure, not of *Ouster*. And agreeable to these Rules, all the Judgments which I have met with have been given; and this Course hath been found most beneficial to the Subject, who, tho by Forfeiture, Mispleading, or Default, he may lose his Liberty, may have Recourse to the King's Mercy for Restitution.

In the Case of the Bailiffs and Aldermen of *New Radnor*, which was by Default, Judgment of Seizure only was given.

Mich. 20 Jac. 1. Rot. 17.

In the Case of *New Malton*, tho the Issue, that the Corporation was by Prescription, was tried against them; yet having long acted as a Corporation, they might have mispleaded their Title, as the City of *London* hath done, in claiming that by Prescription, which commenced by Grant within Time of Memory, Judgment only of Seizure was given, and not of *Ouster*. In all Cases of Disclaimer, Judgment only of *Ouster* shall be given; upon the same Rule Judgment only of *Ouster* was given in the Case of *Staverton*, reported in *Telverton* and *Crook*: But the Entry there is mistaken; for it is entred *Mich. 8. Jac. 1. Rot. 2.* for it appeared to the Court, that it was a mere Usurpation without Title, for that no such Court as he claimed, could be gained by Prescription, nor indeed by Grant, thro' the meanness of his Estate. Mr. Recorder

Trin. 6 Jac. 1. Rot. 3.

infisted upon this Judgment, as a Measure for all Judgments upon Forfeitures of Liberties, but plainly mistook the Reason of it. Upon the Reason of these Rules, in such Cases, where Grants do appear, but either the Parties are not capable of taking, or the Liberty granted not allowable by Law, the Course hath been to enter a mixed Judgment both of Seizure and of Ouster.

In the Case of the Inhabitants of Hil. 27 Eliz. *Denbigh*, who claimed by Charter several Liberties; but it appearing Rot. 15. they had no Capacity to take, yet Co. Ent. 537. the Usurpation being by Colour of Letters Patents, the Judgment was mixed both of Seizure and Ouster; for there was no Possibility of Restitution, because they were not capable.

And in the Case of *Cusack* it appearing to the Court, that the Liberties granted did not pass, nor could be lawfully used; yet the Usurpation being by Colour of a Grant, Judgment of Seizure was given, as well as Ouster in these Cases, as likewise in Sir *George Reynell's* Case; and by Multitudes of Cases of Offices seized, it appears how vain the Objection was, that the King cannot seize a Corporation, because he cannot have it, or be the Mayor and Commonalty; for not only what the King may have or hold, but what he may dispose of, are in Judgment of Law, said to be in his Hands; and it is the proper Office of the Hand *disponere*, as well as *tenere*. And what but colourably came out of the Crown, tho it cannot subsist by Law in a Subject, shall be seized, as in *Cusack's* Case.

3.) In the last Place there are other Seizures, which are by Process by Commission of Inquiry upon Inquisition found, or upon Presentment; and such are always for Forfeitures, upon Faults found in breach of Conditions annexed by Law. That the King is in possession of all incorporeal Rights by such Seizures upon Inquisition, appears by the Resolution in Sir *George Reynell's* Case. In these Cases of Seizure for Forfeitures, no Court, or the Lord of the Liberty, whether Body Politick, or Natural, can admit to a Fine, and thereupon make Restitution; neither is there any other way by Law to take off the King's Hands, but by direct Traverse of the Fact, if the Fact found be not true; or by Demurrer, if the Fact found be not in Law sufficient cause of Forfeiture. The Facts upon which such Seizures have been made, have been generally so notorious, and the Consequence of Law upon them, taken to be so evident, that I never met with any such Inquisition ever traversed or demurred to; but the Application for Restitution hath still been to the King's Grace. And these Inquisitions have been taken either *ex officio* by the Sheriff, or by special Commissions. The Sheriff by his general Commission is intrusted with the Preservation of the whole County, and the publick Peace thereof.

And tho in the Grant of Corporations and other Liberties, there be special Clauses exclusive, *Ita quod*, &c. Yet these Clauses, as the Grants themselves, have another *Ita quod* annexed to them by Law, that they preserve good Government, and do not abuse the Franchise, by committing or permitting Riots and great Disorders in Breach of the publick Peace; which if they do, is by Law a *Non omittas* to the Sheriff to enquire and take care of the publick Peace within the Liberty.

The Town of *Hereford* was seized into the King's Hands by the Sheriff of the County, for holding of a Market contrary to the King's Prohibition. Upon Certificate thereof into Chancery, the King's Writ issues to the Sheriff approving thereof, and commanding him to keep it in the King's Hands, *Donec Dominus Rex aliud inde preceperit*. Rot. Clauso. 15 H. 3. memb. 7. *Hales lib. K. fol. 41.*

Of Seizures made upon Presentments, and Inquisitions taken by Commissions, there are many Instances some whereof I shall mention when I come to the Precedents. The Seizures upon Judgments, or for a Forfeiture, which are always in the King's Right, do as effectually put the King into Possession, and oust the natural Persons from using the Right, as any Judgment of Ouster whatsoever. And the difference between such Seizures, and those upon the Grand Cape, which are only upon Mean Process, and in Right of the Subject, and in his Aid, is too apparent to be further enlarged upon. There is some resemblance between this Seizure upon the Grand Cape, and that in the King's Suit for Default, that Appearance for both are upon mean Process, and both repleviable, if the Defendant or Tenant come in Time.

There is also a further Resemblance between them, which makes not for Mr. Recorder's purpose; and that is, in that both are lost for ever, if the Parties come not in Time. For at Common Law, if upon a *Præcipe quod reddat*, and the Lands seized into the King's Hands upon the Grand Cape, the Tenant makes Default, and come not within forty Days, he could not wage his Law to excuse his Default, but the Demandant should have Judgment to recover the Land presently, 15 Ed. 4. fol. 7.

The Difference that it was not the Franchise or Liberty of the Corporation, but the Towns themselves were seized into the King's Hand, is as void of Authority as of Law. Sometimes indeed *Civitas & Villa* in Records are used promiscuously for the Franchise and Freedom, which is jointly used and enjoyed by the Inhabitants, exempt from the Common Law Jurisdiction: And in such Case the Seizure of the City or *Ville*, and of the Franchise, is all one; and the Inhabitants thereby put under the Government of the Common Law, discharged of the Franchise. But if the Town or City be taken for the natural Persons who are the Inhabitants, or for the Houses wherein they inhabited, which they must be upon Mr. Recorder's Distinction, otherwise it will be a Distinction without a Difference: Neither the Inhabitants nor Houses were ever seized, or could be seized into the King's Hands upon such Inquisitions as have been found, and Judgments of Seizure that have been given. The only Proof for this Difference was a strong Averment, that whilst the City of *London* lay under the several Seizures, sometimes of the Mayoralty only, at other times of the whole Franchise, the Corporation was as vigorous as ever, and in *Statu quo*; not so much as suspended, but did exercise all Corporate Acts as before. An Averment against the express Sense of all the Citizens when under those Seizures, and against many Authorities of Law.

At the Parliament, 18 Ed. 1. the Citizens (for they had then no Mayor) petitioned the King in Parliament, *Quod Rex velit eis concedere pristinum Statum, sc. Majorem et antiquas Libertates*. They Roll. Prerog. 204. petitioned

petitioned not for their Houses, or the Liberty of their Persons, those were never seized; but to be restored to the Mayoralty, and their antient Liberties, which were under Seizure in the King's Hands. If the Corporation had been in *Statu quo*, they would not have troubled the Commons to present such a Petition, nor the King to grant so idle a Petition, as *eis concedere pristinum statum*; but they who knew their Condition better than Mr. Recorder, could admit themselves out of Possession both of the Mayoralty and their ancient Liberties, and pray to be restored to them. And the King's Answer was, he was not at present advised *statum mutare*. My Lord Coke's Opinion is, that the Chapter, when no Dean, or

1 Inst. 263. b. Commonalty, when no Mayor, have not Capacity so much as to make continual Claim, nor to take by Purchase, nor sue any Action.

If the Commons of London meet

24 Ed. 4. 27. on Michaelmas-day, and choose a Mayor, the old Mayor not present, the Election is void; and so any other Act without the Mayor. If the Commonalty

21 Ed. 4. 69. in the Vacancy of a Mayor make Obligation under their Common Seal, it is void; how much stronger will the Case be, when the whole Franchise is seized?

I have now removed the Objections which lay in my way, by opening the Nature and Effect of Seizures of Liberties into the King's Hands, and where Judgment of Seizure, and whereof Ouster are properly given; whereby it may appear, that this special *Capias* of *Capias in manus Regis* is as proper an Execution against the Body Politick, as the common *Capias* against the Body Natural; and in Judgment of Law the Politick Person is as properly said *civiliter mortua* by Judgment of Seizure, as the Natural Person is said *civiliter mortua* by Judgment of any Attainder for any capital Offence. Mr. Recorder acknowledges, that in case of Natural Persons, when the Law gives Forfeiture of the Body, or of the Liberty of the Body, it is all one in Judgment of Law; the Law is the same when it speaks of Bodies Politick, to forfeit the Liberty of the Body Politick, and to forfeit the Body Politick.

3. My Way thus cleared, I will lay down the Grounds and Reasons of Law, upon which I conceive with some Clearness, that Corporations may be forfeited and seized into the King's Hands, as well as Offices or any other Liberties whatsoever; and then shall instance in some further Precedents, whereby it will appear they have been forfeited and seized. My Grounds are principally these:

(1.) That there is a Condition in Law annexed to the Franchise of a Corporation upon its first Erection, as strong, if not stronger, than to any other Franchise or Liberty whatsoever.

(2.) That there is nothing extraordinary or peculiar in the Nature of a Corporation, to hinder taking Advantage of the Condition broken, or to exempt it from the common Condition of other Liberties in Consideration of Law.

(1.) As to the first, Wherever the Law introduceth or alloweth any Right upon a Trust, or for the benefit of the Publick, it implies a Condition, that the Trust be discharged, and the Ends of its Creation complied with. This Con-

dition implied by Law is of stricter Obligation than Conditions express; it shall bind Infants and Females Covert, 8 Co. 44. The principal Case is of Offices; but the Book saith, *So it is of all Liberties and Franchises*. And indeed thro'out our Books, the Cases of Offices of Publick Trusts and Franchises run parallel; and the greater the Trust is, or of greater Necessity to be performed, the Condition is still the stricter. And therefore in Franchises, as well as Liberties, if the Franchise be for the better Administration of Justice, and of Necessity, *Non user* will be adjudged a Breach of Condition; but where not of Necessity, bare *Non user* will not be a Breach; yet *Refuser*, which is an obstinate and wilful *Non user*, may be a Breach; but in case of all Liberties and Franchises whatsoever, *Abuser* was ever judged a Breach of the Condition. This matter, upon the Question of Forfeiture of an Office is well stated in the Countess of Shrewsbury's Case, 9 Co. 50. Now this Franchise of a Corporation is granted upon a far greater Trust and Confidence, than any other Liberty whatsoever, as I have already shewn, *viz.* For the Government and Peace of the Inhabitants, and others coming within the Liberty of the Franchise, in Subordination to the general Government of the King; and that they are intrusted therewith by the King upon the publick Account of Government only, and not for any private Respect or Benefit whatsoever. Other Franchises are either subordinate and auxiliary to this, as to hold Courts, have Goals, and such like, for the better Administration of the several Parts of Government; or else are of Profit or Ease, *pro meliori sustentatione* of the Charge and Burden of this subordinate Government. And therefore Banks, in the Argument of Hayward and Fulcher's Case, Palmer 495. calls it the *Principal Liberty*, and other Liberties the *Accessories*.

In the Case of Knights Templars, the Corporation was dissolved upon 1 Inst. 432: the account of *Non user*, tho' without their Default; but the End of their Institution ceased. The Case is much stronger where it is a voluntary *Cesser*, as where the Abbots and Monks put off their Habit, and leave their Houses; this *Non user* will be a good Cause of discharging the Order. Where the Commonalty have Power to choose every Year a Mayor, if they do not choose a Mayor, their Franchise shall be forfeited, or they may be fined, upon this Reason, that common Justice fails for want of such an Officer, which was a Breach of the Condition annexed to their Liberty by *Non user*, 21 E. 4. 14. It appears by this Case, That the Commonalty, in the Vacancy of a Mayor, are to this purpose a Corporation, to choose a Mayor to perfect the Body; and 'tis the only Corporate Act, that they are by Law enabled to do without a Mayor; and this Right may be forfeited too. And as by never choosing a Mayor, they themselves would dissolve the Corporation; so by forfeiting their Right, it is in the Power of the Law to dissolve them. It also appears expressly by this Case, that the King may proceed either for a Fine, or upon a Forfeiture, as he may do in the Cases of all Offices, and Franchises whatsoever, as he shall be advised.

If *Non user* in some Cases (as I have shewn) will forfeit a Corporate Right, no Shadow of Reason can be offered, why *Misuser* or *Abuser* will not do it as well as in all other Liberties. For as

greater the Trust is, or stronger the Condition, so an *Abuser* of that Trust is a far greater Breach of the Condition, than a simple *Non user*. Single Bodies Politick have indisputably such Conditions annexed to them upon the Trust of their Creation; and the Breach of the Condition is in Law good Cause of separating the politick Person from the natural, by Deprivation, which in the Civil Law is of the same Effect as Judgment of *Ouster* by the Common Law; and their Suspension hath some Resemblance with our Seisures into the King's Hands. If Mr. Recorder had but observed the different Laws that Spiritual Corporations and Civil Corporations are guided by, he would not have raised his Wonder to that Height, that *Quo Warranto's* were never brought against Monasteries, Bishops, Deans and Chapters, Parsons and Vicars, and that bringing it now against the City of London threatned the whole Hierarchy of the Church; when, with his Leave, all these, if they offend, may by Law lose their Corporate Right, which may be severed from them by a certain Instrument called *Deprivation*, the Edge of which is no sharper than Judgment of Seisure, or *Ouster* in our Law. And certainly the Union between the politick and natural Body is as close and as strong in single Corporations, as in aggregate; and the same Authors have bestowed upon them the same Epithet, and that they cannot commit Treason and Felony; and the Body Corporate of the Bishop, Parson, Prior, Alien, &c. is as invisible, immortal, and as politick as that of aggregate Bodies. Yet not only Treason and Felony, but far less Misdemeanours committed by the natural Persons will forfeit the corporate Right, and amount to a Breach of the Condition annexed by Law. So little Crimes, as Waste, and wilful Dilapidations, will be Causes of Forfeiture; many of the Cases thereof are put in Sir *James Bagg's* Case, to which I refer, 11 Co. 98. For I do take that Case to be an expresse Judgment in Point, That there is a Condition annexed by Law to every Corporation, and that the Breach thereof is a Forfeiture. The Resolution there is, that any Member of the Body may forfeit his Corporate Right, and may by Law be divested of it, which Right is there called his *Freedom* and *Liberty*. And it is the same Right or Liberty, in which all, jointly considered, have an inheritance, wherein each Member hath a Freehold; for they are not seized of this Right in their Corporate Capacity, but as Natural Persons, the Question being of that Right which gives them the Corporate Capacity. And what any Member may forfeit, every Member may; and the same Acts which will forfeit the Right of every Member, separately considered, if done jointly by all the Members, will have the same Effect. What Act will amount to a Forfeiture, that Case generally determines, whatsoever is contrary to the Duty and Trust of a Member; especially if the Fact be contrary to his Oath, the Oath of Allegiance by the Statute 7 *Jac. cap. 6.* is made a part of the Freeman's Oath. The Case goes further, and assigns many Particulars, which will be Breaches of the Condition, *viz.* Attainders, Forgery, Perjury, Conspiracy, or any other Infamous Crimes at the King's Suit; if these will be sufficient Cause, there can be no doubt but Treasons, Felonies, and Oppressions, Seditions, and other Attempts in disturbing the Government, will be good Causes of Disfranchisement of any or ma-

ny of the Members, who commit such Crimes. And this upon the Trust and Condition implied by Law, upon the first Erection of the Corporation; for the present Members are under no other Trust or Condition as to this Matter, than what the Law imposed upon the first Members.

I cannot see how the Counsel for the City can evade the Force of Sir *James Bagg's* Case, unless it be by a Distinction or two:

- 1.) Between every Man, and all Men; every Man may forfeit his Part, but all Men cannot forfeit the whole: Just such another Distinction as was made to all the Precedents between Seisures and Forfeitures.
- 2.) The other Distinction seems to have a little more Colour, and it is between the King and the Corporation.

The Corporation, say they, are intrusted by Law with Power over their Members to remove them for acting against their Duty; but the King cannot disfranchise any Particular Member; and if he cannot disfranchise any one Member, much less can he all Members, or seize their Liberties into his Hands, which in Law amounts to a Disfranchisement of all the Members.

I answer, the King may do both the one and the other; and in saying the King can do it, I mean in Course of Law.

1.] The King doth it, when the subordinate Ministers and Governors within the Corporation do it; for they do it as his Ministers in Execution of his Laws; and it is their Duty to do it, according to the Trust he hath reposed in them, and the Power he gave them; and this Authority is greater or lesser, as he is pleased to grant it, as appears by Sir *James Bagg's* Case. If the King grant them expresse Authority to remove, they may remove the Offender before Conviction at Law. But if no expresse Power be granted, a Conviction at Law must be first had; and the Judgment of the Law directs their Duty, and they are accountable herein to the King in his Courts of Law; If they mistake the Law, and displace a Member convicted of an Offence, which amounts not to a Forfeiture, the Party shall be restored by *Mandamus*; an excellent Precedent of Restitution, if they do not their Duty, to Disfranchise where the Offence requires it.

2.] The King may do it, by commanding them to do it by his Writ *Dyer 333.* out of the Court where the Conviction remains, or out of the Chancery, as he may the Coroner of the County, Mayor, and other Officers, as the Precedents have been. A Writ to remove the Mayor of *Berwick*. So where an Alderman is dead, the King may send his *Mandamus* to choose another, as done in the Case of *Lanceston*, P. 8. Car. I. 23 R. Hale, Corporat. Pl. 5. If they yield not Obedience, they may be fined, or may incur the Forfeiture of their Liberties, as the Case may require.

3.] In Case the Corporation cannot do Justice in punishing and displacing the Offenders, either because the Majority are Offenders, or favouring, or abetting the Offenders, there being a Failure of Justice in the Franchise, which the Law will not permit, by Judgment of Law the City or *Ville* shall be restored to the Government and Jurisdiction of the Common Law, by Seisure of the Franchise into the King's Hands.

4.] Failure

4.] Failure of Justice and the not suppressing and punishing of notorious Riots and Tumults, have been adjudged good Causes of Forfeiture of Liberties, and the Plea of *Non Ability* to suppress them, disallowed as any Cause of excuse, as to the Point of Forfeitures of the Liberties, which doth and will appear by the Precedents insisted on by Mr. Solicitor, and what I shall superadd. So that I conceive the Authority of Sir *James Bagg's* Case remains unshaken, that there is a Condition annexed to the Franchise of a Corporation, the Breach whereof will be a Forfeiture. The greater the Trust of any Member of a Corporation is, the stricter is the Condition; as where any of the Members are chosen into any Places, which more immediately concern the good Government of the Corporation, a less Crime will be the Cause of his Removal, than will be of Disfranchisement of a private Member, as in the Case of an Alderman.

Taylor's Case
Trin. 14. Jac.
1. B. R. Roll
Restitution
455. pl. 1.

It was resolved, for being a Drunkard and Haunter of Taverns, he being a Magistrate more immediately intrusted with the Government, was Cause of Removal; tho he have Freehold in the Place, yet it is upon special Trust and Confidence. The Law will be the same, if the Magistrate gives the least Encouragement to popular Tumults, or frequent Conventicles, and unlawful Assemblies. And it is no Objection to say, that some Statute Laws have laid a Penalty for the Offences, as it is in the Case of Drunkenness, and many Offences of Officers; and in Common Law Offences, the Law provides a Penalty against the Offender by Fine or Imprisonment; and yet the same Offence, if a Breach of Condition, will be Cause of Disfranchisement, as appears in Sir *James Bagg's* Case. The Penalties inflicted by Statutes or Common Law, are for the Breaches of particular Laws; but the displacing of a Magistrate is for Breach of the general Trust of his Place, wherewith he is intrusted for the publick; and having broken that Trust and Condition, the Law adjudgeth him unfit to be intrusted, *ne quicquam detrimenti capiat Respublica*. The Question, what Acts of a Member will forfeit his corporate Right, is no where in our Books so distinctly put as in Sir *James Bagg's* Case. But the Question, What Acts of the Members, and of what Number of the Members will forfeit the whole Franchise, I know no where distinctly put in our Books, but as they lie scattered in the Instances of Forfeitures taken, and Franchises seized; otherwise than upon the General Rules of *non user & abuser* of the Trust committed to them. But the Civilians do largely treat upon these Questions; Whether the Cities, Colleges, and Universities may be forfeited and dissolved, and what Acts of the Members will be Causes of such Forfeitures. And therefore I crave leave, before I conclude this Head, from the Condition annexed by Law to all Corporations, only to mention one of them. It is *Oldradus*

Oldradus de
Pont. fol. 29.

de Ponte, in his Book intituled *Consilia sive Responsa & Aurea Quaestiones*. Where he debates the Point at large *Pro* and *Con*, and puts the Objections of some Authors, which are much the same enthusiastick Raptures, as have been made use of in this Case; viz. that they have no Souls, but are immortal Bodies, and such like Stuff. But he

resolves the Question thus; I will repeat his own Words: *Sed licet non habent veram personam, tamen habent personam fictam fictione Juris. Et ideo dicit Lex, quod Municipium Curiae & Societatem persona sustinent: Et sic eadem fictione animam habent, & delinquere possunt, & puniri, ea tamen poenae quae possit cadere in eas, scilicet, quod privetur Privilegiis, & sic Capite minuitur. Et sic sicut vera persona per mortem naturalem definit esse quod erat, sic ista persona ficta per mortem Civilem, quae est, ut privetur Privilegiis definit esse quod erat, quia amodo non erit Universitas.* And then assigns the Causes generally: *Et quod Privilegia possint revocari, cum incipiunt esse iniqua vel damnoisa. Et non potest esse magis iniquum, si utatur eo in contumeliam concedentis.* Tho this be a full Opinion of a learned Man, as to the Case in question, both as to the general Question of Forfeiture, and the particular Breaches assigned; yet I use it not as an Authority; but only to shew the Concordance of other Laws with the Law and Practice within this Kingdom; and that learned Men have before now not only dreamt of such a thing, but have concluded the Point upon Debate and Reason of Law, That Corporations may be forfeited and dissolved, when their Privileges, as used by the Members, *incipiunt esse iniqua vel damnoisa*.

(2.) My other Ground is, that there is nothing extraordinary or particular in the Nature of Corporations aggregate, to exempt them from the Condition of single Corporations, or of other Liberties: If there be, it hath not yet been shewn. It must arise either from the Number of the Persons who take, and are the Subjects of this Liberty, because they are many; or from the Right conferred upon them. The Number of the Persons constituting this Body contributes nothing towards the Indissolubility thereof, pleaded for. They were several natural Persons before the Union, and remain so many natural Persons; and by retaining their Natural Capacities, are as capable of being separated, as they were before capable to be united by taking this Right. And as to the Number of the Persons, a Corporation differs nothing from other Communities, which may assemble and act in a Body: As the voluntary Societies in Inns of Court and Chancery, and Armies, which act under Commissions to some Persons to collect and assemble, others to act jointly under them. These Societys have their peculiar Rules and Laws to act by, and act jointly and in a Body as Corporations do: But yet, in the one Case, if the Members so agree; or in the other Case, the Commission be revoked, they are all separated, and the Union dissolved. So as to the Nature or Numbers of the Persons collected, a Corporation differs nothing from other Societies not incorporated. From Number may be presumed a greater Duration, and it is most probable many may outlive one; but it is certain that many shall die as one Man, and probable that all may die before others elected, which was admitted to be a Dissolution of the Body Politick: but ingeniously distinguished, that this was rather a Separation of the Persons from the Body, than of the politick Body from the Persons. Be it so, it is admitted then they are separable, and that Number cannot protect the natural Persons from being severed from the Body Politick by natural Death. And I have already shewn, that Number contributes

contributes nothing to the Indissolubility of a Corporation, by Separation of the Members one from the other, which is called a Civil Death; and in Cases of Civil Death, the separating the Liberty from the Person, or the Persons from the Liberty, is all one. To take the Office from the Officer, or remove the Officer from the Office, is all one; and so in Disfranchisement, to take away the Freedom of a Member, or to remove him from his Freedom, is all one: And so in Forfeiture of Franchises, the Judgment of *Ouster* is formally putting the Persons from the Franchise, and Judgment of Seizure taking the Franchise from the Persons; but in effect they are the same, viz. a Separation between the Persons and the Franchise. And this Separation being wrought by a Condition in Law annexed upon the Union, the Number of Persons can no more prevent it, than where Lands, or incorporate Inheritances are granted to many, and their Heirs, upon an express Condition, that no Advantage could be taken of the Condition broken, because the Grant is to many Men.

From the Nature of the Right or Franchise, as little can be inferred for this inseparable Union pretended.

1.) In its Creation, it is merely by the Policy of Man, and the Rule is taken in *Calvin's Case*, 7 Co. fo. 25. That what is by the Law of Man may be altered. And divers other Books speaking of the Effects of human Constitutions, laying down as a certain Rule, *Quicquid colligitur, dissolvi potest*; mortal beings cannot confer Immortality.

All Rights whatsoever are incorporate and sometimes *abusivè* are styled immortal, which by Intendment of Law is only, that they have Continuance so long as any Persons subsist capable of having them: And in this Sense the Right to Lands and Corporate Inheritances are of greater Duration than many Liberties, and particularly those of Corporations; because they subsist when they return to the Crown, which many Liberties do not, but are then extinct. *Strata Marcella*, 9 Co. & 15. Ed. 4. fo. 6.

2.) As to the Nature of this Right, whether it be considered as a Right of taking and holding in another Capacity than that of natural Persons, or as a Right of taking in Succession, under neither Consideration can it import any inseparable Quality. In the former, it is both the same with that of single Corporations, and plainly implies a Trust. In all the Cases of our Law, wherever any Person take another's Capacity than their own, it is always upon Trust, as Executors or Administrators, Churchwardens, &c. and all single Corporations: And where the Law creates the Trust, the Law provides Remedy, if the Trust be broken for putting the Trust into safer Hands. And likewise, if considered as a Right framed by Policy, to take in Succession, it is in Substance the very same with that of single Corporations, and if any Advantage be in point of Duration, it inclines to the Side of single Corporations, as better framed by Policy to have Continuance, than the other of aggregate Corporations.

1.) Because the Choice of the Successions, whether elective, donative, or presentative, is placed elsewhere, and not in the Person himself, that it cannot be in his Power to prevent the Succession.

2.) Because the Law leaves it not in his Power

to determine the Corporation, either by Surrender or Forfeiture, but during his Life; and so cannot prejudice his Succession.

But in Lay Corporations the Power of Succession being intrusted with them by Elections to continue it, the whole Right is in them, and consequently in their Power to determine it, either by not electing, or electing those the Law incapacitates, which is the Case of *Worcester*; or every Man of them may for good Cause be disfranchised, or the Franchise for Cause seized, and consequently, for want of Succession, fail. Besides, to go in Succession doth not necessarily imply a Perpetuity: Goods may go in Succession, as to Churchwardens. A Chattel Lease may go in Succession. The King grants Lands for Years, rendring the Rent to the Aldermen of *Chesterfield*; they take in Possession as a Corporation, *Cro. Eliz.* 35. (*Mich.* 26.) The same Case, *Hales, Corporation pl.* 25. Upon these Grounds that there is a Condition annexed to all Corporations, as well as other Liberties, and that there is nothing peculiar in the Nature of Corporations aggregate, to exempt them from being liable to Seizure for Breaches of that Condition, I conclude, Corporations may be taken into the King's Hands by Seizure; which is a Separation of the Liberty of being a Body Politick from the natural Persons, who (as *Bracton* phraseth it) were but *Usu-fructuarii*, and had not *Absolutum Dominium*. And by this Separation the natural Persons are only restored to the Government of the Common-Law.

The Mischiefs that would inevitably follow, were the Law otherwise, have been insisted on by Mr. Solicitor. It were to set up independent Commonwealths within the Kingdom; and according to the Judgment of the Parliament 21 Ed. 3. would certainly 21 E. 3. pl. 17. tend to the utter Overthrow of the Common Law, and the Crown too, in which all Sovereign Power to do Right, both to itself and the Subjects, is only lodged by the Common Law of this Realm.

The Answer Mr. Recorder applied to the Mischiefs, That they may be otherwise punished, is of little avail. Tho he did not express in what Manner they might be punished, yet it must be intended by Fine, or at the Suit of the Persons injured by their Oppressions. The same Answer may be applied to the Oppressions by Officers, and the Abuses of all Liberties whatsoever, and likewise to excuse the Disfranchisement of any one Member of a Corporation: But that is no sufficient Remedy to cure the Mischiefs, whilst the Cause still remains, and is in as great Power to oppress, as before; which nothing can sufficiently restrain, but the Loss, at the least the Fear of the Loss of that Power. To put the Subjects grieved to contend with Corporations for their Relief by their several Actions, were for the Common Law to lay a greater Burden upon them, than what they suffered from the Corporation, as was sufficiently experimented in the Case of the Duty of Water-bailage of *London*, before the *Quo Warranto* was brought to rescue them: And if they recover Damages, those Damages can only be levied upon the common Goods and Estate of the Corporation, 8 H. 6. 1. And many Corporations have little or nothing in common Stock, and few

19 H. 6. 64.
9 H. 6. 36.
Fitz. Ex. 128.

Corpo-

Corporations sufficient to make Satisfaction for all their Oppressions. And to prosecute for a Fine is no Satisfaction to those who are injured, nor doth remove the Cause of the Oppression. And the Law would be very deficient, if such inferior Jurisdictions, or Corporations, were not subject to the Common Law upon the like Conditions as other Liberties, Franchises, and inferior Jurisdictions are.

Mr. Recorder hath affirmed it with great assurance, That never any till this Suit ever so much as thought of resuming Corporations, which are subordinate Governments. I shall only request of him, and of the other Gentlemen of the City's Counsel, to shew me the Opinion of one learned Man of this Kingdom, or any other Nation, deliberately delivered upon the Question, That feodatory and subordinate Governments cannot, for any Cause whatsoever, be forfeited or resumed. That *de facto* they have been resumed in other Nations is testified by many Authors, with their Opinions, that *de Jure* they may so be; which I forbear to trouble the Court with. Within this Kingdom of that Nature are Counties Palatine, the Cinque Ports, the Liberties of *Ely*, Lordships Marchers, and such like, and the Corporations of Cities and Towns; which are all held of the Crown of *England*. What the Practice and judicial Opinions have been concerning these Liberties, according to the Law of this Land, Mr. Solicitor hath shewn in several Instances; which I shall not repeat, but shall produce some others to prove the same Matter. I beg leave to rescue a very considerable Precedent produced by Mr. Solicitor, from the Gloss Mr. Recorder was pleased to put upon it, That it was an Act of Parliament; when 'tis no such Matter, but Judgment of the King's Bench in point upon a Forfeiture. It is the Case of *Sandwich*, cited p. 9 Ed. 1. Rot. majus 35. Kanc. The Record is amongst the Plea-Rolls, in the Treasury or Tally Office.

It was upon an Information at the King's Suit, presented by the Sheriff of the County against the Mayor of *Sandwich*, and Three others, for assaulting the Sheriff's Bailiff upon Execution of the King's Writ within *Stanore*, beating the Officer, and taking the Writ from him, and tearing it; and stamping it under his Feet. They plead to the Jurisdiction, that *Stanore* was within the Liberty of *Sandwich*, within the Cinque Ports; and that *De aliqua seductione fac' corporis Regis non tenentur respondere alibi*, than at the Court at *Shepway*. The Plea was over-ruled upon this ground, that none could claim such a Liberty without express Grant; and they shew no Charter for it, and were ruled to answer over. They insist upon that Exemption, and refuse to give any farther Answer; whereupon Judgment was given, that they be committed to Prison: And the Judgment goes farther, *Et quia Johannes Dennis Major de Sandwich convictus est de transgressionibus predictis; et factum Majoratus in his quae tangunt Comitatum est factum ipsius Communitatis, consideratum est, quod Communitas de Sandwico amittat Libertatem suam*. This is an express Judgment of this Court upon the Forfeiture of the Liberty, for a Crime committed by the Mayor and others, in a Matter relating to the whole Liberty. Before this, the Franchise of *Sandwich* was seized, as forfeited into the King's Hands for a notorious Riot committed by the Inhabitants, in Obstruction of Justice, 3 Ed. 1.

The Case upon that Record was thus: Upon an Inquisition found of Purprestures within the King's Warren of *Dover*, by stopping a Water-course, whereby the Warren was overflowed, a Writ issued from the Court of *Dover*, to distrain the Offender by his Goods, to amend and remove the Purpresture: The Officer distrains the Cattle of *Simon Ercheston*, who was the Offender, and lived at *Sandwich*, within the Cinque Port. Some of the Men of *Sandwich* make Rescous; and when the Constable of *Dover* sent Messengers to complain to the Mayor of *Sandwich* of this Rescous, and to require Redress; after the Complaint made, and no Redress had, several of the Men of *Sandwich* fell upon the Messengers, and severely beat them. Then the Constable sent more Officers to see Right done, against whom the Town was barrocaded and chained, and his Officers kept out by the Townsmen in hostile manner. Then the Constable went in Person, and after some time suppressed the Tumult, and upon their Submission, the Commonalty prayed the Constable would deliver their Submission to the King, which they then delivered to him under their Common Seal; and accordingly was delivered by the Constable to the King and Council, and adjourned into Parliament: And the Mayor, Bailiffs, and Commonalty ordered to be there at a certain Day, before the King and his Council in Parliament. Upon hearing thereof in the Presence of the Mayor and Bailiffs for the whole Commonalty, Judgment is thus entred upon that Record; *Consideratum fuit per Dominum Regem & concilium suum in Parlamento, quod Majoratus & Libertas de Sandwich pro predictis Transgressionibus in manus Regis capiatur, & tradatur in custodia Constabulario de Dover, ad disponendum de predicta Villa secundum communem Legem & Consuetudinem Regni, non obstante aliqua Libertate*. It evidently appears, both by the Form and Matter of it, that that Form was judicial, and not legislative, and agreeable to the Forms of Judgment, in the other Common Law Courts, and in our Law Books. Here is a Judgment only of Seizure upon a Forfeiture, yet it amounted to a real Ouster; for the Town was actually divested of the Liberty, and delivered up to the Government of the Common Law. For *capiatur Majoratus & Libertas de Sandwich* in the Singular Number, *in manus Regis tradatur in custodia Constabulario suo*, who is the Common Law Officer, within the Cinque Ports, is no more than leaving the Town to the Government of the Common Law; which is fuller explained by the subsequent Words of *disponendum de Villa secundum Legem & Consuetudinem Regni*. And it appears by this Record, that there is a difference between the Liberty and the *Ville*, tho sometimes *Ville* is used for the Liberty of the *Ville*; but here the Mayoralty and the Liberty are seized, and the *Ville* delivered over to the Common Law Officer.

The next Precedent I insist upon, is that recited by Mr. Recorder, the Case of the Town of *Cambridge*, but lamentably defaced by my Lord Coke's marginal Note, and Mr. Recorder's Averment, that by the Record it appears to have been by common Consent of Parliament. I rather insist upon this, for that Mr. Recorder hath acknowledged its Force, that it worked upon the corporate Right, and was upon a Forfeiture,

Pasch. 3 Ed. 1.
Kanc' 54.
Dorfo Rot.
majus.

Forfeiture, but lays the Force of it in its being an Act of Parliament, when in truth it is a plain Judgment of a Court of Law, and it appears by the Record it was no Act of Parliament.

Mr. Recorder cited the Record, 8 R. 2. No. 11. 4 *Inst.* 228. and it is probable Mr. Recorder looked no further than that Book for it: In the Margin it is so cited, but miscited; yet in the Body of the Book, in putting the Case, it is truly cited; for the Record is 5 R. 2. 45. to 66. and it is evident by the marginal Note; and my Lord Coke's saying it was the common Consent, misguided Mr. Recorder, to affirm it to be an Act of Parliament, when the contrary appears by the Record. The Complaint to the King and his Council in Parliament, against the Town of Cambridge was for a great Riot committed, and an Assault upon the University; and the Fact in Substance is the same as related in the Fourth Institutes. It was prosecuted at two Suits, the one against the late Mayor and Bailiffs, who were at the Time of the Riot in their natural Capacity; the other against the Mayor, Bailiffs, and Commonalty in their corporate Capacity; the Writs returnable *coram nobis & concilio nostro*. The former Mayor and Bailiffs appear, and plead in their natural Capacity, that they were neither assenting nor aiding to the Riot; neither did or said any thing, that might turn to the Damage of the University, unless only by Coaction and outrageous Compulsion: And their seems to have been no further Proceedings in that Suit. Upon the other Writ the Mayor, Bailiffs, and Commonalty appear, and pray they may have a Copy of the Articles, which were read to them, and Counsel allowed to them, and Time to answer; and such Answer was returned, as is mentioned in the 4th *Inst.* But in the Record it is said, it was answered by the Court; and that the Court told them, that at present they should not be put to answer to the Crime (which must be in order to a Fine), but only touching their Liberties.

Cotton's Records. Then touching their Liberties, they put in a Plea by their Counsel, to the Jurisdiction of the Court,

which is omitted in my Lord Coke; only he saith, after many Dilatory Shifts and Subterfuges following therein, the Court overruled the Plea to the Jurisdiction, and ruled them to answer in chief; and if not, Judgment should be entered by *nihil dicit*. They then pleaded a frivolous Plea, partly not guilty, partly in Excuse; and the King's Serjeant replied, and the Plea was held naught. Thereupon they submitted, as to the Franchise, to the King's Grace, saving that it might be no Conclusion to them, if they should be called in question for the Crime. Whereupon Judgment of Seizure was only given. The Words of the Record say thus: *Nostre Seigneur le Roy de Assent des Prelates & Seigneurs en cest Parliement fist seiser la dit Franchise en sa maine come forfist pur la ditz Causes.* Thro'out the Record it appears by all the Proceedings they were judicial; but the Plea to the Jurisdiction of the Court, and the Judgment by the King and Lords, only are Demonstrations it was no Act of Parliament, nor adjudged by the legislative Power, but by a Court of Law.

It appears upon the same Record, that the King granted several of the Particulars which were seized, to the University, who enjoy them to

this Day. *Et la Remnante de la Franchise de la dit Ville* the King granted to the Mayor and Bailiffs, to hold of him and his Heirs, at the antient Rent of 101 Marks.

33 Ed. 1. *Plac. parl.* 277. The Liberty of the City of Winchester seized into the King's hands by Judgment of the King and Lords, for suffering a Hostage of Baion, who was committed to their Charge by the King for safe Custody, to escape, to the King's great Damage. The Writ of Seizure is directed to the Sheriff of the County, *quod predictam Civitatem Wintonie & Libertatem ejusdem Civitatis, cum omnibus ad eas tangentibus sine dilacione capiat in manum Regis, & eas salvas custodiat, donec Rex aliud praeceperit.* Whereby the Franchise being seized, the Men of the City are put under the Government of the Common Law Officer. Afterwards the City compounded with the King for 500 Marks, and then the King *reddidit eisdem Majori & Civibus Civitatis & Libertat. predict. habend. & tenendum in forma qua eas tenuerunt ante captionem earundem in manus Regis*, and Letters Patents of Restitution were granted, and a Writ of Restitution directed to the Sheriff.

These were Judgments by the King and Lords in Parliament, upon Forfeitures, and were Judgments of Seizure only, according to the settled Rule and Practice in the Common Law Courts.

Mich. 18. Ed. 3. *Rot.* 161. B. R. in the Treasury or Tally Office. A Judgment of the King's Bench, against the Town of Ipswich, upon a Forfeiture. The Bailiffs of Ipswich are impleaded by the King, upon a special Information, reciting that in the King's Bench, sitting there, several Malefactors were indicted for the Death of one John Holby, and that many of the said Town, *tam de majoribus quam de mediocribus*, did comfort and encourage the Felons after the Felony committed, and treated and entertained them with Viands and great Joy. And, after the Departure of the Justices, kept a mock Court publicly, and summoned the Justices and the Officers of the Court, to appear under several Pains. To which the Bailiffs appeared, and were opposed, by the Court, why they did not attach and stay the Malefactors? They answered, the Malefactors flew to Sanctuary: Being further opposed, that they did not attach those of the Town, that furnished the Malefactors with *esculenta & poculenta*, they pleaded, *quod non ausi fuerunt, eo quod tanta fuit multitudo gaudentium, & plures eorum fuere & parentela Malefactorum*: Whereupon Judgment was given *contra Balivos & Communitat. quod custodia ejusdem Ville seiscatur in manus Regis, & quod aliquis ex Parte Domini Regis, qui sit ausus ad pacem Domini Regis manutenendam, se intromittat in eadem Villa, quousque Dominus Rex aliud inde dixerit.* Which the Record shews, is the Bailiff of the County, the common Law Officer. And the Mayor and Bailiffs in open Court surrendered their Staffs of Office. This Judgment is agreeable to those in Parliament, and of Seizure only.

R. Claus. 7. Johan' Memb. 24. *Civitas & Libertas Norwici* was seized into the King's Hands, for hanging Approvers without the License of the King or his Justices; and the Mayor was summoned to answer for the Damage done to the King. *Rot. Fin' Memb.* 10. (13 Ed. 1.) the Liberties of Norwich seized for a great Riot, and burning the Church: The Case is mentioned

tioned *Roll. Prerogative*, fol. 204. The Liberties of *Norwich* were again seized, 21 H. 6. upon a Presentment of a great Riot taken before *Fortescue*, and afterward regranted to them, 27 H. 6. Pat. Roll. Memb. 19. The Case is cited by Mr. Noy, in the Case of the City of *London*, concerning the Death of Dr. *Lamb*, Cro. Car. 252.

The Liberties of *Oxford* were seized, 32 H. 3. for a great Riot committed by the Towns-Men, when the King's Brother was there, and killing of his Brother's Baker. The Writ to the Sheriff runs thus; *Quod capiat in manus Regis villam de Oxon, ut eam salvam custodiat ad opus Regis, ita quod Major et homines ejusdem nullam inde habeant administrationem*; the King in the same Year pardons them, and grants them Restitution, and a Writ to the Sheriff to put them into Possession, 32 H. 3. Memb. 13. Hal. Lib. L. f. 326.

Again the Liberties of *Oxford* were seized 29 Ed. 3. and part of their Liberties granted to the University, which are enjoyed by them to this Day, and the Residue restored to the Town; the Seizure was for a Riot committed, Rot. Claus. 29 Ed. 3. M. 21.

20 H. 3. The Liberties of *Evesham*, for using false Measures, when the King was there, and afterwards, upon Submission of the Abbots and Monks, the King makes Restitution to them, R. Cl. 20 H. 3. M. 8.

18 Ed. 1. The Town of *Southampton* was seized into the King's Hands, for wounding, even to Death, an Officer in serving the King's Writs: They after submitted to a Fine, and took a new Grant, and raised their Fee-farm Rent to 20 l. per Ann. Roll. Prerog. fo. 204.

It would be too great a Trouble to the Court, to cite more Precedents of Seizures for Forfeitures. In all these Instances Restitution was never made by the Court, but by the special Grace of the King, after Submission to him, and upon such Terms as he was pleased to accept; and in some Cases was pleased to restore them to the whole; in other Cases, but to the Part of the Liberties. That this Liberty of being a Body Politick may be seized into the King's hands by *Quo Warranto*, Mr. Recorder in Effect hath admitted it, if the Suit be brought against particular Members, and the Cases produced by him prove it. For in the Case of *Cusack*, the *Curia advisare vult* was upon that very Point of being a Body Politick: And the Case of the *Virginia Company*, the very Liberty of being a Body Politick is by the Judgment seized into the King's Hands.

I will give some Instances where it hath been done, in Cases of *Quo Warranto*, against them by the incorporate Name.

Fitzh. Avowry 129. In the *Iter* of *Lancaster*, a *Quo Warranto* against the Bailiffs and Commonalty of *Lancaster*: They appear, and claim by a Charter of King *John*, whereby the King grants to them all such Franchises, which the Borough of *Northampton* had; but do not set forth upon Record what Franchises *Northampton* had; nor do make Title to the Franchise by Prescription: And for that Reason Judgment was given, that their Franchise be seized into the King's Hands, as forfeited.

In the Case I before cited, a *Quo Warranto* against the Bailiffs and Aldermen of *New Radnor*, and Judg-

ment against them by Default, that the Liberty should be taken and seized into the King's Hands, tho afterwards it was reversed, because in *misericordia* was entred instead of a *Capiatur pro fine*; yet it is a Judgment in Point, that a Corporation might be forfeited and seized by Default in Pleading.

The Case of *New Malton*, Trin. 6 Jac. 1. R. 3. is an express Authority, that this Liberty may be seized by Judgment in a *Quo Warranto* against the Inhabitants of a Town, by their corporate Name. It is brought against the Bailiffs and Burgeses of *New Malton*; and the Form of the Information is the very same with this against the City of *London*. They plead by their corporate Name, and intitle themselves to the Liberty by prescription; and Verdict and Judgment against them by their corporate Name of Seizure only, that the Liberty be taken and seized into the King's Hands; and which is more, the *Capiantur pro fine* against them is entred against them by the corporate Name of *Ballivi & Burgeses*, tho the Corporation by the Seizure was dissolved; and the Reason no Doubt was, that that general Name was a sufficient Description of the Persons who were liable to the Fine for their Usurpation. And no doubt can be made, but that the true Liberty may be forfeited and lost, by insisting upon a wrong Title, as well as by Default, or any other Forfeiture whatsoever. This Town lies under the Weight of that Judgment to this Day, and are no Corporation; and being opposed by the Interest of the Lord *Eure*, who prosecuted that *Quo Warranto*, did never obtain any Restitution or Regrant.

A *Quo Warranto* against the Bailiffs and Burgeses of *Berkhamstead* Mich. 15 Car. in Com. Hertford: They appeared, 2. 23 R. and Judgment *pro defectu responsi*

given of Seizure, Pasch. 16 Car. 2. and they are no Corporation at this Day. In the ancient Eyres, the Justices in Eyre, when upon Claims put in, the Liberties were lost, either upon some Defect in Pleading, or for some small Abuser or Mistake, the Justices were entrusted with the King's Mercy, to admit to a Fine for Redemption, and make Restitution: But Judgment first passed for Seizure. And regularly upon the general Summons of *Quo Warranto* in Eyre, or special Suit of *Quo Warranto*, which are all founded in the same Right, no other Judgment can be given, if for the King, but a *Capias in manus*, or of *Ouster*; if for the Defendants, a Judgment of Allowance, or *Eat sine die*. The *Capias pro fine* is collateral, and for the Usurpation, not for the Cause of Forfeiture or Seizure. It was one of the Articles of Inquiry in Eyre, how they had used their Liberties; if an Abuse was found, tho never so small, Judgment of Seizure was given; tho afterwards redeemed by Fine upon Submission. *Quo Warranto* upon a Claim of View of Frank-Pledge in Eyre. It Rastal pl. 1. was demanded of the Defendant, if fol. 540.

he had any Pillory or Tumbrel; he answered, He had not. Judgment was prayed on the Behalf of the King; for that amounted to a forfeiture; and if that were not sufficient, that then it might be inquired on Behalf of the King, how they had used the Liberty. The Jury find, that the Defendants and their Ancestors had view of Frank-Pledge, but find that the Defendants had taken Amerciaments of Offenders against

the

the Affize for Bread and Beer, amounting to two Shillings, in such Cases where the Offenders should have been punished by the Pillory and Tumbrel. *Ideo consideratum est, quod Visus capiat in manus Regis.* And then they pray they may have their Liberty again upon a Fine, which is granted to them, upon Pledges for well using of their Liberties. And there is no Difference where the Liberty is lost upon a defective Claim or Mispleading, or for a Forfeiture in *Quo Warranto*; the Judgment is the same of *Capias in manus*; and it is all one, whether the Cause of Forfeiture be found by a Jury, or confessed upon the Pleadings, in a *Quo Warranto*.

The next preliminary Point which was moved, is, Whether the Acts of Common Council be the Acts of the Corporation, and do oblige them?

It seems a strange Question, that, when to assemble, consult, determine, and to make Orders and By-laws for the Rule and Government incident to every Corporation, without special Clauses of Grant, and that herein only consists the Exercise of the Politick Reason of the whole Body, it should be doubted, whether what they determine and resolve upon, being so jointly assembled, be a Corporation Act, or may affect the Corporation? Upon the Erection of all Corporations, this Power of assembling, deliberating, and determining for the Corporation, is either intrusted with a few particular Members, whose Continuance in that Trust (both as to the present Members and the Succession of them) is directed by the several Charters: Or else it is intrusted with the whole Body, and that either expressly in plain Words, or by Implication of Law, when the Charters are altogether silent therein: The Law in such Case lodgeth the Power of assembling, debating, and determining for the Corporation in all the Members, and the whole jointly assembled (or so many of them as upon Notice shall appear) constitute the Common Council: And such Assembly is not stiled the Common Council from being retained and giving of Counsel, as Mr. Recorder would have it, in which Sense he only, and the Common Serjeant are the Common Council of the City; but they are so called from their joint assembling and consulting for themselves, who constitute the Body Politick. In the same Sense, the Parliaments of *England*, by many Authorities, are called *Communia Regni Concilia*. This Power thus lodged in the Whole, may be the Whole, or the major Part, which always binds the Whole, being lodged or delegated to a certain Number, which may represent the Whole. In such Case, where the Power is transferred, those Members to whom it is transferred constitute the Common Council in the same manner, and their Acts are of the same Obligation, as where all meet, unless the Delegation were not general, but certain Cases reserved for the Determination of the Whole, as hath been done in several Corporations; but in all Cases not excepted, their Acts are the Acts of the whole Body. Where the Common Council is constituted of the whole Body, or of all the Members, who will meet upon Notice, there is no room left for Doubt, but their Acts, and the Acts of the whole Corporation are the same. Mr. Recorder seems the only Person that ever doubted it, and is not to be beaten from his holds:

First, That the Common Council consists only of particular Members, and their Acts bind only the Members; & *Actio non egreditur Personam*.

Secondly, That no Corporation Act can be without the Common Seal.

Thirdly, That the Acts of the Common Council of *London* are under the Protection of the Statute or Charter in Parliament of 1 *Ed. 3.* their Acts are Personal, and they but Ministers of the City; and that the Charter provides, that the Liberty of the City shall not be taken into the King's Hands for any personal Trespass of any Minister of the City.

For the first, I have already demonstrated, that there are no Acts of the Corporation, but what are performed by the particular Members; I will not repeat. I have produced many Instances, that in point of Crime the Acts of particular Members do affect the Corporation, touching their Liberty: That they do so in point of Wrong between Subject and Subject, the Cases are infinite; I will only mention the Authorities: 9 *H. 6.* 36. *b.* 8 *H. 6.* 1. *a.* & 14. *b.* 45 *Ed. 3.* 2. *b.* 15 *Ed. 4.* 1. *b.* 5 *H. 7.* 26. *a.* 4 *H. 7.* 13. *a.* 32 *H. 6.* 9. *a.* 7. I shall add one Case more, that absolutely destroys Mr. Recorder's Hypothesis, upon which he relies, *That a Corporation cannot do or suffer any Wrong*; it is 48 *Ed. 3.* 17. *b.* The Mayor and Commonalty of *Lincoln* bring Covenant against the Mayor and Commonalty of *Derby*, upon a Deed of Covenants made by the Predecessors of those of *Derby* to the Predecessors of *Lincoln*, that those of the Town of *Lincoln* should be discharged from Toll for their Merchandizes brought to *Derby*. In their Count they assign for Breach, that two of the Burgesses of *Derby* by name did exact and take Toll of several of the Burgesses of *Lincoln*. The Defendants first take Exception to the Count for Variance from the Writ; that the Writ supposeth and alledgeth the Breach to have been committed by the Mayor and Commonalty, and the Count assigns the Breach by two Burgesses: The Exception is over-ruled, and the Count held pursuant to the Writ for the Breach of Covenant, which binds the whole, and must be made by the Members. Then it was insisted upon, in point of Law, That the Act of the two Burgesses did not oblige the Corporation. It was admitted, that the Act of all the Members met together would oblige the Corporation: But it was resolved, that it was a Breach, and obliged the Corporation; and that the taking of Toll by their Officers was a taking of Toll by the Corporation; and the Reason given is, that all the Members of the Corporation cannot, by any common Intendment, be understood to meet together to take Toll. Here is an express Judgment, that *Crimen egreditur Personam*, and shall render the Corporation liable for Wrongs done to a Particular Member of another Corporation. Much stronger is the Case of the King upon Breaches of the Condition in Law, as I have shewn, where the Acts of the particular Members committed against the King's Officers, are adjudged done against the King, and render the Corporation liable; but when all meet together, and do an Act, I may say it was never yet doubted, but the Corporation was obliged.

Trin. 17 Car.
1. Cro. 540.

The Case of *Warren*, which was cited of the Place of Common Council-man of *Coventry*, is nothing to this Purpose; nor the Reason given, That such Place was collateral to a Corporation; which was no more, than that the Court could not *ex Officio* take Notice of it as a fixed Place or Office, but must take it upon the Return; it being variously used in several Corporations, as I have shewed; and the Custom being returned to choose and remove them *ad libitum*, the Court could not judge otherwise, as they may of the Freedom of any Member, which is the same in all Corporations. And therefore in the Case of *Estwillk* and *Bret*, Common Council-men of *London*, where the Court could take Notice, they were chosen for a Time certain, the Court adjudged they could not be removed without Cause, and granted

Trin. 23 Car. 1
Rol. Restit.
Pl. 8. fol 456.

Restitution. That the Members of a Corporation can be punished only in one Capacity, and not in both Capacities, and impeaching them for Treasons and Felonies in their Corporate Capacities, will be licensing them, or at least giving them an exemption and Encouragement to commit these Crimes *impune* in their Natural Capacities, is a Strain so much above *Ela*, that I cannot understand it. Sir *James Bagg's* Case teacheth other Doctrine, that the punishing of any of the Members criminally for infamous Offences, by Fine, Imprisonment, or Pillory, at the King's Suit, doth not exempt the Criminal from Disfranchisement,

The many Precedents I have produced do prove, that the Rioters or Members, who committed the Cause of Forfeiture were not discharged by proceeding against their Liberties. In the Case of *Norwich*, for hanging the Approvers, the Liberty was seized for Misgovernment, and Process issued against the Mayor to answer it at *Westminster*, *criminaliter*. And in the Case of *Cambridge*, the Court told them, they did not then put it upon them to answer criminally, but as to their Liberties. And they themselves knew, that by Seizure of their Liberties they were not discharged of their Crime: And therefore in the Plea of Submission they insert a Saving, that it might be no Conclusion to them, in case they were impeached criminally. Mr. Recorder doth admit, that if all the Members commit Treason, and be executed, the Politick Person is destroyed as well as the Natural Persons, and that justly too for so great an Offence; and therefore the Extent of Forfeitures doth not encourage, but deter Offenders from Commission of the Crimes. And the Citizens, when they know that their Riots, Oppressions, and Libelling of the Government, do not only subject their Persons to Punishment, who are the immediate Actors, but also subject the Constitution and Government of their City to be questioned, will look upon themselves under stricter Bonds for discharging their Duties, than common Subjects are. And therefore the Nobility, who have so great a Share in the Government, for Treasons do not only forfeit their Lands and Lives, but their Right of Peerage, which is a special Trust for Government; and that was forfeited in Cases where their Lands were not forfeited, but only during their Lives, upon the Condition annexed to that special Trust; as before the Statute of 26 H. 8. If a Nobleman (to him and the Heirs Males of his Body) having

entailed Lands, commit Treason, his Lands are not forfeited from his Heir in Tail: but the Dignity is forfeited and extinct, and not supported by the Statute of *Donis*, by reason of the Condition annexed, *Nevil's Case*, 7 Co. fo. 34. The Law is the same, where the Dignity is granted in Parliament, or by Act of Parliament, it is no less forfeitable in one Case than in the other; the Condition the Law annexed is still the same. If when the Members of a Corporation, *corporaliter* assembled, commit Treason against their Prince, it must certainly be acknowledged to be against their Duty, in whatever Capacity they be consider'd; especially since the statute of King *James*, which makes the Oath of Allegiance to be Part of every Freeman's Oath; and the corporate Right is held of the King. If the Law allowed no other Way of taking Advantage of Forfeiture of the Corporate Right, but by executing of all the Members, the Law itself might be accused of as great Tyranny as ever was practised by the greatest of Tyrants. And to this, and nothing else, the Principle laid down by Mr. Recorder, that Treasons, Murders, and Felonies of the Members do not affect the Corporation in Law, doth directly tend, *viz.* to introduce Cruelty.

The Objection that no Acts are corporate Acts, or can affect the Corporation, but what are under the Common Seal, nothing certainly can be more vain than such an Assertion. Then no Mayor, Sheriffs, or other Officers, ever acted legally in their Choice by the Corporation, because not under the Common Seal: Then no By-laws are valid as corporate Acts, because not under the Common Seal: The same may be said by most of the corporate Acts in Cities and Towns.

In the Case of *Cambridge* before the King and Lords, 5 R. 2. *Birdfield* and other Burgesses appeared on the Behalf of the Commonalty; the Court demanded of them if they had Authority under the Common Seal of the Town? They answer, The Town had no Common Seal, but that they were chosen at a common Assembly of the Town summoned for that Purpose, which is the Common Council, to appear for the Commonalty, to answer and receive *ce queux la ley volt*, and the Authority was adjudged sufficient. The Common Council, say they, are but Ministers of the City, and the Liberty of the City hath a special Protection against the Personal Acts of their Ministers by the Charter in *Parl. 1 E. 3.* I have a Copy of that Charter by me from the Records in the Tower. The King's Grant indeed is, *de assensu Prælatorum, Comitum, Baronum, & totius Communitatis Regni in instanti Parlamento.* The Considerations of the Charter are *pro melioratione Civitatis*, and for the laudable Services of the Mayor, Aldermen, and Commonalty, performed to the King and his Ancestors; but the Grant is only *Civ. Civitatis prædictæ. habendum sibi & successorib. suis.* The Words of the Grant are: *Quod pro aliqua personali transgressione vel iudicio personali alicujus ministri ejusdem Civitatis non capiatur libertas illius in manum nostram vel heredum nostrorum, nec custos in eadem Civitate ea occasione deputetur, sed hujusmodi Minister prout qualitas transgressionis requirit, puniatur.* These are all the Words in that Charter, which refer to this Matter; and the same were granted to them, in some former Charters out of Parliament. This appears by this Charter in Parliament, that Li-

berta,

bertas Civitatis, which is the Franchise or Corporation, had been seized and might be seized for some personal Miscarriages of the Ministers; for it is merely the King's Grant, that exempts them from it for the Time to come. I do agree, that every Personal Miscarriage of their Ministers was never any Cause of Forfeiture; but it must be Miscarriages of Omission or Commission, which amounted to a Misgovernment within the Corporation. As 30 H. 2. Rot. Cl. memb. 5. The City of London was taken into the King's Hands, for not levying a Hue and Cry upon the Death of Persons who were slain, *Hale Lib. L. fo. 269. H. 3. memb. 2.* Their Liberty seized for giving of false Judgment in the Hustings, *Lib. L. 309.* These are sufficient to shew what are the *personalis transgressio*, and *personale Judicium* intended to the Charter; tho many the like Instances may be produced. Who are the Ministers intended partly appears by the Charter, but fuller by other Authorities, viz. Mayor, and Aldermen, and Sheriffs, who are in that Charter expressly mentioned. But this Charter did not prove of any great or long Advantage to the City, in differing them as to this Privilege from other Corporations; for they were met with, either by excessive Fines, set upon their Officers for personal Defaults and false Judgments; or that it excused the City only upon the first Offence; and if again they committed the like Offence, it was no longer Personal, but become their Offence, because they did not displace their Officer to provide against his reiterated Crimes. And therefore, as Mr Solicitor hath shewn, the Liberty of the City of London was after this seized into the King's Hands for Misgovernment; besides the Punishment of their Ministers became difficult, because the Offences being committed in London, the Inquiry of them must be by Men of the same, who favoured these Officers. And thereupon, to settle this matter, an Act of Parliament was made by the same King, which is in Print. The principal Grounds of the Act, as the Act recites, 28 Ed. 3. c. 10. were that the notorious Errors, Defaults, and Misprisions for Default of good Governance of the Mayor, Sheriffs, and Aldermen of London, could not be inquired of, nor found by Men of the same City. The Act settles the Rule, that for the first Default of the Mayor, Sheriffs, and Aldermen, they shall forfeit 1,000 Marks; for the second Offence 2,000 Marks; and for the third Default, the Franchise and Liberties of the City shall be taken into the King's Hands, and this for the Defaults of their Ministers; which is a Plain Judgment in Parliament, that the Franchise of London may be forfeited; and explains the Charter of the 1st Ed. 3. And to make the Remedy effectual, these Defaults are omitted to be inquired after by the Juries of Foreign Counties; and so shut the Door against all Pretences for the Charter, 1 E. 3. and former Charters. It is enacted, that the Ordinance shall be held firm and stable, notwithstanding any Franchises, Privileges, or Customs. By this Law the Fines of their Ministers for their first and second Offences, in Breach of good Government, are ascertained, which by the former Charters were at Discretion; but for the third Offence of their Ministers, their Franchise might be seized as before 1 E. 3. and their other Charters might, for the Offence of Misgovernment, and from

thence till this Statute for the second Offence. But neither the Charter 1 E. 3. or this Law did extend to any outrageous Acts of their Members, as breach of their Duty and good Government, but only to the personal Acts of the Mayor, Sheriffs, and Aldermen, in their several Trusts committed to their Managery. Under this Law the City of London stood till 1 H. 4. from which King the City expected greater Favours than ordinary, as having merited them by being the chief Instruments of his Promotion to the Crown; but the manner wherein they were instrumental, I forbear to mention. Yet from that King they could obtain no more as to the Forfeitures for the Personal Offences of their Ministers and Officers, than to be put into equal Condition with other Cities and Bouroughs. The Statute after Recital of 28 Edw. 3. That our Lord the King considered the good and lawful Behaviour of the Mayor, Sheriffs, and Aldermen, and of the Commonalty of London towards him, and therefore willing to ease and mitigate the Penalty aforesaid, by Assent of Lords and Commons, hath ordained and established, that the Penalty aforesaid, as well of the 1,000 and 2,000 Marks, and the Seizure of the Franchise, shall not be limited in a Certainty; but the Penalty in the Case shall be by the Advice and Discretion of the Justices, as other Cities and Boroughs be within this Realm; and that the Remnant of the Statutes stand in their Force; So that from 1 H. 4. the City of London never could pretend to any other Exemption for Forfeiture of their Franchise than other Cities and Boroughs may.

Here I crave leave to join some other Records to those produced by Mr. Solicitor, particularly relating to the City of London.

2 Pat. Roll. Pars 2. memb. 9. The King appoints John Lord Breaton Custos of the City, with Commission to amerce and punish the Aldermen and others of the City, according to their Demerits.

8 Ed. 2. memb. 3. dorf. A Writ issues for the orderly choosing of the Mayor and Sheriffs, which began then to be tumultuous, and, as the Record saith, *Quod quidem populares & plebes, conspiratione inter eas habita, dissidia innumeraque facinora in dicta civitate nocte dieque perpetrantes, conventiculaque clandestina in locis privatis facientes, non vocati & summoniti, hujusmodi Electionibus se immiscerent communicationibus & clamoribus.* The Writ recites the Elections to have been *per Aldermannos & alios cives discretiores & potentiores*; and commands that they be so done, *prout in eadem civitate antiquit' fieri consuevit*: otherwise, that the King would not admit them, when presented to him or his Exchequer.

14 Ed. 2. pars 2. memb. 22. The King grants the Office of Mayor, seized into his Hands at the Her in the Tower, to Robert Kendall, *durante bene placito.*

15 Ed. 2. pars 1. memb. 2. The King first replevins to the Aldermen, Sheriffs, and Citizens the Office of Mayor, who present to the King Hamond de Chigwel for the Office, and the King admits him; and then the King grants to the Aldermen, Sheriffs, and Citizens, the Mayoralty to hold at the King's Pleasure.

26 Ed. 2. memb. 5. The King absolutely restores to them the Mayoralty, to choose as before the Seizure into his Hands.

16 R. 2. pars 1. memb. 28. dorso. A Commission issueth to the Duke of Gloucester, and several Lords and Judges, to enquire of the Defaults of the Mayor, Aldermen, and Sheriffs, upon the Statute of 28 Ed. 3.

16 R. 2. memb. 2. dorso. The Commissioners sat at Eaton, in Com. Bucks, and the Mayor, Sheriffs, and Aldermen, were convicted of several Miscarriages, and the Liberty of the City (by the Judgment of the Court) seized into the King's Hands; and the King (by Advice of his Council at Windsor) constituted Baldwin Badington Mayor in the Room of William Venner, and two other Sheriffs, and 24 Aldermen, to hold during the King's Pleasure; and they all took their Oaths before the King and his Privy Council: And in that Record the Prior of Christ-Church was sworn an Alderman.

16 R. 2. pars 2. memb. 31. In the same Year the King, at the Intercession of the Queen, grants to the Aldermen, Sheriffs, and Citizens, that they might use their Franchises as they did before the Seizure; but with this Clause of Restriction, *Quousque aliter ordinaverimus*. Upon which the City chose John Hend Mayor, and John Shadworth and Henry Venner Sheriffs, who were removed the same Year by the King, and Henry Dalinger appointed Mayor, to hold during the King's Pleasure.

16 R. 2. pars 1. memb. 36. The Record assigns the Cause, *Pro minus discreta & insufficienti gubernatione & regimine civitatis nostræ*.

20 R. 2. The King makes full Restitution to them of their Liberties; in Print, and in the Charter pleaded.

22 H. 6. memb. 25. dorso. Elections of Mayor and Sheriffs beginning again to be tumultuous, a Writ in the nature of that in Edward the second's Time issued, commanding the Choice to be *per Aldermannos, necnon discretiores dictæ civitatis, ad hoc specialiter summonitos*, according to the ancient Custom: And after in Edward the Fourth's time the Choice was settled upon the Livery-men by Act of Common Council.

So then there can remain no Question, but that the Mayor, Sheriffs, Aldermen, and all the Commons in Council assembled, may commit Acts for which their Franchise may be seized: And tho' there may be no real Difference where all the Commons assemble, and where only a certain Number elected by the rest; yet I shall not farther discuss that Point at this Time, because that Question doth not arise upon this Record. For the Offences wherewith they are charged are both laid, in the Replication, to be committed by the Mayor, Citizens, and Commonalty of London, by which must be intended the whole Body.

The whole Body plead to it; but in the Rejoinder they do not traverse; and deny they did the Facts: So that as to the Actors, it must be intended they are the same Persons, who are sued and defend upon Record, which are all the Members of the Corporation.

There are two Branches of the first Offence laid in the Replication:

1. That the Mayor, Citizens, and Commonalty in Common Council assembled, did make and publish a Law for levying of Money.

2. That the Mayor, Citizens, and Commonalty, by Colour of that illegal By-law, did exact and levy upon the King's Subjects divers great Sums of Money.

In the Rejoinder they take it by Protestation, that no Act or Fact of the Mayor, Aldermen, and Common Council, is an Act or Fact of the Body corporate, or politick; which is *Protestatio Juris, non Facti*, and is that Error I have endeavoured to refute, that the Acts of all the Members of the Corporation assembled in Common Council, are not the Acts of the Corporation. But yet by this Protestation of Matter of Law they would insinuate a Not Guilty as to making of the Law, and seem afraid to own it, and do not bare-facedly own it. But after they have intitled themselves to the Markets, in such a Manner as I afterwards consider, then they proceed to number the People, which surely was not done upon any legal Ground to move your Judgments. Then say they, that Time out of Mind there hath been a Common Council not exceeding 250 Persons, elected out of the Freemen; but do not say of what Number it doth consist, nor by whom elected, whether by Citizens or Foreigners, by the Mayor, Aldermen, or by whom chosen, so as the Court may judge of the Matter of Law so strongly protested, whether they were the Representatives of the whole Body, or no. Then they say, Sir William Hooker Mayor, and the Aldermen of the City, *ac communarii, sive cives de Communi Concilio ejusdem Civitatis*; which may as well be intended of Mr. Recorder and the Common Serjeant, who are *de Communi Concilio civitatis*, as of any other; for the Persons are not named, nor is it said they were elected, nor by whom, nor any Words of Reference to the Custom alleged; but generally, that they met in *Communi Concilio secundum consuetudinem civitatis*, not referring to the former Custom alleged. But being met, they made the By-law for the several Sums of Money, to be received for the Use of the Mayor, Citizens, and Commonalty. Which Rates, and no other, the Mayor, Citizens, and Commonalty, *exegerunt & perceperunt*, according to the By-law. *Qui quidem Actus sive Ordinatio est eadem Lex* supposed, by the Replication, to be made by them the Mayor, Citizens, and Commonalty. And traverse *absque hoc*, that any Law was made for Monies of Persons coming to the Markets *aliter vel alio modo* than they had before set forth. I know those learned Gentlemen who signed this Plea, and the other to the Charge of the Petition, if they could have found sufficient matter of Justification to either, they would not have suffered them to appear upon Record in such uncouth Dresses; and therefore Deficiency of Matter may excuse the Insufficiency of Pleading; for there is Skill shewed in the Contrivance to have drawn on a Demurrer; for nothing was dreaded more than an open Examination of the Facts upon a Publick Trial, which would have fallen very little short in both Cases, as to the Aggravation laid in the Replication.

Upon this Pleading the Mayor, Citizens, and Commonalty have confessed, that the By-law was made for them, and the Monies to be levied for their Use. They have also confessed, that by force of that By-law they exacted and received the Monies; and their Justification will be considered by and by. But as to the making the Law, they neither confess it made by themselves, nor by any deriving Authority under them; neither do they traverse, or deny it. For the Averment, that it is the same Law, and the Traverse, that any Law was made *aliter vel alio modo*, is no legal Denial, that

that the whole Corporation (consisting of Mayor, Citizens, and Commonalty) did not make that Law upon which an Issue could be taken. Besides, if Mr. Recorder would have the Court intend, that the Common Council, set forth in the Rejoinder, is a distinct Body of Men from the Politick Body of the whole City, the whole Plea amounts but to the General Issue. What the consequence thereof will be, I will consider upon the Point of the Crimes set forth; but at present the Court cannot otherwise intend, but that they that made this Law and this Petition, were the same Mayor, Citizens, and Commonalty, who are expressly charged therewith, and in their Pleas they do traverse or deny it. It is just such another Plea, as where an Information is brought against several Persons for killing and taking away of the King's Deer; the Defendants should plead, that certain Persons (not naming them, nor from whence they come, nor by whom sent) pretended a Custom to kill the King's Deer, and according to that Custom they killed the King's Deer, for the Defendants Use, and the Defendants carried away the Deer. Who (I pray) shall the Court intend killed the Deer, but the Defendants, or some by their Authority?

I now come to the main Point of the Case:

Whether by any thing disclosed upon those Pleadings, there appears a sufficient Title to the King, for the Court to give Judgment of Seizure of the Franchise of the City of London? The Title I insist upon for the King, is for a Forfeiture by Acts done by the Mayor, Citizens, and Commonalty, in breach of their Duty and the Publick Trust reposed in them upon their first Erection. It is my part to maintain, that the Causes assigned are sufficient in themselves, and sufficiently disclosed to the Court, for the Court to give Judgment upon; I shall consider them,

First, As they stand upon the Replication, as Crimes laid to their Charge, which will amount to a Forfeiture of the Franchise.

Secondly, How they stand upon the Rejoinder and other Pleadings, whether sufficiently traversed or denied, confessed and avoided, or in the least extenuated.

First, The Crimes laid in the Replication, are two in general:

1. Oppression of the King's Subjects by colour of Law: And,

2. Stirring up Seditions by Libelling their Prince and his Government.

These two only are laid in the Replication, but collected out of many sufficient Causes for Seizure of any Franchise. The notorious Riots committed in the Face of Justice, to the comforting and abetting of Criminals, and Terror of the Judges; and those not only not suppressed or punished by the Magistrates; but countenanced and encouraged by them. The Tumults of many Thousands, exposing and burning in Effigie several of the King's Protestant Subjects, not suppressed or punished by the Magistrates; but by some encouraged, and by Contributions supported. The Encouragement of Libels and Libellers of the King and Government, by and within the City. These and many more I could enumerate are common Offences to the City of London, with other Cities, and populous Corporations; but these are such as have been in the Cases produced adjudged Causes of Forfeiture of the Franchises for Misgovernment.

And in these London hath but imitated itself in former Times, and other Cities and Boroughs.

But in the Cases insisted upon, London hath outdone itself, and all other Cities and Boroughs too, by assuming a Power to make Laws for levying of Money upon Foreigners for their own Use; and to deliberate, adjudge, and condemn their Prince's publick Actions, and publicly libelling of them to his Subjects. Never did London before now, or any other City or Borough (in times of Peace, and not under an actual Rebellion) commit the like Breaches upon the Government, to assume a Power superior to any the King hath in like Cases, to lay Burdens upon his People, and to levy Money, and to invade the King's Prerogative, by deliberating and determining of his publick Actions to the consequences thereof, and publicly libelling them to the rest of his Subjects. And in Execution of such unjust Power, that the Mayor, Citizens, and Commonalty, did make and publish a Law for levying of Money upon the King's Subjects, as well Foreigners, as others, coming to the publick Markets with Provisions. And chargeth several Particulars, and divers other Sums imposed upon all Comers to the Markets, whether they sell or no; and that if any Person refused to pay, he should be put out of the Market.

Again, that the Mayor, Citizens, and Commonalty, by pretext of this Law (made by themselves, and for their own private Lucre) did exact and levy yearly of the King's Subjects, Sums of Money amounting to Five thousand Pounds *per Annum*, and converted and disposed the same to their own use, in subversion of the good Government of the City; in oppression and depauperating the King's Subjects coming to the Markets; in raising the Prices of Provisions in Markets, to the Damage of the King's Subjects; to the manifest Dishonour of the King and his Crown, contrary to the Trust reposed in them as a Body Politick.

In the first Branch of their levying Money, there is this Crime laid to their Charge: An Abuse of the Liberty of a Body Politick in its highest Point of Trust, *viz.* of making Laws for the better Government of its Members, and other the King's Subjects repairing to the City. This is no distinct Liberty from the Body Politick, but incident to it, as hath been shewn, and therefore cannot for any Abuse be singly lost, or severed from their Body Politick, no more than the Body Politick can subsist or attain the Ends of good Government without such a Power, which the Law raiseth for a better Discharge of that Trust. But the Law entrusteth no Corporation with a Power to levy Money for their private Profit, be the Colour what it will; nor can such Power be derived from the Crown to any Corporation; neither can any Authority be produced, that gives the least Countenance to such an Authority: The Case of *Blackwell-Hall* is express against it; that was ruled good, because it was *pro bono publico*, and not *pro privato lucro*; it was but a small Reward for the Officer who attended that Business; the City got nothing thereby. Corporations, as well as other Communities not incorporate, are by Law entrusted with Power to raise Money for Uses publick to the Community; but such Power is confined to the Precincts of the Community; they cannot lay their Charge upon Foreigners; as for Reparation of Churches, Highways,

ways, Bridges, and such like publick Charges. These Crimes, at Common Law, came the nearest Treason of any. Sir *Thomas Halley*, 20 R. 2. for preferring a scandalous Bill, was adjudged to die as a Traitor; his Life spared at the Instance of the Bishops; and after 1 H. 4. N. 9. upon his Petition the Judgment was reversed. To lay Impositions upon the King's Subjects was not only an Inroad upon the Royal Power, but of the Power of Parliaments. And what Inroadments of Royal Power were Treason, what not, was in the Breast of the Judges, as appears by the Petition in Parliament 21 Ed. 3. N. 15. and after settled by the Statute 25 Ed. 3. Certainly that they have an immediate Tendency to a Rebellion, is evident. To alienate the Subjects Affection from their Prince is a great Step that Way; and for so great a Body of Men (both for Riches and Reputation) to adjudge and publish, that the King, by his Prorogation, hath interrupted the publick Justice of the Kingdom, and the necessary Provisions for his own Safety, and the Preservation of his Protestant Subjects, is in effect to determine and publish the King unfit for the Government, and by necessary consequence would aliene the Affections of such as should believe them. Add to this the Power they assume, and justify, to levy Money to their own use, upon Foreigners as well as Citizens, and that to any Sum; which Mr. Recorder pressed as the force of his Argument, that little or more made no difference. When those they have persuaded to draw their Affections, shall be assured of such a Legislative Power to assist them with Supplies; what Consequences may be expected, every Man may judge. Especially if one thing more had been effected, as was contrived and endeavoured to be established; that *London* should become the *Asylum* of all Malecontents, as *Rome* was heretofore, who might there vent their Gall against the Government *impune*, and without fear of Conviction.

I shall consider the Offences particularly, as they stand upon the Replication, as to the Levying of Money.

1. They are charged, that they in Common Council assembled, respecting only their private Lucre, and in breach of the Trust reposed in them for good Government, did assume upon them an illegal and unjust Power and Authority to levy Money upon the King's Subjects to their own Use, without any lawful Authority. And the City of *London* have by several Charters such express Power given them, but it is confined to their own Members; neither the King nor the Law ever gave them any Power over Foreigners, to charge them for the private Profit of this City. Now to assume such a Power is a plain Usurpation by a Body Politick upon the Crown and the Law, and is a manifest Breach of that Trust for good Government, by an open and avowed Oppression of the King's Subjects by colour of Law, which is the worst of Oppressions; and therefore the Law not only gives a new Name, but layeth heavier Penalties upon Oppressions committed by Persons in publick Trust. It is called Extortion, and Oppression, where committed by any Person in publick Offices or Trusts. It is not sufficient that the injured Persons may have their Actions, or that they may be fined at the King's Suit; but the Law gives a Forfeiture of the Places of Trust, and all may

be exacted from them, if the King please. The Persons injured may recover their Damages: They may be fined at the King's Suit, and their Offices seized, the Law adjudging all these Penalties but equal to the Crime. The Markets, as they stand upon the Replication, must be intended Free Markets, as the Streets of *London* are for all the King's Subjects to have recourse to with their Provisions, for supply of the Inhabitants, without payment of any Toll. The Sums of Money, for buying whereof the Law is made, as set out in the Replication, cannot be for any Toll of Markets, nor for Piccage or Stallage, which may be annexed to Markets; but Imposition upon the Persons, or Goods, coming and brought thither, whether they sell, or not, and whether they have any Stalls, or not. And the Process is admirable, that if the Person refuse to pay, he shall be turned out of the Market; as if the Law were, that every Man that walks in the Streets should pay 6 *d.* and if he refuse, he should be turned out of the City. I must confess, the Process is as good as the Law. Thus this Crime stands upon the Replication. How have the Mayor, Citizens, and Commonalty varied it in their Rejoinder? Not one jot; for as to this point of Charge, that they usurped such a Power, and did execute it by making a Law for levying of Money in Oppression of the King's Subjects, they give no Answer at all, either by traversing, or denying, confessing and avoiding. If they had traversed their making of the Law, the Special Plea had amounted to the General Issue; but as it is, there is no Answer at all given to it. And therefore, if the making of such a Law, in the manner set forth in the Replication, be an Abusion of the Franchise, Judgment of Seizure must be given for that Abuse.

The Reasons given by Mr. Recorder, that the making of this Law will not forfeit the Franchise, were these:

(1.) That if the King had made such a By-law in the Charter of Incorporation, that would not have forfeited the Corporation; no more can it, if it be made by the Corporation afterwards.

I do not understand the mystick Inference of this Argument, unless it be to continue the Allegory of resembling Corporations to Kings, that they can do no Wrong, and consequently can forfeit nothing by their Acts, tho against Law. Where the King annexeth any Power to any Offices or Corporations, which the Law allows them not to exercise, the Law doth not adjudge the whole Grant void, but only those Powers: But if Officers or Corporations shall assume upon themselves to exercise Powers which the King could not grant, against the End of their Institution, by Extortion and Oppression of the King's Subjects, it is not sufficient that the Acts are void, because illegal; but the Offenders shall be punished in such manner as the Law provides.

(2.) In all the Suits where By-laws have been adjudged unreasonable and void, it was never held or said, that such By-laws forfeited the Corporation; and if it should, every little Mistake in the By-law should forfeit the Corporation, which would render the State of Corporations very unsteady and uncertain.

1.) I Answer, first, That in those Suits between Party and Party, there was no occasion for the Court to declare how far the By-law has intrenched upon the Prerogative, by breach of the Condition

Condition in Law annexed to the Liberty. But I remember, in the Case of the Mayor of *Wiccomb*, Mich. 27 Car. 2. upon Complaint in this Court to my Lord Chief Justice *Hales*, of his refusal to sign the Poors Rates, he publicly declared to him, That if he persisted in his Obstinacy, a *Quo Warranto* might be brought to seize the Franchise.

2.) There is a plain Difference between By-laws, for regulating the Actions of the Members, and others within the Corporation, with a Penalty to enforce Obedience, and a Law directly for levying of Money: In the latter Case, the levying of the Money is the principal End of the Law; and to levy it *pro privato lucro*, and upon Foreigners, can receive no Palliation from being a Mistake against all the Laws and Authorities that are extant. But in the former Cases they have a Semblance for common Benefit, and possibly might be for the Benefit of all the Members, could the Restriction be made by Law; and the Penalty is but collateral, to enforce Obedience, and will stand and fall as the Law determines of the Principal. And the Law no where determines all the Cases, where the Liberty of any Members, (as to Trade) may not, or may be restrained, whereby there is Room left for Mistakes; but against so known and universal a Principle, that no Corporation can levy Money for their private Profit, no Excuse of Mistake can be admitted.

3.) That which shelters all other By-laws from Oppression, is wanting in this; that as to the Recovery of the Penalty, they refer to a Course of Law, whereby they submit their By-law to the Judgment of Law for its Validity, that if they have committed any Mistake, it may be corrected by Law. But here the Remedy is plain Force; if the Person do not pay, he shall be turned out of the Market with his Goods: What was settled by Wrong, shall be recovered by Force. Thus Mr. Recorder's arguing makes the Duty a mere voluntary Payment; it is *solve, aut abi*, he hath his Election to pay, or be gone. I have not met with a more arbitrary Principle asserted, or defended in a Court of Law. Should the King lay an Imposition of 12 *d.* on every one that entered *Whitehall*, with Order to the Porter to turn him out upon Refusal of Payment, what a Dust would this make, that the Subjects Rights to have access to their Prince were invaded? Why, it is no more than *solve, aut abi*. The Right of all the King's Subjects, to come with the Provisions to publick Markets, is far greater, and as great as of the Lord Mayor, or of any of the Citizens to come there; and the putting such Terms upon their Right is absolutely illegal in the worst Sense that Word is at any time used. And herein Mr. Recorder was in the Right, that more or less are not material, because every Sum imposed in such Case is illegal, and what is illegal, cannot be reasonable; which absolutely precludes the Averment, that the Sums were reasonable; which obtains only in such Cases, where of common Right some Sum may be taken.

4.) In the last Place, the questioning of a Liberty in a *Quo Warranto*, whether upon the Title, or for a Forfeiture, is upon the Right between the King and the Corporation. In Case of Mistakes and common Errors committed, those are not to be justified upon a Question of Right;

and if they be, they are no longer Mistakes, but wilful Crimes. And therefore in all times such Mistakes, both in making of Laws and Matters of Fact, have been passed by, and pardoned by the Charter of Confirmation, *etiamsi abusi fuerint*. And in the Multitudes of *Quo Warranto*'s that have been brought, most ended by Submission before Pleader. But where it shall be insisted upon in Point of Right, tho in a smaller Point of Oppression, upon such Grounds as may equally intitle them to commit the greatest Oppressions, *Magis & Minus* do not affect the Case in Point of the Right of Forfeiture: but the Question is, Whether they have broken their Trust? And if so adjudged, Forfeiture is a necessary Consequence.

(3.) The Third Reason Mr. Recorder insisted upon is 19 *H. 7. cap. 7.* That there had been no need of that Law, if Corporations By-laws would be Cause of Seizure.

1.) I answer, That Statute extends not to the By-laws of Cities and Boroughs incorporated; but to Guilds and special Fraternities.

2.) It extends to good By-laws as well as bad, for greater Caution, that they put no new By-laws in Ure till allowed; but the Allowance makes them neither better nor worse, only shelters for the 40 *l.* Penalty, as in the Taylors of *Ipswich's* Case, *c. 11. b. f. 54.* So that the By-laws are but of the same Force they were before that Statute, &c. if they are good Laws, they may be executed without Allowance; and I have before shewn, that the Addition of another Penalty doth not dispense with the Penalty upon breach of the Condition given by the Common Law. The other Crime of Oppression they are charged with, is, that they did exact and levy, to their own Use, the several Sums, and others, amounting to 5,000 *l. per Ann.* in Oppression of the King's Subjects, and raising the Prices in the Markets for their own private Lucre.

Secondly, In their Rejoinder, taking by Protestation they are not of that Value, the Mayor, Citizens, and Commonalty acknowledge the exacting and receiving the Monies to their own private Use, but say not of what Value they are; but be they of what Value they will, attempt a Justification. It must be admitted, that if the Justification be insufficient, the Court cannot otherwise judge of the Crime than as it is laid in the Replication; where it appears to be as great Extortion and Oppression of the King's Subjects, and continued for many Years together, by colour of an Authority usurped by them, as ever was practised by any Subjects upon their fellow Subjects; which cannot be denied to be an apparent Breach of that Trust committed to them, for the better administration of the Laws and Justice to the King's Subjects.

The Parts of their Justification are these:

(1.) A Custom, that Time out of Mind, there have been publick Markets within the City.

(2.) They make Title to these publick Markets by Prescription, but claim not any Toll of common Right belonging to these Markets.

So that both upon the Custom alleged, and Prescription made, the Court cannot otherwise intend but they were free Markets, as in truth they were. Then they allege a Custom, that Time out of Mind, they used at their Charge to provide Places where the Markets were held, and

and Stalls and Stations, and other Accommodations for the Market People, and Surveyors, and other Officers, for the better Government of the Market People; and did cleanse and were bound to cleanse the Market-places. And for defraying of their Charges for all the time aforesaid, they had and used to have *diversa rationabilia Tolneta, Ratas, five denariorum summas*, of all Persons coming to the Market, for Stalls, Stations, and other Accommodations for the selling of their Provisions. Altho they received Monies time out of mind, and until the By-laws, they cannot tell what these Sums were, nor what to call them, whether Tolls, Rates, or Sums of Money. Tolls they could not be, that is admitted of all Hands, because against common Right, and to be paid upon entry into the Market, whether sold, or not. They do not intitle themselves so much as to Picage or Stallage; for they make no Title to the Land where the Markets have been, or are held: And we all know, that before the Act of Parliament provided at the Publick Charge fit Places, and settled them upon a publick Trust for Market People, what Provision was made of Places by the City, *viz.* in the Publick Streets, where there ever was a Free Market for Provisions, as would have been made evident, had the City tendered a sufficient Issue. Besides, the Sums charged in the Replication can neither be of Picage or Stallage; but laid upon Goods brought within the Market, whether the Vender made use of any Stall, or Breaking of the Ground, or no. Neither is it averred in this Plea, or by any Words of Reference can it be inferred, that the Sums in the Replication are the same with those they claim; they claim only by Custom *rationabilia Tolneta, Ratas, five denariorum Summas*.

(3.) Mr. Recorder would justify this Plea, that such a General Claim, with an Averment that they are reasonable, is a sufficient Justification of particular Charges, which are against common Right; and insisted upon the Claim of the City of London of the Water-Bailiff's Office, with the Fees thereto belonging; and the Case of Maidenhead in Palmer's Reports, of the Market, with the Toll thereto belonging. These Precedents answer themselves, there was no particular Charge for the Toll or Fees, but what is charged particularly is answered; besides, the Toll and Fees are claimed of common Right, as belonging to the Market and Office. In Maidenhead's Case the Judges agreed, that Toll according to common Right might be granted by general Words; but Toll against common Right could not, nor be prescribed for but in certainty. In that Case reported by my Lord Hales, Franchise, *pl.* 11. the Difference is expressly taken; and the Authorities cited of 9 H. 6. 45. 11 H. 6. 14. *Fit. Avowry* 126. That Demands against common Right ought to be prescribed for in certainty; and the Authorities produced by Mr. Recorder in the Lord Cobham's Case, 1 Len. 218. Hickman's Case, 2 Roll. Abridg. 125. and Roll. 2 Abridg. 265. The Case of Dublin for Keyage or Cranage, so the Case of Hill and Hawks, and the Bell-Man of Litchfield, prove it. No Man questions but Cities and Boroughs, upon good Consideration, may prescribe for Sums of Money against common Right; and may prescribe for an apt Remedy for Recovery of such Sums; but all the Authorities prove it must be prescribed for in certainty, that

the Court may judge of the Reasonableness of it: And whoever claims against common Right, must make out his Demand, both in certainty, and that it is reasonable; it is otherwise, where according to common Right, as in Fines for Copyhold Estates, it is incumbent on the Tenant to shew if unreasonable. Besides, this Custom is void, because they do not intitle themselves to any Remedy for these uncertain Sums.

(4.) The next part of the Justification is, that time out of mind, within the City there hath been a Common Council; the Imperfection whereof I have already observed.

(5.) They set forth a Custom for this Common Council to make Laws for the better Government of the Markets, and appointing convenient Places and Times for the Markets. *Et ex Assessione & in certitudinem reductione* of reasonable Tolls, Rates, or Sums of Money to be paid by Persons coming to the Market, *pro Stallis, Stationibus, & aliis accommodationibus*; so as these Laws be profitable to the King and his People, and not contrary to the Laws of the Land. For the first part of the special Custom, for the better Government of the Markets, and appointing convenient Places and Times, it needed not; for it is incident of Common Right to every Lord of a Market, and the Grantee of every Market, without special Clauses, hath the same Power and Trust. And yet it is ushered in with great Solemnity, a Confirmation by *Magna Charta*, a Charter in Parliament, 1 Ed. 3. & 7 R. 2. to make good a Custom, which is but the Common Law. Unless they set up this Custom to divert themselves, who have pleaded themselves Lords of the Markets; and so to fix it in others who are no Lords of the Markets; and thence to infer that the Custom having intrusted others, than the Mayor, Citizens, and Commonalty, with the Government of the Market, they the Lords of the Market ought not to suffer for the Misgovernment of those other Members. The Second part of the Custom is insensible. To make Laws and Orders, *ex Assessione & in certitudinem reductione* of reasonable Tolls, Rates, or Sums of Money, to be paid by all Persons coming to the Markets, for Stalls, Stations, and all other Accommodations. What is meant by *Assessione* without an *Anglice* I cannot imagine; it is no Law Term; in its proper Signification, it signifieth sitting together; whence our Sessions quarterly, and Sessions of Parliament, have their Name. The general Rates set by the Parliament upon the several Counties are sometimes called Assessments, and those intrusted with equally dividing the Rates in the several parcels upon the Inhabitants, are called Assessors. In which of these Senses, or what Sense, the City's Counsel apply this Word, I cannot resolve; for Mr. Recorder did not resolve it. It seems by the subsequent Words to be explained *in certitudinem ponere*, and to have some resemblance to the Parochial Assessments, where the Duty before is imposed by Law, but the ascertaining of every Man's Proportion is done by the Assessors: And this Mr. Recorder inclined to in his Endeavours to support the Custom, generally for reasonable Rates. And in this sense too the City seems to understand it, by waving of the Assessment in their Rebutter. In our Surrejoinder we traverse the Prescription of taking of the Rates mentioned to be by the By-law assessed, and reduced into certainty; which Issue they wave,

and insist only upon their Prescription generally alleged. Now, if taken in this sense, the Clause is wholly insensible and incertain, because the Tolls, Rates, or Sums of Money to be paid, are not referred to any former Law that imposed them; they do not so much as refer to the Prescription, and the Sums claimed thereby; but the Clause is independent and absolute of itself. Neither can the Court now intend it to refer to those Sums claimed, because we would have so intended it; and therefore took an apt Traverse; but the City waved it in their Rebutter; and they do lie under this *Dilemma*, that either it must be so intended, and then being traversed and waved by them, the Issue must be taken against them; or it cannot be so intended, and then the Custom is incertain and insensible. And it cannot be intended by the Court for levying of Money by a new Imposition for the private Advantage of the City; that (as I have shewn) would be against Law, and is contrary to the Prescription they have made, and would vitiate their Plea, by claiming the Thing by Prescription, and by a new Law.

(6.) They set forth a By-law, which imports a new Imposition thro'out, of several Sums to be paid to the Mayor, Citizens, and Commonalty; and they provide a new Remedy, that the Refuser shall be removed out of the Market. They aver indeed, the Sums are reasonable; but set out no Fact upon which the Court may any ways judge they are so; which are incumbent upon him that will claim any thing against the common Right. They do not so much as aver, that the Mayor, Citizens, and Commonalty laid out one Penny out of their Revenue, for providing the Markets and Stalls, or what other Stations or Accommodations they furnished the Market People with, so as to give the least Support to this extraordinary By-law.

And this Averment was industriously left out, lest Issue might be taken upon it; and sufficiently proved, that both the Places, Stalls, and Conveniencies, were provided for out of the publick Monies granted by Parliament, in Trust for all the King's Subjects coming to the Market, as we have set out in our Surrejoinder. Then it would have evidently appeared, that this By-law was not only in Breach of the Common Law Trust reposed in them for good Government; but in Breach of that Trust reposed in them by Act of Parliament. For all the King's Subjects, and these publick Monies received and laid out upon that Trust, are made the Consideration to ground the Subjects Oppressions upon by this By-law. Tho they laid out not one Penny, as appears to the Court, yet they acknowledge to have received all the Money to their own Use; and their Justification failing, it must be intended, they did it in such manner as is set out in the Replication, which chargeth the highest Oppression that can be possibly committed by Subjects upon Subjects, and is destructive of common Justice and good Government. It is likewise as great an Usurpation upon the Crown, to lay Taxes upon the King's Subjects without his Authority, and openly and avowedly to justify it. How much superior this Offence is to those, whereupon Instances of Seizure have been given, I leave to the Observation of the Court. Their reply, that the Toll only can be forfeited, or at most the Markets, can weigh little. That the Markets cannot be forfeited, Mr. Recorder admits upon the Authori-

ty of the Case of *Maidenhead*, that Toll is not incident to a Market. This Imposition is wholly foreign to the Markets, which must be intended Free-Markets, wherein all the King's Subjects have Right to sell and buy, discharged of Toll, which shall be intended to have its commencement by Erection, not by Grant to any Person, which the King may do in cases of Fairs and Markets. Or if they be granted to any Person, if without Tolls, such Grants are upon Trust, for benefit of the King's Subjects to buy and sell in; and the Grantee intrusted with the Rule and good Government thereof, for the benefit of others. Besides, the seizing of the Markets is no punishment of the Corporation, but of all the King's Subjects, who are the Persons oppressed, and whose Rights are invaded by this Imposition. The Oppression is by the Corporation, and by an Authority they claim over the King's Subjects, to lay an Imposition upon their Goods, and to levy it by Force; which is an Abuse of the Power the Law hath intrusted them with, and a Misuser of the Franchise to Oppression. To forfeit the Sums exacted and levied is idle, and no Punishment; for they never had Right to them, and so no Right can be forfeited. In the Case of *Maidenhead*, where a reasonable Toll was granted, they had a Right to Toll, which may be forfeited by Abuser, in taking an unreasonable Toll; but where there is no Right to take any Thing, there is no Right to be forfeited, but that Right by colour whereof the Extortion or Oppression is committed. If an Officer, by colour of his Office, oppress, the Office is forfeited, or *R. Quo War.* the Officer may be fined; the *ranto 1.* Cases were cited by Mr. Solicitor. The Levying of two Shillings for the Penalty of breaking the Assize, forfeited the View of Frankpledge. Using of false Weights and Measures forfeited the Franchise of *Evesham*. And generally, whatever is an apparent Breach of good Government, wherewith every Franchise is intrusted, will in point of Right between the King and the Franchise amount to a Forfeiture; because it is a Breach of publick Trust reposed in them by Law.

2. I shall conclude with the last Branch of the Crimes laid to their Charge:

For invading the King's Prerogative, and publicly libelling of him and his Publick Acts to the People.

The Replication chargeth the several Facts thus:

(1.) That the Mayor, Citizens, and Commonalty, in Common Council assembled, maliciously, advisedly, and seditiously, and without any lawful Authority, took upon them to censure the King, and the Prorogation of Parliament made by the King.

(2.) That they gave their Suffrages, and ordered a Petition should be presented to the King, in the Name of the Mayor, Aldermen, and Commonalty, containing the scandalous Matter alleged.

(3.) That they maliciously, advisedly, and seditiously, and to the intent the said Petition should be dispersed and made publick, to persuade them, that the King by the Prorogation had obstructed the publick Justice of the Kingdom, and to stir them up to a Dislike of the King's Person and Government, and to disturb the Peace of the Kingdom; did order the said Petition (containing the said scandalous Matter) to be printed.

(4.) They

(4.) They afterwards maliciously, advisedly, and seditiously, and to the Intent that the Petition should be dispersed and published among the King's Subjects, to aliene and withdraw their Affections from the King and his Government, did print, and cause to be printed and published the said Petition, in Contempt and Scandal of the King and his Government, and to the promoting and exciting of Sedition and Disturbance of the Peace within this Kingdom.

These Crimes, at Common Law, were *contra Pacem*, and punishable by Fine and Imprisonment in particular Subjects; where committed by Persons in publick Office, or intrusted with Government and Preservation of the Peace, they are of a deeper dye. In the Title of the Statute, 13 Car. 2. cap. 1. for Preservation of the King's Person and Government, they are called seditious Practices and Attempts; for prevention whereof that Law provides, *That if any Person or Persons shall maliciously and advisedly (by Writing or Printing) express, publish, or declare any Words, Sentence, or Thing, to incite or stir up the People to hatred or Dislike of the Person of his Majesty, or the established Government; such Person is made incapable of any Office or Place of Trust, and to be further punished, according to the Common Law and Statutes in such Cases.*

This Law takes Notice, they were Crimes at Common Law, and punishable as seditious Practices. Sir James Bagg's Case allows Conspiracies and ignominious Crimes to be Causes of Disfranchisement; much more a Conspiracy of all the Members to libel the Government, and alienate the Affections of the People from their Prince.

Now what answer do they give to these Charges in either Rejoinder?

To the first and last they give none at all, they shew no Authority for them in Common Council to debate, deliberate upon, and to determine of Prorogations of Parliaments by the King, or the Consequences thereof, which are *inter ardua Regni*, and not to be treated of but by the King's Writ: They are not of the King's and Kingdom's Common Council, but intrusted to advise in Affairs of the City, and *ne sutor ultra crepidam*. They are charged to have done this advisedly, seditiously, and without any Authority; and it is charged precedent to the Petition.

To the fourth for Printing or Publishing of it, to the Intent that it should be dispersed amongst the King's Subjects, to aliene and withdraw their Affections from the King laid to be 13 Jan. 32 Car. 2. they say it was printed by Samuel Roycroft, by the Mayor's Appointment; *Qua quidem Petitio & Impressio sunt eadem Petitio, Impressio, & Publicatio*, in the Replication mentioned: And traverse, *Absque hoc quod aliqua Petitio concern' Prorogationem præd' fact', ordinat', publicat' si impress. fuit aliter, vel alio modo quam;* but do not add *vel alio tempore*. In which respect this Plea is stronger than the former, to involve the City in the Guilt.

Then they own the Petition was voted and ordered to be preferred and printed *nemine contradicente*, to be sure to leave not one Citizen out of the Guilt; but they do aver, the Printing was to undeceive their fellow Citizens, whereas the Charge is, that it was to deceive them. The whole Plea amounts but to the General Issue, admitting the Petition itself were justifiable, and

the making of the Petition lawful. Many things in themselves are lawful, yet if done with an evil Intent, and for an evil Purpose, become unlawful and criminal, and upon *Not Guilty*, Proof must be made of the evil intent; where the Thing itself is unlawful, there needs no other Proof.

To lie under an Hedge on *Shuters-Hill* is lawful; but to lie there in wait to kill or rob a Man is unlawful, and imports Scandal. To lay Wool near the Sea Side is lawful; but laying it there with an Intent to export it, is criminal, and forfeits the Wool. And it is not good in Pleading to answer such Intent with contrary Averments; but where the Intent is Substance, it must be traversed or denied specially, otherwise the Plea amounts to but the general Issue. This Manner of Defence, or shadow of Justification, proves one especial Ingredient of the Charge; that it was done *advisedly*. The City say it was done upon weighty Considerations, and many Occurrences deliberated upon, and relate to them, all upon Record, that the Court may judge, whether they had not good Reason for what they did. And if they could judge, that their whole History taken together are no sufficient Considerations for any Subjects to agree or order any Petition to be preferred and printed, to stir up the Subjects to a dislike of the King's Person and Government, which is charged upon them, and not answered; the Court must adjudge the Fact to be done maliciously, and seditiously. But the Words of the Petition are in themselves scandalous to the King and Government. Petitioning is lawful, and the City of London have often petitioned the King with good acceptance, and observed a good Decorum becoming Subjects, both in the Matter and Manner of their Petitions; they used not to advise or meddle in matters of State, but when sent for to advise, they confined themselves to the Affairs of the City. They never before, as I have met with, charged the King's Acts of State as interruptions of the Prosecution of publick Justice.

The Words of the Petition are, *Your Petitioners were extremely surprized at the late Prorogation, whereby the Prosecution of the publick Justice of the Kingdom, and the making the Provisions necessary for the Preservation of your Majesty, and your Protestant Subjects, hath raised an Interruption.* To delay, interrupt, or deny Justice spoken of any Person intrusted with the Administration of Justice, and spoken of him in Point of his Trust, always imports Scandal; in the Case of the common Magistrates, they do necessarily import breach of Duty; neither in common Parlance amongst the Vulgar, nor any History or Author, that I have met with, were they ever used in any Sense of Credit or Reputation to the Person of whom they were spoken or published. Interruption of Justice is a greater Imputation than Delay barely, because the one may be a mere Omission, but Interruption imports some Act, whereby Justice is stopped; but both are temporary Denials of Justice, as Denial is an absolute Stop of Justice. *Nulli negabimus aut differemus Justitiam*, are not only the Words, but the Duty of every King. To say or publish of, or to a King, in the Point of the Exercise of his Kingly Office, and a Point of as high Trust as any is, that of the Prorogation of Parliaments, that he hath interrupted the Prosecution of the publick Justice of the King-

Luckner and
Cruchly,
4 Car. Bro. 149
Lock and Lock
15 Jac. 1. Roll.
Abr. 50.

dom, imports the greatest Scandal imaginable. For it was more of the King's Duty than of either Houses of Parliament, to promote the Prosecution of publick Justice, especially in the Cases set forth, which so nearly concerned his Person; and therefore the charging of the King with the Interruption of that Justice, is of greater Imputation to the King; and the more Instances they give, it is an Aggravation of their Crime, by charging the King with interrupting the publick Justice in all these Instances. And there is as much Venom concealed in as few Words, as ever I met with. *Tacitus* did never outdo the Penner of that Petition, whereby all the Principal Attributes, the Law makes necessary for Princes, are impeached at once, both the Judgment, Mercy, and Wisdom of the King. The Interruption of the publick Justice reflects upon his Justice in a high manner. The Interruption of the Means of his own Preservation, besides his Justice, reflects upon his Wisdom; that the King should not take care thereof, or did not foresee the Danger he put himself into, by the Prorogation. The Interruption of the Means for the Preservation of his Protestant Subjects, impeacheth his Mercy too, and chargeth the King with Cruelty to his Subjects, in taking no better Care for their Preservation, when under such imminent Dangers; with a secret Insinuation, that as he had stopped Justice against his Popish Subjects, so he was regardless of the Preservation of his Protestant Subjects. What greater Malice could be inclosed in a Nutshell? If Words were dubious and of a double Signification, and might be taken in a good Sense as well as bad, they ought not to be published by Subjects of their Prince; and when charged to be spoken or published in the worst Sense, to withdraw the Subjects Affections from their Prince, the Court cannot intend them spoken in any other Sense; that must appear upon the Evidence, which cannot be in this Case because they have not Pleaded the General Issue, nor traversed that Point. But here the Words can bear no other Sense, but a direct Scandal to the King and his Government, in the Point of Prorogation of Parliaments. That the City so understood them is evident by the Petition, in that very Clause, where they say, they were extremely surprized at the late Prorogation. Why should they be surprized? If the King had done nothing thereby, but what was just and good for his People, they had often tasted of his Goodness, and could not be surprized at that. It must then be some very ill thing in the Prorogation, that so extremely surprized them, and filled them with such Terrors, as throughout the Petition they express. And they discover their Minds plainly, that the Effects of the Prorogation were the Causes of their Surprisal, *viz.* The Interruption of the Prosecution of the publick Justice of the Kingdom, and of making the necessary Provisions for the Preservation of the King and his Protestant Subjects; and in the next Paragraph they explain themselves further, and call that a Delay, which before they called an Interruption; that they were even impatient of the least Delay, of the long hoped for Security, whilst they see the King's Life invaded, and the true Religion undermined, and their Families and innocent Posterity likely to be subjected to Blood, Confusion, and Ruin. The panick Fear, and dismal Consequences, are charged upon the Pro-

rogation. And to what other Purpose do they publish this severe Sentence upon the Prorogation, with their dismal Fears, but to affrighten the King's Subjects, and beget the like Fears in them? The natural Consequence whereof is to withdraw their Affection: *Oderunt quem metuerunt Populi.*

Mr. Recorder, tho he could not produce one Authority, that to interrupt publick Justice, was ever used in a good or justifiable Sense; yet endeavours to evade the Scandal of the Words by proper Answers.

That these Words are not spoken of the King, but of the Prorogation, as Consequences of it. Is not this Quibbling? The Prorogation is only the King's Act of proroguing the High Court of Parliament. And to charge the Acts of a King, or other subordinate Magistrate in execution of his Office, with Injustice, Folly, or Insanity, is the same thing as to charge the Persons themselves.

No, saith Mr. Recorder, unless the Action had been charged to have been done with such Intention; but they do not charge the King: And that it is so explained in another part of the Petition, by saying, *But that which supports them against Despair, is the Hopes they derive from your Majesty's Goodness, that your Intention was, by this Prorogation, to make way for your better Concurrence with the Counsel of your Parliament.* Evil Intention may make an Act otherwise good, to be bad and against Law, by Intendment of Law; the Intention is evil, and the Person answerable for all the Consequences thereof. If a Man throw a great Stone over the Wall, and a Person is killed, the Law adjudgeth it Murder: He cannot justify it by averring he had another Intention. So in the matter of Scandal, if an unlawful Act or Crime, which purports Scandal, be charged upon a Person, it is no Justification, or Excuse, to aver he did not charge the Person, nor his Acts, with doing it with an evil Intent; but as the Law supplies Malice in the Criminal, where the Act is unlawful, so it intends Malice in the Libeller, in a matter which in itself imports Scandal. Several Cases may be put to this purpose. To charge the Wife with poisoning her Husband, is Roll. Ab. 71. actionable, tho not alledged done voluntarily, or with an Intent to kill; the Law intends it. In this Case they charge that the King by his Prorogation interrupted the publick Justice of the Kingdom, and with the dismal Consequences, which in their Judgment would follow thereupon, and publish this to affrighten the whole Kingdom; and that they were near despairing of their Safety, but hoped his Majesty did likewise intend by the Prorogation to make way for his better Concurrence with the Counsel of his Parliament. A pretty Compliment for so infamous a Charge; and if it import any thing, it is a further Reflection upon the King, that he had not before concurred with the Counsel of his Parliament. But to fix the matter home, Mr. Recorder in the last place justifies this Libel from the Truth of the Fact, that the publick Justice of the Kingdom, and finding out means for Preservation of the King and his Subjects, had received an Interruption by the Prorogation. This toucheth to the quick, and is more than the City have averred in all their Pleadings; they have nakedly represented their several Facts, precedent to the Petition; and leave it to the Court to judge, whether

whether there be sufficient to justify them, to make and publish such a Petition. But to aver it to be true, is to equal the Crime of the Petition, in charging the Prorogation with the Interruption of the publick Justice. But I hope, upon better Consideration, he will change his Opinion, and likewise upon the Inference he made, that if true, it is no Scandal to print and publish it to the King's Subjects; for in both Points he is apparently mistaken. It is admitted there was a Plot, and such Proceedings as are set forth against Delinquents; and that the King by his Proclamation and in his Speech expressed his Sense of the Plot, and pressed the Parliament to proceed to Trial of the Lords in the *Tower* committed for the Plot, and that there are many such Bills depending in Parliament. And it shall be admitted, that upon the Prorogation all these Proceedings were stayed, and, if Mr. Recorder please, received an Interruption; and to say so is true.

But in this Case, if the City had been of an Opinion, that the Parliament, upon the King's Signification of his Pleasure they should proceed to the Trial of the Lords, did not make such haste to try them, as the City judged was necessary for the Preservation of their Lives and Fortunes; and thereupon the City should have petitioned the Parliament to proceed to the immediate Trial of the Lords in the *Tower*, and thereby charge them, that they had delayed them the publick Justice of the Kingdom, by not proceeding sooner to the Trial of them, according to the King's Desire, Mr. Recorder would not have averred the matter of Delay of Justice to be true, and therefore no Scandal to the Parliament; but he would then have found out the Difference between staying of Suits, and Proceedings in Courts by the proper Judges, and the Delays and Interruptions of common Justice; the latter are unlawful and criminal, and against the Duty of the Judges, but the former upon just Grounds are lawful, and many times in Prosecution of common Justice; and many times to proceed in such Cases would be great Injustice either to the Criminal or the Publick, where the Witnesses on either Side are not ready, or for some other good Cause the Judges put off Causes till another time, or adjourn a Court before all the Causes be tried. No Lawyer can truly say, that by the putting off the Cause, the Prosecution of Justice hath been interrupted; or will it be any just Justification for him for such Scandal, that there were Causes depending before the Adjournment. The Acts of inferior Magistrates are not to be examined, censured, and adjudged, much less scandalized by those that are under their Magistracy; that would let in Confusion, and tend to the Overthrow of all Government. To say of a Justice of the Peace, *You have perverted Justice*, is actionable; *Seignior De la Ware* and *Pawlet*, *Trin. 37 El. More* 409.

Mich. 1 Car. 1. Cro. 14. Sir John Ilham versus Torke; I have been with Sir John Ilham for Justice, but could never yet get any at his Hands but Injustice.

Trin. 7 Car. Cro. 223. W. Marsham versus Briggs; Sir William Marsham is but an half-eared Justice, he will hear but one Side.

Mich. 8 Eliz. Rot. 1. Walsh was indicted for scandalizing one *Sir Robert Catline*, Chief Justice, and this Court, by saying, *My Lord Chief Justice is incensed against me, I cannot have Justice, nor*

can I be heard; for it is made a Court of Conscience. He was afterwards discharged upon the general Pardon, 8 *Eliz.*

They may be judged by Superiors, but not by Inferiors. Where the Common Law alloweth or authorizeth the staying of Proceedings by Adjournment, or otherwise; to say the Act is done to delay or interrupt the publick Justice of the Kingdom, or that thereby the publick Justice of the Kingdom hath received Interruption, is not only highly scandalous, but absolutely untrue: For it is according to the Rules of Common Law, and the publick Justice of the Kingdom, and may be the promoting of Common Justice, and for the Benefit of the Publick, and ought to be so intended, when done according to Law. For the Reasons of such Acts, much less the secret Intentions of the Judges, or of the Persons whom the Law hath entrusted with such Powers, are not to be examined, censured, or condemned by any Subjects, by any Corporation whatsoever. Petitions may be rejected by either House of Parliament, and so may Bills too, tho they have the greatest semblance of common Benefit; yet this is no denial of Justice, nor to be scandalized under any such Notion: They may defer the Consideration thereof, or enter upon other Business; that is no Delay or Interruption of common Justice.

The King may do the like, he may reject the Bills passed by both Houses, or he may advise upon them by these Acts, which the Law allows to be no Interruption of publick Justice: The King may adjourn or prorogue the Court of Parliament. Antiently those Words were used and taken promiscuously, tho now from the different Effects they are differently used. And Mr. Recorder owns, that the King is by Law intrusted with this Power, and it is happy for the Subjects he is so intrusted, it being for their Benefit; which is a flat Contradiction to his Position, that it is true that the publick Justice of the Kingdom is interrupted, or hath received an Interruption by the Prorogation: Because what is just and lawful, *secundum legem terra*, cannot be unjust or unlawful, which every Interruption of publick Justice is; and if the Act be not unlawful, it is no Delay or Interruption of Justice. And if the Subjects cannot examine into or censure these lawful Actions of their Princes, but must intend them to be upon just Grounds, and for their Benefit, and in order to their common Safety; to charge their Prince's Actions with the interrupting of publick Justice, and of the Means for his own and his Peoples Preservation; and to publish this to all his Subjects, is, in Judgment of Law, a false, scandalous, and malicious Libel; and if not sufficiently punished, where will it end? To publish a Libel is in no Case lawful, be the Matter never so true, nay, tho the Party who is libelled be dead; and the Degrees of the Crime, where against a private Person, and where against a publick Person, appear in the Case cited by Mr. Solicitor in the Reports, *fo. 125*. And that it is against all Laws both of God and Man, and the Mischiefs there represented. In the Case of all Common Pleas the Offender shall be fined, and by the Statute of 13 *Car. 2.* all natural Persons are for the future disabled, and incapable of any Office or Place of Trust, where the Libel is against the King. But where the Matter is false, and the Libel published against the King, to withdraw

withdraw his People's Affections from him, and that by the joint Counsels of a Corporation, there can little Room for a Question remain, but they have broken their original Trust for good Government, and misused their Liberty to Licentiousness. How criminal is it for private Subjects to deliberate of and determine, and publicly to censure the Counsels and Actions of their Princes, will appear by the Case of *Stubs*, Mich. 21 & 22 Eliz. Rot. 3. where the Case was, that a Treaty of Marriage being on foot between the Queen and Duke of *Anjou*, *John Stubs* published a Book called, *The Discovery of a gaping Gulph, whereinto England is like to fall by another French Marriage*, containing a Disswative against the Marriage: And therein amongst other Things chargeth, *That this Marriage hath Sin in itself, and of itself only, for being against the Law of God.* And in another Place, *That it opens all the Ports of Foreign Enemies*, with several bad Reflections upon the Duke. This Book was delivered by *Stubs* to *Hugh Singleton*, a Stationer, to print, who caused it to be printed and published. They were both indicted for it in this Court, and the Indictment laid to be, with intent to hinder the lawful Purpose of the Queen and Duke to marry, and to animate and stir up the Queen's Subjects to Rebellion, and to raise Discord between the Queen and her Subjects, and to subvert the good Government of the Kingdom. Upon *Not Guilty* pleaded (for they had not the Confidence to justify) they were found Guilty, and Judgment given for cutting off their right Hands upon the Statute 1 Eliz. cap. 6. for libelling the Queen. In this Case the censuring of the Queen's lawful Purposes, in a more private Matter than the Administration of her Regal Office, by common Subjects not called to advise, is a Subversion of good Government within the Kingdom; and the publishing the Effects and Consequences thereof to be sinful and dangerous to the Kingdom, is a libelling of the Queen and her Government within the Statute. The censuring of the Exercise of the King's lawful Prerogation, and charging it with the Interruption of publick Justice, is of a more dangerous Nature. Every natural Person convicted of this Offence, is by the Statute of 13 Car. 2. disabled for any publick Trust; the Proceeding against the natural Person could not be for want of Proof, it being transacted in their Council. In this Process against the Whole, they have confessed it with the Aggravations laid. If the King pass not a Bill which the City of *London* have a mind to, this Rejection of such Bill shall in print be published to all his Subjects, to be a Denial of Justice. If the King reprieve a Malefactor, it shall be a Delay or Interruption of publick Justice. To pardon a Malefactor, shall be a Denial of the publick Justice of the Kingdom. So that the Tenor whereby the City of *London* hold their Franchise, and all their Liberties, will be quite changed and altered, without the Aid of an Act of Parliament. The City will no longer hold all their Liberties from the Crown *quam diu se bene gesserint*, which was their antient Tenure, reserved by the Crown and the Laws of the Land upon their first Erection, but will gain *absolutum Dominium*. And the King shall exercise no just Prerogative, but at their good pleasure; otherwise they will blast him to his People, and aliene their Affections from him. I have done with the Case. I have nothing more to offer. I have

at large proved, that the Corporation of *London* is a great Franchise and Liberty. I have proved that Point of Forfeiture, and their Demeanors towards the Crown: they stand in the same Level with other Cities and Boroughs, which be forfeited and seized. I have presented to the Court two superlative Offences, both against their Prince and their Fellow Subjects, as well as can be; wherein they have exceeded all other Cities and Boroughs, and themselves too in any former Age. The manner of their Pleading, and Defence at the Bar, argue the Disease to be dangerous and infectious to other Cities and Boroughs, and of the Nature of the King's Evil, incurable without the King's Hands. I have this Day brought them in Judgment before the Court, in order to their Cure. Nothing remains for effecting of the Cure, but the Judgment of the Court for Seizure of the Franchise of *London* into the King's Hands; which I demand for the King.

Mr. Attorney General having taken up so much time, the Court put off the hearing the Counsel for the City till another Day, when *Mr. Pollexfen* argued, as follows,

Mr. Pollexfen. IN this Case, when I consider the Greatness and Consequence of it, That it affects the King, the Parliament, the Laws, the very Government under which we have lived, this great City of *London*, and all other Corporations and People of *England*, and their Posterities for ever, I cannot but be troubled that I should be the Man to whose Lot it should fall to argue it; but that which comforts me is, that your Lordship and the Court upon whom the Judgment of this great Case depends, will help out my Defects, and according to what is required in the great Places you bear, take care and provide, that by your Judgment the antient Government and Laws of this Kingdom receive no Damage or Alteration. The King's Counsel have on their side only some general words out of old Records of Forfeitures and Seizures of Liberties, which are of uncertain and doubtful Sense; but there is not on their side produced any one Precedent, Judgment, or Opinion, to maintain the Point in question, *viz.* That a Corporation, or Body Politick, ever was determined, or dissolved, or taken away for a Forfeiture: No, not in the maddest of Times, in the Times of *Edward the 2d.* and *Richard the 2d.* when the Tumults and Disorders were so great, that they not only seized and took away Liberties and Franchises, but the Lives of Princes, Nobles, Judges, Lawyers, and all that stood in their way: In those times, tho they have hunted and searched with all diligence, not one instance of a Corporation taken away, or dissolved by a Forfeiture, is cited. So that from hence I hope I may safely conclude, that I argue in this case for the old and known Laws, as they have been ever practised thro' all Ages, and against that which never hath been practised or known, which is a great Incouragement to me. The Pleadings being very long, I shall only repeat so much of them as I use, when I come in order to speak of them.

I. The first thing proper to be spoken to is the Information itself, and therein I make this Question: Whether as to that part thereof that chargeth the Corporation with usurping upon themselves the Being of a Corporation, whether
that

that be properly brought against the Body Politick, as this is, or ought to have been brought against the particular Persons? I do agree, that as to the other things mentioned in the Information, the having Sheriffs, Justices, &c. the Information is properly brought against the Corporation: And I do also agree, that it may be good as to those things, tho bad and insufficient as to the charging the Corporation with Usurpation of their Being, without lawful Warrant or Authority. And that I may come singly to this Question, I do put out all the other Franchises in the Information, and take only what concerns this Point; and then the Information, as to this Point, chargeth, That the Mayor, Commonalty, and Citizens of London, by the space of a Month last past before the Information, did use and claim to have and use, without any Warrant or Regal Concession, within the City of London, the Liberty and Franchise following, *viz.* to be a Body Politick *Re, Facto, & Nomine*, by Name of Mayor, and Commonalty, and Citizens, and by that Name to plead and be impleaded; which Liberty, Privilege, and Franchise, the same Mayor, Commonalty, and Citizens, upon the King, by the time aforesaid, have and yet do usurp. This is the Substance of the Information as to this Point; and, Whether this Information thus brought, as to this matter, be sufficient in the Law, upon which a Judgment can be given, or ought to have been brought against particular Persons, is the Question. I conceive it ought to have been brought against particular Persons, and is insufficient as it is, and that no Judgment can be given upon it, supposing the Defendants had demurred, or pleaded nothing to it. To make out the Insufficiencies, I desire to consider what it imports.

1. The very bringing the Writ, and exhibiting the Information against the Corporation, imports and admits the Mayor, Commonalty, and Citizens, to be a Body Politick, capable to be sued and impleaded, *respondere, & responderi*; otherwise there is no Defendant, no Person in Court, against whom the Suit is brought. It is not enough that the Person sued be a Person by supposition, or a pretended Person, but none in reality. If a Writ or Information be brought against a Baron and Feme, this must admit that they are Baron and Feme, really and truly; and if there be any thing after in the Writ or Information, that shews that they are not truly and really Baron and Feme, but that they do wrongfully and unduly take upon them to be Baron and Feme, when in truth they are not, this would be contrariant and repugnant, and abate the Writ or Information. The like is supposed by the bringing the Writ or Information against the Body Politick; it supposeth and affirmeth them really and truly to be such, and the subsequent Affirmation that they usurped so to be, and are not so really; is contrariant and repugnant.

2. When in the Information it is alledged, that the Mayor, Commonalty, and Citizens, the Liberty, Privilege, and Franchise of being a Body Politick *Re, Facto, & Nomine*, and to be sued and impleaded, upon the King have and yet do usurp; to usurp or do any Act, of Necessity imports and admits a precedent Existence of the Person that doth usurp, or do the Act, to the Act done. Particular Persons may usurp, and

take upon themselves that which they have no Right unto: The Persons that do the Act did before exist, and had a Being. And when a Corporation is said to usurp, it of necessity must be supposed to have a precedent Being. The sense of Usurpation in a *Quo Warranto* is the Subject's taking upon him Franchises without Warrant.

My Lord Coke saith, That Usurpation in the Common Law hath two Significations: *Inst. 1. 277. b.*

1.) The one when a Stranger presents to a Benefice, and his Clerk instituted and inducted, he gains the Advowson by Usurpation.

2.) The other when any Subject without lawful Warrant doth use any Royal Franchises; he is said then to usurp upon the King.

So that an Usurpation supposeth of necessity a Subject or a Person precedently in *esse*, that useth the Franchise, or that doth usurp. That which is not in *esse*, that hath no Existence, cannot use any Franchise, cannot usurp. The very alledging that they usurp, doth admit of necessity an Existence precedent in the Corporation, such as can usurp, or act, and therefore this Information is inconsistent with it self.

3. But another Reason to prove that it ought to be against particular Persons, and cannot be against the Body Politick, is drawn from the Judgment that must be given upon this Information, if Judgment for the King. The Judgment must have two things in it.

1.) To damn the Corporation, *Quod penitus extinguatur & excludatur* from being a Corporation for the future; for being wrongfully usurped, it cannot be continued: A Judgment to continue Wrong and Usurpation can never be a right Judgment.

2.) A Fine to the King for the usurping it for the time past. This Judgment may and ought to be given, where the Information is against particular Persons, for usurping upon themselves to be a Corporation, and they shall be fined and imprisoned; but this cannot be where the Information is against the Body Politick; for by the Judgment the Body Politick is extinguished and dissolved, and no Fine can be imposed upon that which is not: So that hereby the King must lose his Fine, which the particular Persons usurping ought to pay, and the Law is agreeable always to itself, and the means answerable to the end. I suppose no Man will affirm, that where a Suit or Judgment is against a Corporation, that the Fine or Execution shall be against all, or any particular Member.

For the Precedents and Authorities in this Point,

(1.) I do agree, that there be Precedents in the Crown Office of *Quo Warranto's* brought against Corporations in such manner as this is brought, for usurping to be a Corporation, and to claim divers other Liberties.

Quo Warranto against the Bailiffs and Burgeses of Stratford, for claiming to be a Corporation, and to have divers Liberties and Franchises; thereupon a Plea put in, and a Confession of their Claim by the King's Attorney. *P. 2 Elr. 1.*

The like against the Corporation of Reading; the like Plea and Confession, the very next Term after the Information filed. *M. 3 & 4 Elr. 4.*

Against

Against the Corporation of *Horsham*, a Plea and Confession by the Attorney. *H. 14 Jac. r. 37.*

The like against the Corporation of *Dover*, but nothing done upon it besides Plea put in. *H. 19 Jac. r. 26.*

The like against *Bath*, a Claim put in, and confessed. *H. 20 Jac.*

The like against *Brackley*, and a *Noli prosequi*. *H. 20 Jac. r. 58.*

The like against *Boston*, a Claim put in, and confessed. *T. 3 C. 1. r. 22.*

The like against *New Sarum*, Imparlance, and nothing more upon it. *T. 2 C. 1. r. 47.*

The like against *Bridgport*, Claim and Confession. *T. 6 Car. 1. r. 43.*

The like against *Biddeford*, a Claim and *Noli prosequi*. *M. 2 C. 1. r. 36.*

The like against *Wiccomb*; they plead themselves a Corporation by another Name, and traverse the Name in the Information; nothing more on the Roll. *M. 8 C. 1. r. 42.*

And it is probable there may be more like these, but if of any authority, they are for me, and not against me.

1.) For that they all being for claiming other Liberties, as well as to be a Corporation, and being good and sufficient as to the other Liberties and Privileges that the Corporation claims; tho' insufficient for this of claiming to be a Corporation, they must be proceeded upon, if the Attorney pleaseth. But is any to be found where only the claiming to be a Body Politick, and nothing else? or if other things questioned, yet only proceeded in as to this particular of claiming to be a Body Politick, as in this Case? That will be like.

2.) In all these nothing is done; a Claim or Plea put in, and that confessed, or *Non prof.* or not proceeded upon to Judgment. Perhaps not proceeded in because insufficient, and so are Authorities for me: For there being so many of these, which are either *Non prof.* or not proceeded in, perhaps the Reason might be, because insufficient in the Law, as to the Corporation, and so are Authorities for me in this Case. But one there is found.

Quo Warranto vers. Bailiffs and Burgeses of *New Malton* in *Yorkshire*; *T. 6 Jac. 1. r. 3.* *Quo Warranto* they claim divers Liberties, as Courts, Markets, and others, and amongst the rest, to be a Body Politick. They put in a Plea, and make their Claim by Prescription; Issue is joined, and tried by *Nisi Prius* at *York*, and found against the Corporation, and a Judgment entred, *Quod Libertat' & Franchesia predict' in manus Domini Regis capiantur & sequantur, & quod Ballivi & Burgeses capiant' ad satisfaciend' Dom' Reg' pro Fine suo pro Usurpation' Libertat' & Franchesia Predict'.*

There is no mention of this Case in any Book or Report, as far as I can learn; so that this passed *sub silentio*. Next, how can this Judgment be good?

[1.] How can that be a right and lawful Judgment, which shall be given for the continuing a thing that is by the very Judgment adjudged to be unlawfully usurped, and a Fine for it? It is directly *oppositum in objecto*.

[2.] How can the Corporation be seized into the King's Hands? *Extinguatur & excludatur* is proper; the Corporation cannot be in the King.

[3.] How could the Bailiffs and Burgeses be

fined? when they are vanished and gone, there is no Corporation in Being; that which is laid upon a Corporation cannot be levied upon the particular Members.

I have made Inquiry after this Borough of *New Malton*: It is a small Borough, within the Manor of the Ancestors of my Lord *Eure*; it did antiently send Burgeses to Parliament, but from the time of King *Ed. 1.* to the beginning of the Long Parliament, 1640. it sent none; then, upon Petition, a Writ was ordered, and they then and ever since have chosen Burgeses: My Lord *Eure* being Lord of the Manor, and offended with them, did prosecute this *Quo Warranto*, and they having neither Lands, Revenues, or Estates to defend themselves, he easily prevailed, they never in truth being incorporate, nor having any Charter. But that which I give for answer to these Precedents is,

1.] They are all, where not only the Being of the Corporation, but also divers other Liberties were in question; so that the Informations were good in Part, and not worth the while to question whether good, as to that Part of their being a Corporation. The Fine upon them for usurping the other Liberties, would have been more than they could bear or pay.

2.] That this is but one Judgment, and in a Case of a small Borough, and that Judgment, as entred, not agreeable, but inconsistent with the Rules of Law or Reason. The Body Politick could not be seized into the King's Hands; but whenever a Judgment is given for the King, for Liberty which is usurped, or extinct in the Crown, the Judgment must be *quod extinguatur*, and that the Person that claimed them *deinceps Libertat' & Franchesia predict' nullatenus intromittat', sed ab usu earund' amodo omnino cessat; quodque* the Person that used them, *pro usurpation' Libertat' & Franch' predict' super Dominum Regem capiat' ad respondendum dict' Dom' Reg' de Fine suo pro Usurpatione Libertat. & Franch. predict'.* That this is the Form, *C. En. 559. a 537. 527 b.*

3.] That this Judgment of *New Malton* passed *sub silentio*; for there is no mention of it in any Book, nor doth it appear that ever the Question was moved or debated. And for Precedents in Matters of Practice and Process, they are of Authority; but in Point of Law, unless they have been upon Debate, are of little Authority to prove what the Law is. *Rep. 4. 94. Slade's Case, L. 5. E. 4. 110.*

But on the contrary, all the Precedents that are in any printed Books of Informations, were brought to question, Whether Body Politick, or not, are against particular Persons by Name:

Against *Christopher Helden*, and others, *C. En. 527. Pal. 9. fo.*

Quo Warranto against *Cusack*, and others. *Roll. 2 r. 113, 115.*

Quo Warranto against the *Virginia Company* was brought against *Nic' Farder*, and others, *Quo Warranto* they claimed to be a Corporation. *Roll. 2. 455.* Some of them pleaded insufficiently, upon which there was a Demurr, and a Question, How the Judgment should be entered? for that the Master, and chief of the Company were left out of the *Quo Warranto*. By which it appears, that it ought to be brought against the Master, and particular Members by Name.

Next, for the express Authorities in this Case, to prove it cannot be against the Corporation.

Roll.

Roll. Rep. 2. 15. is exprefs, That if a *Quo Warranto* be brought to difsolve a Corporation, the Writ ought to be brought againft the particular Perfons; for the Writ fupposeth that it is no Corporation. The Difference there taken, when the Attorney General fupposeth the Defendant to be a Corporation, otherwife when he questions them as Inhabitants of a Vill, then they ought to enable themfelves, they muft then fhew themfelves a Corporation, alfo prove it.

My Lord *Hale*, in his Common Place Book in *Lincolns Inn Library*, fol. 168. faith thus: *Nota, fc. Quo Warranto foit port pur ufurper de une Corporation ferra port verf. particular Perfons, quia in difaffirmance del Corporation, & Judgment ferra donne que ferra ouste; mes fi le Quo Warranto-foit port pur Liberties claim. per Corporation, ferra port verf. le Corporation.* This is pofitive.

This, if it were only my Lord *Hale's* Judgment, were of no little Authority; but I think it is a Report taken upon the Cafe of the *Quo Warranto* againft *Cusack* and others. But Mr. Attorney finding, as I believe, all the Precedents to be againft him, (for in them all there are either *non Prof.* or no Proceeding to Judgment, the Causes whereof, or at leaft fome of them, probably might be the Inſufficiencies of thefe Informations) and finding alfo the Authorities in Print, which have been cited, to be all againft him, and none for him, endeavoured to maintain the Information as brought not againft the Corporation, but againft the Citizens or Inhabitants of the City in their natural Capacities, and to that purpose cited the Cafe, *C. En.* 537. of a *Quo Warranto* againft the Inhabitants of a Village, *Quo Warranto* they claimed to be a Body Politick; and argued, That a *Quo Warranto* lies againft the *Cives* of ſuch a City, or *Burgenses* or Tenants. This ſeems to be rather a fudden Conceit, and altogether undigefed, and not well confidered. But in answer thereunto, and to prove that this Writ is brought againft the Defendants as a Corporation, and cannot legally be taken in any other Cafe; if a Mayor and Commonalty plead that they are feized in Fee, they need not fay in Right of their Corporation, the Name fhews them to be a Corporation, it need not be alledged, *Leo.* 1. 153. An Action there brought by the Guardians and Fellowship of *Weavers*; the Book faith, That they need not fet themfelves out to be incorporate, the Name fhews it; ſo of Cities, faith the Book, *Hob.* 211. So then, when the Writ is brought againft a Mayor and Commonalty, or Mayor, Commonalty and Citizens, the Law takes notice of them to be a Corporation, and the Writ againft them as ſuch; the Name fhews it. But againft Inhabitants of a Village, a Writ brought by that Name, that cannot be taken to be other than Inhabitants, the Name ſo fhews it; and in ſuch Cafe, ſome of the Inhabitants by Name (*viz.* A. and B.) appear in Perſon, in their own, and Names of the reſt of the Inhabitants, and plead, and are Defendants, *Co. En.* 537. So did they, as appears in that Precedent. No Appearance ever was of Inhabitants in other manner. But in this Cafe here are no Perſons that do appear by Name, but the Corporation appear, and make an Attorney under their Common Seal. The Corporation, and no particular Perſons, are the Defendants before you, or elſe you have no Defendants before you; for there is none appearing in Perſon, here is no Defendant, nor none a-

gainſt whom you can give Judgment; but all the whole Proceedings vain and againſt no body. So that if we ſhould admit, as Mr. Attorney argues, That this Information is not brought againſt the Corporation; then there can be no Judgment for want of Defendants appearing in their natural Capacities; you muſt have it againſt the Corporation, or no body. A Mayor cannot be, but where there is a Corporation; therefore this Notion is impoſſible, as I conceive. So that if there were nothing elſe in the Cafe, if the Information be ill brought, they can have no Judgment againſt us.

II. But admit that the Information as to this Point be ſufficient, then I proceed to conſider the other Parts of this Cafe; the Plea: That contains the Defendant's Title (*viz.*) That ſhe is a Corporation time out of Mind, and many Confirmations by Acts of Parliament and Charters. It is not denied, but that the Title made by the Plea is good.

But next the Replication, that contains,

1. An Iſſue upon the Preſcription (*viz.*) That the Citizens of *London* have not been time out of mind a Corporation by Name of Mayor, Commonalty, and Citizens, &c.

2. A pleading over, That the Mayor, and Commonalty, and Citizens taking upon them (*aſſumentes ſuper ſe*) to be a Body Politick, and to have Power to make By-laws.

1.) *Colore inde*, but for their private Gain, & contra fiduciam per Dominum Regem & Leges hujus Regni in them repoſed, took upon them to raiſe Money upon the King's Subjects by Colour of an Ordinance by them *de facto* made; and in Proſecution of this uſurped Power, the Mayor, Commonalty, and Citizens, in their Common Council aſſembled, publiſhed a Law for levying Money upon the King's Subjects that came to the Markets within the City, 17 Septemb. 26 Car. 2. (*viz.*) *De qualibet Persona*, for every Horſe-Load of Proviſions brought into any publick Market within the City to be ſold, 2 d. a Day, for every Dorſer of Proviſion, 1 d. a Day, for every Cart-load drawn with not more than three Horſes, 4 d. a Day, if with more, 6 d. a Day; that if any reſuſed to pay, he ſhould be amoved from his Place in the Market: That by colour of this By-law, the Mayor, and Commonalty, and Citizens have extorted great Sums of Money for their own private Gain, amounting to five thouſand Pounds per Annum.

2.) And farther, That whereas there was a Seſſion of Parliament holden 21 Octob. 32 C. 2. and continued till the 10th of Jan. 82. and then by the King prorogued to the 20th of that inſtant January; the Mayor, Commonalty and Citizens, Jan. 13. in their Common Council aſſembled, *malitioſe, adviſate, & ſeditioſe, abſque legali Authority*, in ſe aſſumpſerunt ad cenſendum & judicandum diſt' Dom' regem nunc, & Prorogationem Parliamenti, by the King prorogued; and in the ſame Common Council, *Vota & Suffragia ſua dederunt & ordinaverunt*, That a Petition *ſub nomine* the Mayor, Aldermen, and Commons of the City of *London*, in Common Council aſſembled, to the King ſhould be exhibited: In which Petition it was contained, That by that Prorogation the Proſecution of the publick Juſtice of this Kingdom, and the making neceſſary Proviſion for the Preſervation of the King and his Proteſtant Subjects, had received Interruption: And that the

Mayor, Commonalty, and Citizens, in the same Common Council, did unlawfully, *malitiose, advise, & seditiose*, with Intent that the same Petition might be published and dispersed among the King's Subjects, to induce in them an Opinion, that the King had by that Prorogation obstructed the publick Justice, and to incite Hatred against the King's Person and Government, and to disturb the Peace, did order that Petition, containing the said scandalous Matter, to be printed, and thereupon to those ill Ends and Purposes they caused it to be printed and published: By which the Mayor, Commonalty, and Citizens, the aforesaid Liberty and Franchise of being a Body Politick *forisfecerunt*, and after, by the time in the Information, have and yet do usurp it.

Before I come to the Matter, I would speak to the Pleading herein, and in the subsequent Sur-rejoinder: And for the Pleading in it, I think it is as singular and unprecedented as the Matter of it is. This Replication, supposing the Matter had been the Act of the Body Politick, and good and sufficient, yet, as pleaded, is insufficient, and not warrantable by any Law or Practice ever known. It contains,

1. An Issue, *viz.* no Corporation time out of Mind.

2. Two Causes of Forfeiture of the Corporation, admitting they once were a Corporation.

So that tho the Point in Question be but one, *viz.* Whether we are lawfully a Corporation or no Corporation, tho the Plea is single, that we are a Corporation by Prescription time out of Mind; yet here is, to try this Point,

1. An Issue.

2. A double Plea, alledging two Causes to avoid it for a Forfeiture.

This I conceive cannot legally be done, tho in the King's Case. I do agree, the King hath great Prerogatives in Pleadings, and as far as ever they have been allowed or enjoyed, let them be so still; but that the King can to the same Matter both take Issue, and also plead over at the same time, that I deny. It is most reasonable, that the Law should be careful to preserve the King's Rights; but on the other Side, I think it is not reasonable, that the Law should admit or allow as legal, any way of Proceeding that should destroy or render the Subjects Right indefensible, be his Right as good as it may be. If so be that Mr. Attorney may both take Issue upon the Fact, and also plead over, I would, by your leave, ask how many Issues, and how many Pleas over the King's Attorney may have? Suppose the King bring a *Quare Impedit*, or Writ of Right, or any other Action, the Defendant makes his Title, which is usually done, by many Grants and Conveyances from one to another, to bring it to himself. May the King's Attorney now take as many Issues as Facts issuable, plead as many Pleas as he pleaseth, and all this *simul & semel*? It is true, that in this Case Mr. Attorney hath assigned only two Breaches or Causes of Forfeiture; but he might, if he had pleased, by the same Reason have assigned two hundred. If this may be, are we not all at Mr. Attorney's Mercy? If this may not be, then how many Pleas; Is it in Law defined? *In favorem Vita* a Man may plead a special Plea, and plead also Not Guilty, but not several special Pleas; but that there is any such Prerogative for Mr. Attor-

ney, in Suits betwixt the King and his Subjects, I can find no Instance or Authority for it: For tho it be true, as I have said, that the King hath great Prerogatives in Pleading, yet it is as true, that this is not boundless; but that if in the King's Writs there be Mistakes, or his Writ or his Action misconceived, he shall be bound by it in like manner as Subjects are or shall.

Partridge against Strange, Com. 84. a. 236. a. and in the same Book in my Lord *Berkley's* Case, it is expressly said, That tho the King hath many Prerogatives concerning his Person, Debts, and Duties; yet the Common Law hath so admeasured his Prerogative, that it shall not take away, or prejudice the Inheritance of any.

The King hath a Prerogative that he may wave his Demurrer and take Issue, or wave his Issue and demurr upon the Plea: But saith the same Book, *fol. 236.* he must do it the same Term, not in any other Term; for then he may do it *in infinitum*, without end, and the Party hereby may lose his Inheritance; and for that the Common Law will not suffer the King to have such a Prerogative. These are the Words of the Book. And in the Point that this Prerogative must be made use of the same Term, and that the King's Attorney cannot vary in another Term, and wave his Issue, is *13 E. 4. 8. Bro. Prer. 69. 28 H. 8. 2.* So in making Title to a *Quare Impedit*, he at the end of the Term, waved his first Title, and made another. But it is true also, that as to the Point of waving Demurrers, and taking Issue in another Term, there is Authority that he may so do; *Rex vers. Bagshaw, Cr. 1. 347.* but whether it may be done or not in another Term is not material to our Case: But the use I make of these Cases is to prove that the King's Attorney should not have both together *simul & semel*, as in this Case he hath done; he must wave one before he can have another Plea. For those Debates about his varying his Plea by waving his Issue and Demurring, or waving his Demurrer and taking Issue, signify nothing, if he may in one Plea, and at the same time take Issue and Demurr, or plead over to the same Matter or Point, as is done in this Case; therefore those Books strongly prove, that the Prerogative that the King hath, is by waving or relinquishing one, and choosing the other; and therefore not to have or use all together and at once, as is done in this Case.

The King shall be bound by one Issue, he shall not have divers, *9 H. 4. 5.* So that as this Replication is at the same time *simul & semel* to the same Matter, to take Issue that we were not a Corporation time out of mind, and to plead two Matters of Fact for Forfeiture, is the first Attempt that ever was of this kind, and in its consequence confounding the Right of the Subject, and leaves him perhaps only but a Colour of Law, but most difficult, if not impossible by it to be defended, let his Right be what it will, if Issues and Pleas without number may be by the King's Attorney joined and pleaded, and the Subject must answer. The very Charge besides will undo the Subject, and wrest him out of his Estate by the Law that should preserve him. This Point, if I mistake not, will deserve Consideration, if it be new, and the first Project (for so I beg leave to call it) of its kind; for I know no Book or Instance of the like, unwarrantable by

by old Laws and Rules of Pleading. The old Laws and Ways are good and safe: *Eventus varios res nova semper habet.* Perhaps the Consequence and Mischiefs attending this way of joining Issue, and at the same time pleading over as many Pleas as Mr. Attorney pleaseth, are as great as any other in this Case, and not less to be minded or regarded. As of the one side great are the King's Prerogatives, and most necessary to be preserved, and maintained; so it cannot be denied but that the Law hath set Limits and Bounds, which must be kept and observed in pleading, which is the Method and Mean of preserving and determining Rights, without which no Man can be preserved by the Law. But supposing that several Causes of Forfeitures may be assigned, yet they must be all Facts done at the same time, or they confound one the other; for if the first Fact was a Forfeiture, thereby the Corporation was determined, and at an end, and the subsequent could not be the Act of the true lawful Corporation; for that was forfeited, determined, and gone, by the precedent Forfeiture. And if so, that it was forfeited and gone by the precedent Act, *viz.* the making the Ordinance Septemb. 17. 26 C. 2. then how could it act and forfeit itself six Years after, in the Year Thirty two? This seems impossible. But to avoid this, Mr. Attorney in his Argument doth hold, That tho' the Act be a Forfeiture, yet till there be a Judgment, or something on Record to determine the Corporation, (and in this Case the Judgment to be given shall do that Work) till such Judgment, the Corporation remains. Then taking it as Mr. Attorney will have it, and as the truth is, supposing a Forfeiture, until that Forfeiture appear on Record, or that there be some Office or Inquisition that finds it, and that returned, and on Record, were it of any Estate in Lands, Tenements, Hereditaments, or Offices, it is not determined or vested in the King, but continues. This is quite contrary and contradictory to all that you have done, and the very Foundation of this *Quo Warranto*: for if you admit, as then you do, that the Forfeiture *ipso facto* did not determine, but that it must be this *Quo Warranto*, or Judgment upon it, that must determine the Corporation, and that the Corporation, notwithstanding such Act, was or is in being; then they have not usurped upon the King, they are the same Corporation they were; they have the same Power to act they had; they have the same Warrant and Right they had, only subject to a Judgment against them, that may be given hereafter, for a Fact already past. For since that an Usurpation is a tortious and wrongful using a Liberty or Franchise upon the King, without lawful Authority; then supposing such an Act of Forfeiture doth not *ipso facto* determine or dissolve, but a Judgment, or some other Act of Record, must first be had before such Dissolution; then till such Judgment, or Act of Record, they are lawfully a Corporation in being, and their lawful Warrant remains, and they did not, nor could so long usurp their Being, and then hereby is your own Information destroyed and abated. For there you say that they did by the space of a Month, without any Warrant, use and usurp the Liberty to be a Corporation. But hereby you grant that it was not used unlawfully, nor usurped, but notwithstanding the Forfeiture, the Corporation lawfully continu-

ed, unless there had been some Judgment, or other Act on Record to determine it. This I rest upon as impossible to be avoided. Is it possible that a Corporation or Body Politick can at the same time be lawfully and rightfully such, and not lawfully and rightfully such? Can Right and Wrong be the same? Can the same thing rightfully be, or have its Being, and at the same time not rightfully be, or have its Being? Can we possibly be at the same time, *viz.* the time mentioned in the Information, a lawful Corporation, and yet an usurped or unlawful Corporation? Could we then have a lawful and rightful Authority to be a Corporation, and at the same time have no lawful or rightful Authority to be so? These seem to be Contradictions, and if so, are the most difficult of all things to be believed or imposed; therefore to be plain in this Matter, either tell us that we are yet till Judgment a Corporation or Body Politick lawfully and rightfully, or not. If you say we are, then as yet we are no unlawful Corporation, nor have usurped to be one, as in your Information and Replication you have alledged. We have not then unlawfully taken upon us to be a Corporation, and therefore cannot have Judgment against us, or be fined for having or being that which we lawfully have or be, as you now admit we are; consequently you must go some other Way, you have destroyed your own Information, and can have no Judgment upon it. But perhaps this Concession of Mr. Attorney, that the old and lawful Corporation and Body Politick is still in being, and shall so continue, till by Judgment or Matter on Record determined, may only be some sudden Thoughts; for not only the Matter, but the whole Proceedings in this Suit, being at least unexperienced, and perhaps much out of Practice, it might easily happen, that in an hasty Proceeding all things might not be thought on, nor all the Objections or Inconveniences foreseen; and perhaps the Consequence of the Position, that a Mis carriage, or doing an unlawful Act, should *ipso facto* forfeit the Body Politick or Corporation, might make a Man start, and cast about how to avoid it, and flying from one Danger run into another. These are things ordinarily happening, and perhaps have in this Case happened; and were the Cause of this Concession, that the old and lawful Corporation is yet in being; which is contrary to the whole Frame and Scope of both the Information and Replication, and probably never thought on or intended when the Information or Replication was made, being quite contrary and inconsistent with the Frame and Foundation of them both. If it be holden according to this Concession, that the old and lawful Corporation was not by the supposed Acts of Forfeiture dissolved and determined *ipso facto*, but remained and continued lawfully a Corporation, and yet is so; then we have not usurped, but are a lawful Corporation during the Time in the Information; and not as therein supposed by Usurpation, and without lawful Authority; and thereby the Information confounded and abated.

But supposing, according to what the Information and Replication suppose, that the Acts of Forfeiture did *ipso facto* dissolve and determine the Corporation, for they will at last, I doubt, come to that again; for this present thought that it shall be forfeit, but not dissolv-

ed or determined till Judgment, will be subject to almost all the same Inconveniencies; for when Judgment is given, the Forfeiture must relate to the Time of Offence, and to avoid all mean Acts, as in other Cases it doth. But to pass this over.

III. Supposing the Information good, the Replication good, and the Matters alledged for Forfeiture to be as in the Replication alledged: The next thing I pray leave to speak unto, is, Whether the Matter alledged in the Rejoinder be not sufficient to justify or excuse the two Facts alledged for Cause of Forfeiture. I conceive they are. The Pleadings here must first be stated.

1. As to the Ordinance or By-laws for the Toll in the Markets. As to that the Defendants in their Rejoinder have alledged, that the City of London is, and was always the capital and most populous City of the Kingdom. That there are and always have been great publick Markets within the said City. That the Mayor, Commonalty, and Citizens, are and always have been seized of those Markets in their Demesne as of Fee; and at their own proper Charges provided Market-places, Stalls, Standings, and other Accommodations for Persons coming to those Markets; and Overseers and Officers for better Regulation and keeping good Order, and cleansing the same. That for defraying those Charges, they have, and always had and received divers reasonable Tolls, Rates, or Sums of Money, of all Persons to those Markets coming, for Stalls, Standings, and other Accommodations by them had, for exposing to Sale their Victuals and Provisions in those Markets. That the Freemen of the City of London are numerous, above fifty Thousand. That there hath been time out of Mind a Common Council, consisting of the Mayor, Aldermen, and certain Freemen annually elected, not exceeding the Number of two Hundred and fifty, called the Commons. That there is a Custom within the City, that the Common Council make By-laws and Ordinances for the better Regulation and Government of the publick Markets, and for the appointing convenient Places and Times when and where, within the City, the Markets shall be kept; and for the assessing and reducing to Certainty reasonable Tolls, Rates, or Sums of Money, to be paid by Persons coming to the same Markets, for their Stalls, Stations, and other Accommodations by them had, for exposing to Sale their Victuals as often as, and when to them should be thought expedient, so as their Ordinances be useful to the King and his People, consonant to Reason, and not contrary to the Laws of the Land. That this Custom is confirmed by *Mag. Chart. Stat. 1 E. 3. Stat. 7 R. 2.* That after the Burning and Rebuilding London, and the Alterations thereby made, Controversies did arise within the City concerning the Markets and Tolls. That thereupon Sir William Hooker, then Mayor, and the Aldermen, and Commons in Common Council assembled, did make an Ordinance, entituled, *An Act for the Settlement and well ordering the severall publick Markets within the City.* By which reciting, that whereas for Accommodation of Market People with Stalls and Necessaries for their Standings, for cleansing and paving the same, for defraying incident Charges about the same, reasonable Rates had always been paid:

To the end the Rates to be paid might be ascertained, that the Market People might know what to pay, and the Officers what to take, to avoid Extortion, it was ordered there should be paid by the Market-People for their Stalls, Standings, and Accommodations in the Markets, For every Horse-load of Provision under publick Shelter, 2d. a Day; for every Doffer 1d. a Day; for every Cart-load drawn with not above three Horses 3d. a Day; with more Horses 4d. a Day; and upon refusal to pay, to be removed. Then they aver that these Rates are reasonable: That they are all the Rates that are paid by such Market-People to the Use of the City: That these Rates they have received since the making these Ordinances: That there is no other Ordinance for raising Monies for such Provisions exposed to Sale in their Markets in any manner made.

To this Rejoinder Mr. Attorney hath sur-rejoined, and taken it by Protestation, That the City were not seized of the Markets, nor at their own Costs provided Stalls and other Accommodations; and that the Rates by the Ordinance appointed were not reasonable. For Plea sets forth an Act of Parliament made 22 Car. 2. enacting, *That to the end apt and convenient Places within the City should be put out for Buildings, and keeping the Markets; and that the Royal Exchange, Old Bailey, and common Gaols and Prisons within the City should be made more commodious;* for the enabling the City to do these things, they should have a Duty out of Coals imported betwixt May 1670, and Mich. 1687. into the Port of London 12d. per Chaldron; which Duty they have accordingly received, amounting to a great Sum, and notwithstanding that Duty, without Title or Right, the Defendants made the By-law for their private Gain, *absq; hoc*, that the Mayor, and Commonalty, and Citizens have time out of Mind had, or accustomed to have *Tolneta, ratas, five denariorum summas per ipsos Majorem, Communitatem, ac Cives Civitatis predicti superius suppositi fore per prefatam legem five ordinationem predictam assess. & in certitudinem reduci prout per placitum superius rejungenda supponitur.*

The Defendants they rebut, and say, that they have always had reasonable Tolls, Rates, or Sums of Money of all Persons coming to their Markets to sell their Provisions, for their Stalls and Accommodations: *Et de hoc ponit se super patriam.* the Attorney demurs. Upon his Pleadings the Questions are, Whether the Matters alledged by the Defendants, in Justification of the Ordinance, or By-law, be a good Justification in Law, or not? If it be, Mr. Attorney in his Sur-rejoinder hath given no Answer to it at all; he hath neither confessed it, nor denied it. The Rejoinder saith, that the Defendants are, and always have been seized of the Markets in Fee: That they at their Charge provided Market-places, Stalls, Standings, and Officers for the Accommodations of the Markets, and cleansing them. That for defraying those Charges they have always had divers reasonable Tolls and Rates for Standings and other Accommodations. That the Common Council have, as often as expedient, always made Ordinances for regulating those Markets, and for assessing and reducing to certainty reasonable Tolls, Rates, and Sums of Money to be paid by the Market-People for their Accom-

Accommodations. That according to this Custom, they made the Ordinance and By-law. Mr. Attorney in his Sur-rejoinder hath not denied any Part of this; but offers a Traverse to that which is no where alledged or supposed. It is never pretended that the City have had time out of Mind the very Tolls and Sums of Money for Toll assessed by the Ordinance. There is not a Word in the Rejoinder to that Purpose, but to the contrary; (*viz.*) That they in their Rejoinder claim a Power by Ordinance of Common Council to assess and set the Rates of these Tolls and Payments; as often as and when to them shall seem expedient. It is admitted in the Rejoinder, that these Sums were not time out of mind, only they had Power to set, assess, and ascertain, as often as expedient. Therefore when Mr. Attorney traverseth our having time out of Mind the Tolls, Rates, and Sums of Money by the Ordinance assessed, and *in certitud' reduct'* this is plain, besides any thing claimed or pretended unto, if he had intended to traverse what we have alledged, that we have had time out of Mind divers reasonable Tolls and Sums of Money for Stalls and Accommodations: Or if he would have traversed the Instance alledged for the Common Council assessing those Tolls, as often as expedient, that was plain and easy to do; but that he hath not done: He hath only traversed whether the Tolls, Rates, and Sums of Money, by the Ordinance assessed, and reduced into Certainty, have been time out of Mind. This is the proper Sense of his Traverse, but if doubtful in its Sense, his Traverse is naught for that Cause; for dubious Words can make no Issue for the Jury to try, else Men should be tricked and ensnared by doubtful Words to pervert Right. So that if the Matter alledged in the Record be sufficient in Law to justify the making this Ordinance or By-law, then what is done therein by the Act of Common Council is lawfully and rightfully done, and no Forfeiture. I do agree, that for a Lord of a Market to prescribe to have a Toll uncertain, and as often as expedient to ascertain it, is no good Prescription. But that is not our Case; I do distinguish betwixt that and this Case: Where there is by Custom, confirmed by Acts of Parliament (for I shall shew that they are Acts of Parliament, notwithstanding what hath been objected against them) a Power and Authority vested in the Lord Mayor, Aldermen, and Common Council, to regulate and order the People, Trades, and Markets in the City, and the Places, and Conveniencies, and Officers, from time to time, and consequently to regulate and ascertain the Tolls or Rates to be paid by the Market-people, to prevent Extortion and Disorders; that such Custom is legal. The Chamberlain of London's Case: An Ordinance that no broad Cloth shall be sold in the City, before it be brought to *Blackwell-Hall* to be searched, and a Penny for every Cloth to be paid for Hallage, under pain of forfeiting 6 s. 8 d. a Cloth, to be recovered in the City Courts, *Rep. 5. 69.* Tho objected that this was an Imposition of payment of Money upon the King's Subjects, yet adjudged good, and a *Procedendo* granted.

An Ordinance that no Unfreeman shall use a Trade in London, adjudged good, *City of London's Case, Rep. 8. fol. 1.* A multitude of Ordinances they have for regulating all manner of

Trades, and of Rates and Prices; and as much reason there is to object against them, as this Ordinance, or the Custom in this Case. But the City of London have a Government and Power of making Ordinances, for governing and regulating Trades, buying and selling within the City, placed in the Common Council, and confirmed by Act of Parliament; and therefore not like the Case of any private Lord of a Market. But it is true, their Ordinances must not be unreasonable. The Payments that are imposed by this Ordinance, are only imposed on those that are under shelter; it is reason a Recompence should be paid, and there is no Unreasonableness or Injustice appears in the Ordinance, but a reasonable Recompence. But the Custom or Power of the Common Council is not denied, as I take it: For they have not denied the Power to regulate and ascertain the Tolls or Sums of Money alledged to be in the Common Council; if they had, that must have been tried: Nor have they denied the Rates set to be reasonable. So that I think, as to this Matter we have well intitled our selves, and justified our making our By-law, and taking the Tolls or Rates thereby appointed; and nothing in the Surrejoinder against us to the contrary is objected.

But for confirming and making good our Customs, in the Plea, there are three Acts of Parliament pleaded:

1. *Magna Charta.*
2. *Stat. 1 E. 3.*
3. *Stat. 7 R. 2.*

The King's Counsel have not denied *Magna Charta* to be a Statute, but have denied the other two to be Statutes, or Acts of Parliament; and the Reasons given by them are:

Because not in Print, nor Roll of it to be found; or because no body knows where to find it.

As to the first, Private Acts of Parliament do not use to be printed, few are.

As to the second, Suppose there were no Roll to be found, doth this after so long a time conclude there was none such, especially since Mr. Solicitor was pleased to acknowledge that there are no Parliament Rolls of *E. 3.* till *4 E. 3*? It is true that almost all the Parliament Rolls of *H. 3. E. 1. E. 2.* and till *4 E. 3.* are indeed lost. But besides, in those Days publick Acts were not only entred upon the Parliament Rolls, but from thence transcribed, and sent under the Great Seal to be published by the Sheriffs of the Counties, in the Cities and Boroughs, and also by Writ to the Courts in *Westminster-hall* to be there entred and recorded, of which there are many found, especially in the *Exchequer*; and hence came the Rule in Law, that Judges, *ex Officio*, are bound to take notice of general Acts of Parliament: But for private Acts they were put under the Great Seal, and the Parties interested had the same to produce. But that these in this Case should be questioned to be Acts, is strange.

But to prove them Acts: As to the Act *1 E. 3.*

(1.) We have pleaded it under the Great Seal of King *E. 3.* that made it, with a *profert hic in Cur'* and shewn it with our Plea as we ought; and this is Evidence sufficient of itself. If the same, produced under the Great Seal put to it when made, be not sufficient Evidence to satisfy, what can be?

(2.) But in this Case it is enrolled upon Record also,

also, *Inter placita Corone penes Camerarios, in Secretario*: it is enrolled there, *Trin. 1 E. 3. r. 61, 62.*

But perhaps it may be objected also, That this was no Act of Parliament, but only a Grant or Patent in Parliament; because it is that the King *de assensu Prelator' Comit' Baron' ac totius Communitat' regni in presenti Parlamento.*

I answer, that Acts of Parliament observe not any certain Form. In the Case of the Earldom of Oxford expressly, *Jones 103.* that there was variety in penning Acts of Parliament in antient time, *Diminus Rex per Consilium fidelium subditor' suor' statuit,* and other Forms there, are yet good Acts. But that they were antiently in form of Patents or Grants in Parliament; *Magna Charta, C. 1.* is in form of a Charter or Grant. The form of the Act of Parliament *11 E. 3. Princes Case, R. 8. fol. 8.* for creating the Prince, Prince of Wales, begins, *Edwardus Dei gratia, &c.* in form of Patent, and is *De communi assensu & consilio Prelator' Comit' Baron' & aliorum de concilio nostro in presenti Parlamento,* and adjudged a good Act of Parliament; and the Authorities and Reasons to prove it an Act of Parliament are *fol. 18, 19, 20.* so full, that it might be thought that this Objection would never have been made: And that this is in the same Form that all the rest of the Acts of this very Parliament of the *1 E. 3. Memb. 17.* are, appears by the Patent Roll of the same Parliament. A Charter granted by the King *de assensu Prelator' Comit' Baron' Communit' Regni in Parlamento apud Westm'* to enable the City to apprehend Felons in Southwark. An Act in the same Form, for the annulling the Conviction of Treason, that was against *Roger Mortimer,* in the time of *E. 2. Rot. Claus. 1 E. 3.* An Exemplification then entred of an Act made in the same Form, in the same Parliament, for the annulling the Attainder of *Thomas Earl of Lancaster,* attainted *tempore E. 2. Rot. Pat. 2 E. 3. P. S. 1. M. 17.* Divers other Acts of Parliament in the same Form made *1 E. 3.* for annulling divers other Attainders that were *tempore E. 2.* So that as to this Act of Parliament *1 E. 3.* I think the Objections are answered, and that it is an Act, as pleaded, *Rot. Pat. 2 E. 3. P. S. 2. M. 11. Inst. 2. 5 27, 639.*

And as to the other Act *7 R. 2.* that that is no Act of Parliament, only a Prayer of the Commons, that there might be a Patent granted to the City, confirming their Liberties, *licet usi vel abusi fuerint*; and the Answer was, *Le Royle veult.*

They object for Reasons against that being an Act of Parliament,

First, That it wants the Assent of the Lords.

Secondly, It is only a Prayer of the Commons to have their Liberties confirmed, and the King's Answer *Le Royle veult,* but nothing done to confirm it.

As to the first Objection, supposing it true that there is no mention made of the Assent of the Lords, yet the Act is a good Act.

1.) It appears to be in Parliament *ad instantiam & requisitionem Communitat' Regni nostri in presenti Parlamento.*

2.) The Answer in Parliament, that is given by the King to the making all Laws, is given to this, *Le Royle veult.*

3.) And next, it is admitted to be upon the Parliament Roll, *7 R. 2. Num. 27.* I have before said, that Acts of Parliament are not in any certain Form; sometimes entred as Char-

ters or Grants, sometimes as Articles, sometimes and frequently as Petitions; the Books I have already cited prove it. But according to the Course of Parliaments, let it be in what Form it will, let it begin in which House it will, yet it must go thro' both the Houses of Parliament, before it can come to the King for his Royal Assent. If either House rejects or refuseth, there it ends, it comes not to the King; nor is the Royal Assent in these great operative Words, *Le Roy le veult,* in Parliament given to any thing, but what the whole Parliament have assented and agreed unto. So that this is an Objection grounded upon a Reason contrary to all the Course of Parliaments, which shews that the Lords Assent was to it, tho not mentioned. *Selden's Mare Claus. 249.* gives a full Resolution herein: *Certissimum est,* saith he, that according to Custom no Answer is given, either by the King, or in the King's Name, to any Parliamentary Bills, before that the Bill, whether it be brought in first by the Lords, or by the Commons, hath passed both Houses, as it is known to all that are versed in the Affairs and Records of Parliament. And in the Prince's Case before cited, there the Act is said to be *de Assensu & Consil' of the Lords,* but doth not name the Commons. And this answers the other Reason also, *viz.* That it should only be a Prayer and Petition also, to have a Charter or Confirmation granted: For since the Forms are in manner of Petitions, since the Royal Assent or Words, *Le Roy le veult,* is never put to any Bills in Parliament, but such as are thereby made and passed into Laws, the giving the Royal Assent is sufficient in this Case to prove it a Law. But for further Evidence, we have it under the great Seal of King *R. 2.* thus penned: *Ad instantiam & requisitionem Communit' Regni nostri Angl' in presenti Parlamento nostro, pro majori Quiete & Pace inter Ligeos nostros fovendis, & pro bono publico de assensu Prelatorum, Dominor' Procerum, & Magnat' nobis in eodem Parlamento assistentium, &c.* So that hereby it is fully proved, and shewn, that tho the Assent of the Lords be not mentioned in the Copy, yet that it was had, and under the great Seal of *R. 2.* it so appears. We have also, in our Book of the Acts of that time in the City, the Proclamation made upon the first promulging this Act, in the time of Sir Nicholas Bramber Lord Mayor, *Lib. H. f. 169. a & b.* and therein it is also entred in the same Words, as before, under the great Seal of *R. 2. de assensu Prelator' &c.* Next, our Books and continual Practice ever since, It is true, that in the *7 H. 6. fol. 1.* when it is said, that the Customs of London were confirmed by Statute, *Quare* what Statute; but it is not there made a *Quere* whether this were a Statute. *Instit. 4. 250. Rep. 5. 63. Rep. 8. 162.* all say that the Customs of London are confirmed by Parliament, *7 R. 2. Justice Jones 283.* hath it *verbatim* out of the Parliament Roll. The constant Course of pleading the Customs of London is to plead a Confirmation of them by this Act of Parliament: So that as to this Point there is not any one Book or Opinion, before this Day, in favour of what is affirmed, that these are not Acts of Parliament; and our Plea stands good in Law, and the Ordinance, and By-law, and Custom is good, and then no Forfeiture thereby.

But

But suppose, and admit, that this By-law be the Act of the Corporation, and not good and sufficient in Law, nor in Law justifiable, *Quid sequitur?* Then it is void in Law. Then if it be void in Law, how can it make a Forfeiture? Suppose a Lessee for Years, or for Life, makes a Feoffment, but it is not duly executed for want of Livery and Seisin, by which it is void in Law, can this make a Forfeiture of the Estate of the Lessee? Suppose a Corporation *Tenant pur auter vie* makes a Feoffment, which is void for want of Livery duly made, will this forfeit their Estate? A void Act shall not destroy or forfeit a precedent Estate. A Parson, that hath a former Benefice, accepts a second Benefice incompatible, was instituted and inducted, but did not read the Articles, his first Benefice was not forfeit or void hereby, because by the Statute the not reading his Articles had made his Institution and Induction void. *Djer 377. b.* So that then whether this By-law or Ordinance were good or void in Law, perhaps is not much material; it cannot make any Forfeiture of the Corporation, it can have no such effect; for if it be a good and lawful By-law, no Forfeiture can be for doing a good and lawful Act. If the Ordinance be not warrantable by Law, then it is void in Law; if void in Law, a void Act can make no Forfeiture.

But you received, say they, and exacted from the King's Subjects Sums of Money by this Ordinance.

I answer, Suppose we did, and that we had no Right to have this Money; if an Officer, by colour of his Office, receive more than is due, it is Extortion, and a Crime punishable: But if a Person, that is no Officer, take Money that is not due, or more than is his due, the Parties injured have their Remedies by Action; but this is no Crime for which any Forfeiture or Penalty is incurred by the Person that so takes or receives the Money. Suppose a Lord of a Manor exact or take greater Fines or Sums of Money from his Copyholders or Tenants, than he ought, they have their Remedies by Action against those that receive; so if a Corporation receive or take Money supposed to be due, but in truth is not, how can this forfeit any thing?

But you took upon you, say they, a Power and Authority to tax the King's People, and to take and receive the Money so taxed.

I answer, This is but the same thing, only put into greater Words. It is still but the making of an unlawful By-law, and thereby appointing Money to be paid which ought not, or more than should be; and as to the turning of it, or expressing it in stately Words, of taking upon you, or usurping Authority to impose upon, and tax the King's People; whosoever doth any Act or Thing, he takes upon him, and doth also execute the Power and Authority of doing that Act or Thing, which is comprehended in the Thing done. The making a By-law, or Ordinance, whereby more is ordered to be paid than ought, or Money appointed to be paid where none is due, is still all the Fact and Thing done; and if that make no Forfeiture of the Corporation, or Crime punishable by Indictment or Information, except only as the Statute 19 H. 7. c. 7. which I shall hereafter mention, hath appointed for Forfeiture of 40 s. the taking or usurping the Power to do it, cannot be more, or effect more, than the doing the thing which comprehends it.

2. As to the other Cause alledged in the Repli-

cation for Forfeiture, the Petition, printing, and publishing it; in the Replication 'tis alledged, That the Parliament the 10th of January was prorogued to the 20th of January. That the 13th of January the Mayor, Commonalty, and Citizens of London, in their Common Council assembled, *malitiose, advise, & seditiose*, took upon them *ad judicand' & censend'* the King, and the Prorogation of the Parliament by the King so made; and that the Mayor, and Commonalty, and Citizens of London, so in the said Common Council assembled, did give their Votes and Order, that a Petition, in the Name of the Mayor, Aldermen, and Commons of the City of London, in Common Council assembled, should be exhibited to the King. In which Petition it was contained, that by that Prorogation the Prosecution of the publick Justice of the Kingdom, and the making necessary Provisions for the Preservation of the King, and his Protestant Subjects, had received Interruption. And that the Mayor, Commonalty, and Citizens of London in Common Council, as aforesaid, assembled, maliciously and seditiously, to the intent the same should be dispersed among the King's Subjects, and to cause an Opinion that the King obstructed the publick Justice, and to stir up Hatred and Dislike against the King's Person and Government, did order the said Petition to be printed, and afterwards they did print it, and caused it to be published.

The Defendants in their Rejoinder to this Breach set forth and alledge, That there was a Plot against the Life of the King, the Government, and the Protestant Religion; and set forth all the Proceedings upon it, the Attainders and Impeachments of the Lords in the Tower in Parliament depending, the Proclamations declaring the Dangers by this Plot, that they could not otherwise in human Reason be prevented, but by the Blessing of God upon the Consultations and Endeavours of that great Council the Parliament, and commanding a General Fast to be kept in London the 22d of December, and that it was kept accordingly. The Proceedings in the Parliament towards the Trial of the Lords, and preparing Bills to be enacted into Laws, for Preservation of the King and his Subjects against these Plots and Conspiracies. That divers of the Citizens, loyal Subjects, being much affrighted, and troubled in their Minds, with the apprehension of these Dangers, did exhibit their Petition to Sir *Patience Ward*, then Lord Mayor, and the Aldermen, and Commons in Common Council then assembled, containing their Fears, and Apprehensions, and Expectations, from the King and that Parliament; did petition, that the Common Council would petition for the sitting of that Parliament, at that time prorogued. And thereupon the Mayor and Aldermen (naming them) and Commons in Common Council assembled, from their Hearts truly loyal to the King, and for the Satisfaction of the Citizens who had exhibited that Petition, and of intent to preserve the Person of the King and his Government, did give their Votes, and order a Petition should be exhibited to the King in the Name of the Mayor, Aldermen, and Commons in Common Council assembled, and set forth the Petition in the Name of the Mayor, Aldermen, and Commons in Common Council assembled *in hac verba*: Wherein among other things it is contained, That they were extremely surprised

at the late Prorogation, whereby the Prosecution of the publick Justice of the Kingdom, and the making Provisions necessary for preserving the King's Person, and his Protestant Subjects, received Interruption. And did farther agree and order, that that Petition, after it had been presented, should be printed, which was so ordered with intent, that false Reports concerning the Petition might be prevented; the Enemies of the King, and the Conspirators, from proceeding in the Conspiracy deterred; the Troubles in the Minds of the Citizens alleviated, and the Citizens know what had been done upon their Petition. That the Petition was delivered to the King, and afterwards printed. That this is the same Petition and Printing in the Replication mentioned *absq; hoc*, that any Petition of or concerning the Prorogation of the Parliament was made, ordered, published, or printed in any other manner than they have alledged, as the Attorney General supposeth. To this part of the Rejoinder Mr. Attorney hath demurred generally; by the Demurrer, the Fact alledged in the Replication is admitted to be true. And it is true, that there are no Words, that are written or spoken, but are subject to various Constructions: But I take it that no Words, whether written or spoken, ought to be taken in an ill sense, if they may reasonably be taken in a better, *Nemo presumitur esse malus*; and therefore the Words must stand as they are penn'd. And having first expressed their Fears, and next their Hopes, from the King and Parliament's Proceedings in Trial of those that were impeached, and making Laws for their Security, and how they were surpris'd at the Prorogation, then they say, That by that Prorogation, the Prosecution of the publick Justice of this Kingdom, and the making necessary Provisions for the Preservation of the King and his Protestant Subjects had received Interruption. It is mentioned only as a Consequence of the Prorogation, it is not said or expressed that the King did interrupt; for I think there is great difference betwixt the one sort of Expression and the other. An ill Consequence may attend a good, and commendable, and most necessary Act; but no Consequences can make an ill Act good; and therefore the expressing the Consequence doth not necessarily condemn or declare the Act to be an ill Act. Suppose that in the time of the great Plague a Man had had a Suit in *Westminster-Hall*, wherein all his Estate had been concerned, and had said or writ, that by the Adjournment of the Terms by the King, the Proceedings of the Courts of Justice in his Suit had received an Interruption, had these Words been punishable? The Adjournment was then the most necessary and commendable Act that could be for the Preservation of the King's Subjects in that raging Pestilence; and the Act itself being so good and necessary, tho there were such Consequence as to that particular Suit, the writing or saying that it had such a Consequence, such an Interruption, did not, I conceive, condemn, judge, declare or express the Act to be ill. Suppose a Man had had a Bill depending in that Parliament, to be enacted for the enabling him to sell his Land to pay his Debts, to free him from a Goal: Or, suppose that some one of the Lords impeached in that Parliament had made a Petition for the Sitting of the Parliament, and had therein expressed as a Reason and Ground of his Petition,

the like Words as in this Petition: What would the Court have judged of it? are not the Cases much the same? If they are, there will be no distinction of Persons in Judgment; I am sure there ought not. Perhaps when this Petition was made, there might be too much Heat in the Minds of Men; and it is true, that Heat increaseth Heat, and Fire kindles Fire; it is time for all sorts to grow cool and temperate, and to weigh and consider; we are, or should be, considering Men. This Petition was made *Nemine contradicente*; and undoubtedly among such a Number as the Common Council, there must be Men of variety of Tempers and Dispositions: But for the greatest number of the Aldermen, and Common Council, think of them; we know the Men, many of them; can we imagine, that they had either the least ill thought or meaning towards the King, his Person, or Government, in this Petition, or the printing it? And as for the printing it, that, my Lord, stands upon the same Reasons and Grounds: For if there be nothing ill or unlawful in it contained, then the printing and publishing of that which contains nothing ill or unlawful, is not, as I conceive, ill or unlawful. Printing is but a more expeditious way of Writing, and is good or bad as the Matter printed is good or bad. The Defendants in their Rejoinder have set forth their whole Case, the Reasons and Grounds of what the Common Council did, and the manner and intent of their doing it; all which Fact cannot be denied to be true, but is now confessed by the Demurrer. It hath not, nor can be said, but it is well pleaded, and might have been traversed and denied, if not true: But it is confessed by the Demurrer to be true, and therefore that must be taken to be the Fact, and not as alledged in the Replication; and then so taken, I submit it to your Judgment.

3. But the next thing considerable is, Whether, supposing and admitting, that if done by the Body Politick, it had been a Miscarriage or a Crime, whether not being done by the Body Politick, nor under the Common Seal, but by Common Council, whether thereby the Being of the Corporation shall be forfeit?

A Common Council in Corporations is generally a select Number of the Body corporate, constituted to advise and assist the Corporation in their ordinary Affairs and Business. There is no certain Rule nor Measure of their Power, wherein all the Common Councils agree. In some Corporations the Common Council have greater Authority, in some less, according to the several Authorities by the respective Charters where the Corporations are by Charters; or by Custom or Usage, where the Corporations are by Prescription: But in all they are a subservient Number of Men, constituted and authorized for particular Ends and Purposes. And in this Case I think the Court can take notice of the Common Council no otherwise than upon the Record they appear to be. The Replication doth not say what they are, but would go in the dark, by Intention and Presumption, the best Way and Method to arbitrary Determination. The Rejoinder saith, that the Citizens and Freemen are a great Number, Fifty thousand, and more. That there hath been time out of mind a Common Council, consisting of the Mayor and Aldermen, for the time being, and of certain Freemen, not exceeding

ing two hundred and fifty, annually elected to serve as Common Council Men, and are called the Commons of the City. That time out of mind there hath been a Custom, that the Mayor, Aldermen, and such Citizens, so elected to be of the Common Council, according to Custom, have been accustomed to make By-laws and Ordinances, for the better Regulation of the publick Markets, for appointing Times and Places, and assessing and reducing into Certainty reasonable Tolls, Rates, and Sums of Money, payable for Stalls and Standings in the Market. For any thing appears upon the Record, this is all they have Power to do: *Non constat* to the Court that they have any other Power or Authority over Land, Estates, or any thing else. Next, if this which in the Rejoinder is alledged, of the Being and Power, be true, and so admitted, then what they did in making the Ordinance, was done by good and lawful Power and Authority, and then can be no Offence: But if to make the Ordinance be an Offence, and an unlawful Act, you deny the Custom to be good, and say, the Custom is void, and against Law, and for that Reason the Ordinance illegal. Then *non constat* that they had any Power at all to do any thing, and then a Common Council to advise without Power to do any Act: And if so, how can a Parcel or Part of a Corporation, not authorized to do any Act, do an Act that shall forfeit? Suppose a particular Company, as the Mercers, had done this, could this be a Forfeiture? But if to avoid this you will say, that the Court shall take notice of the Common Council of *London*, to have the Management of the Business of the Corporations belonging to them; this I think the Court cannot do, and I cannot see how possibly they can, as a Court, judicially take notice hereof. Suppose our Question had been concerning another Corporation, could the Court then, as a Court, judicially have taken notice of the Power or Authority of their Common Council? Mr. Solicitor in his Argument held, that there was no Difference betwixt *London* and another Corporation, except that *London* was the biggest. Then put the Case of any other Corporation, could the Court judicially have taken notice of their Power or Interest, without having it specially set forth? Is it possible the Court can, since they differ one from the other, as much as their Charters or Constitutions do differ, of which there are hardly to be found two in *England* that do agree in their Powers? If it had been of another Corporation, of Necessity the Constitution of the Common Council must have been set forth. If you are upon a By-law, made by any other than the Body Politick itself, must not the Power and Authority of those that made it be shewn, and set forth in Pleading, in any Case where there is Occasion to use it? How otherwise could the Court judge or determine of it? So that taking the Law to be as the other Side saith, that *London* differs not from any other Corporation; it is no where alledged in the Pleading, that they have Power to make By-laws, for the ordering and governing the City, or that they can bind all the Corporation in Sale or Disposition of their Lands, or have the Power of the Common Seal: Therefore when the King's Counsel argue from these Powers, their Power of forfeiting, they argue quite out

of the Record; they have no where alledged or pleaded what they are, or what Power they have, as they should have done, if they had so intended. So as to this Particular, here is nothing before the Court, nothing upon Record to shew how or which way the Body Politick should be concerned in these Acts of about Two Hundred and fifty of their Members called the Common Council. Wheresoever any By-laws or Ordinances are pleaded, the Power to make these By-laws or Ordinances is pleaded, and so are all particular and derived Authorities, whenever Occasion to plead them, and necessary they should be so: For it is Fact that the other Side may and ought to be at liberty to deny it, if he see cause; and therefore if they will have it that the Common Council have abused some Power or Authority they have, thereby to forfeit the Corporation, they ought to have shewn it; to say that notice shall be taken, or it shall be intended or presumed, is in truth a Presumption upon the Court, as if the Court should take notice of, intend, or presume, what the King's Counsel would have, which the Court cannot, nor will do, more in this than in other cases. But supposing the Court will take more notice of *London* than any other Corporation, and will take notice of the Common Council there, and of their Power and Authority; and I will suppose, as the other side do, that they have the Power of making By-laws, of leasing, granting, and managing the City Lands and Revenues, and of sealing with the Common Seal, and that this they have by Custom; then surely, say the other side, they have the Power of surrendering and forfeiting the Corporation. If I should answer, Surely and without doubt they have not, this would not argue they have not; but the Argument should come of the other side, to prove they have: they have not, nor can produce any Case or Opinion to prove it; and the very thought that they could is so new, that I believe none can be found like it. But let us consider the nature of this thing a little particularly: Tho general Discourses are most easy and florid, yet perhaps a particular Enquiry may best discover. Admit that they have the Power the other side say they have; yet they are not the Corporation, but a Part constituted for these particular ends and purposes, for which they are impowered. Corporations had their Creations by Charter; that gives them their Being, and the Form, Method, and Power of Action. Suppose that the first Charter of Incorporation that was granted to *London* did grant, that the Citizens should be incorporate, and a Body Politick, by the Name of Mayor, and Commonalty, and Citizens; that there should be a Mayor, so many Aldermen, and so many of the Citizens annually elected that should be a Common Council; and that they should have Power to make By-laws, to demise or grant their Lands, under the Common Seal, in the name of the Corporation: If they do any Act not within their Commission, is not that void? Suppose a Grant made to the Common Council, would not that be void? Suppose a Grant made by the Common Council, in the Name of the Common Council under Seal, or in the Name of the Corporation, but not under Common Seal; is not all this void? This I only instance, to shew that their Charter and Authority

is their Power and Warrant they are to act by: Did ever any Man hear of, or see a Charter giving the Common Council Power to surrender the Corporation? Or was it ever thought of before these Days? If then no such Power by the Charter be given, if they cannot do it without Power given them, shew me their Power, or else I think I may conclude sure they cannot surrender the Corporation without Power. But the Common Council in *London*, that is by Custom, and their Power is by Custom. Then if the Question be what is their Power? It is answered, what they have used and accustomed to do, that they may do; what they have not used and accustomed to do, that they cannot do: for if Custom and Usage be the Authority, that Authority can go no farther than their Custom and Usage goes. Then put the Question, have the Common Council used to surrender or forfeit the Charter? No body can say it. What Reason then is there for any Man to say they can do it? It is probable, that the Common Council in *London* had first their Institution from some By-law or Ordinance, tho now not to be produced, but consumed by Time. But be it that, or any other imagined Commencement, can it be imagined that those that gave them their original Authority, gave them Power to surrender the Corporation, or forfeit it? Suppose that the Power given them did authorize them not only to make By-laws and Ordinances for the good Order and Government of the Corporation, to grant or demise their Land and Revenues, but had some general Words in it to act and manage the Matters of the Corporation: Is it not against all Sense to suppose, that that which is deputed and constituted for the well ordering and managing of the Corporation, should have Power to surrender it? Then as the Counsel of the other Side argue, that because they may surrender, they may forfeit: By the same Reason, I hope, I may argue, if they cannot surrender or dispose of the Corporation, they cannot forfeit. Next, those Acts of the Common Council are not done neither in the Name, nor as the Acts of the Corporation, nor under any Seal; but do import in themselves only to be the Acts of the Common Council: The Ordinance, that is made by the Mayor, Aldermen, and Commons in Common Council assembled. The Petition is the Petition of the Lord Mayor, Aldermen, and Commons in Council assembled. Their Leases or Grants are in the Names of the Corporation, and under the Common Seal; and the Common Council only ministerial to the Corporation in ordering, managing, and disposing all for the Benefit and Advantage of the Corporation, to avoid the Inconveniency of assembling the numerous Body. But that any thing that hath but a ministerial Power, for the Service and Benefit of their Principal, should have Power to dispose of, sell, convey, or surrender, and destroy their Principal, is no Consequence in Law or Reason. No Deputy, Assistant, or Bailiff hath such Power; if he exceed his Authority, his Act is void. Is it not so with all Authorities and derived Powers? what they do beyond their Authority cannot bind those from whom they derive it. It cannot be the act of the Corporation; for a Corporation cannot make a Petition, no more than they can make a Deed, or subscribe a Writing, except under the common Seal. Corporations cannot make a Lease at will, license a Man to enter upon their Lands, or do

any like Act, but under their common Seal; nor can they commit a Trespass or Disseisin but by Command precedent, or Assent subsequent, under their common Seal. How then can this be their Act? There is nothing in it that imports it should be theirs, nor ever intended to be theirs; it is not done by them, nor in their Names, but by the Common Council, and in the Name of the Common Council. If we may take notice of what is out of the Record, we know that they have in *London* a greater Assembly than the Common Council, viz. the Common Hall, wherein the Common Council are no more than others. Can the Petition of the Mayor, or Mayor and Aldermen, in their Names, be taken to be the Act of the Corporation? if that cannot be, why should the Petition of the Common Council in their own Names be any other than their own Petition, as their Ordinance and By-law are theirs, and not the Corporation's? 12 H. 7. 25, 26. 9 E. 4. 39.

The Case of Corporations takes notice of their Power, as Common Councils, to exclude the Commonalty and the rest of the Corporation. The Act allows the Common Council's ordering Petitions. But where is it to be found that it was ever said or thought on before, that they could forfeit or dissolve the Corporation? Rep. 4. 77. 13 C. 2. cap. 5.

4. But supposing all that I have said against me; and supposing the Acts of the Common Council to be the Acts of the Corporation; and supposing those Acts, viz. the making the Ordinance and Petition, not justifiable or excusable; then the great Point will be, whether they or either of them are such Miscarriages or Offences in Law, for which the Charter, that is the very Being of the Corporation, shall be forfeit? This I call the great Point, for I think it to be as great in Consequence as ever any at this Bar, as if *Magna Charta* were at stake; for in my apprehension, not only *London*, but all the Corporations of *England*, and the Government of *England*, will be deeply concerned in the Question. For let us but consider what a vast part of *England* is concerned in the Corporations of *England*.

(1.) Ecclesiastical, or mixt, as Archbishops, Bishops, Deans and Chapters, Parsons, Vicars, Universities, Colleges, Hospitals of all sorts.

(2.) All the Cities and considerable Towns and Boroughs in *England*.

(3.) The very Frame of our Government is concerned; for one of the Estates of the Kingdom, viz. the Commons in Parliament, consists of Knights, Citizens, and Burgeses; the Citizens and Burgeses are usually chosen by them that are free of the respective Cities and Corporations; and where not chosen by them, yet the Elections are generally under their Power and Influence, and the Return made by them.

Perhaps also a Peerage is a sort of Corporation. Perhaps the World itself, at least this little World, will no longer be able to subsist in Health than the due Order and just Temperament of the several Parts and Powers therein are preserved, and contain themselves within their own Bounds. The taking away or infeebling any principal Part brings a Lameness and Deformity, Pain and Disorder upon, and at length confounds the whole. The Laws answer their ends, whereof the principal is the Preservation of the Government, which preserves the Laws, they cannot subsist one without the other; therefore whatsoever it is that tends to the Subversion, or leaving

ing at Will and Pleasure, that which is so considerable in our Government as Corporations are, ought to be thorowly considered.

The better to examine and consider this great Point: In the first Place, the Reasons given on the other Side are,

First, that if Corporations be not forfeitable for their Miscarriages, they will attempt and do extravagant Acts, raise Sedition or Rebellion, and there will be no adequate Punishment to their Miscarriages.

In answer to this Reason, I say that there is no illegal Act that they can attempt or commit, but that they are under the same Severities and Corrections of Law, as any other the King's Subjects not incorporate are. Tho' it be true, that the Corporation itself is only a Body Politick, an invisible Body, yet the Members of it they are visible. If they as Members of that Corporation commit or do any unlawful Act, they are punishable for it in their own private Capacities: If they make any Ordinance or By-law to raise Money unlawfully upon any of their Members, or others, the By-law or Ordinance is void: If they receive or collect any Money by it, the Receivers and Collectors are to answer it, they are to be sued as any other Subject: Suppose a Lord of a Manor or Market make an unlawful Order to collect or take Money from his Tenants or Copyholders, or unreasonable Tolls in his Markets; this Order is void in Law, and those that collect or receive any Money by it, are answerable for it, and the Parties grieved have their proper Actions and Remedies, and perhaps the Markets, or at least the Tolls, may be seized, or forfeit for this Miscarriage. This is the Provision that by Law is made against such Exactions; and this is just, and adequate, and reasonable. And if a Corporation make such Ordinance, By-law, or Order, and thereby there is the same Receipt or Exaction, the Subject hath the same Remedy, and there is the same Forfeiture of Toll or Market, as in Case of any natural Person, or Lord of a Manor; and the Provisions by Law made are just, and reasonable, and adequate, in this Case of the Corporation, as of the other. The like for any Offence that can be committed, it must be done by particular Members, and they must answer for it. And this is no new Opinion; 21 E. 4. 14. is exprefs, that a Mayor and Commonalty, or other Body Politick, cannot commit Treason, altho' all the Commonalty do commit Treason; every of them is a Traitor in his own Person. I might cite other Authorities to this Purpose, but they have been already cited by Mr. Recorder in his Argument; and tho the Counsel for the King would make these Books to be but some slight Opinions, yet unless they could shew some Authority, Book, or Case, to the contrary, their despising or little valuing what they can find no Answer for, will not render the Authority and constant Opinions of our Books of less Esteem than they ought to be. It is no Excuse if they do an unlawful Act, that they are Members of a Corporation, or did it as a Corporation. No body can say this will excuse them; so that, notwithstanding their being a Corporation, they are as subject to the Law, be the Offence Treason, Sedition, or any other Crime or Offence, as any other the King's Subjects are; every particular

Member that acted or committed that Offence, is answerable to the Law for it. The particular Members, that commit the unlawful Act, and all that act under their Authority, are subject to the same Law as all other the King's Subjects. And therefore this Reason, that else there will be no Punishment upon them adequate to the Offence, and consequently a Mischief and Inconvenience, is but a Shadow, and nothing proportionable to the Mischief and Inconveniences attending the Position of a Forfeiture of the other Side. But consider the Injustice that would be of the other Side, if this should be so: We know Assemblies determine their Acts by the major Vote, and great struggling there is, as we too frequently see in their Debates and Resolutions, and carried by Majority of one or two Votes, sometimes by Surprizes and undue Management, sometimes by Fear and Terror: Suppose an evil Act so carried or managed, is it Reason that all the whole Corporation should be thereby forfeit; and thereby all other Men, to whom they owe any Debts, must lose them, and the many Interests and Livelihoods depending upon the Corporation, the Customs, Courts, Offices, and Privileges belonging to it, endless to enumerate, shall all be undone and destroyed?

Secondly, The next Reason that hath been given is, that it is a general Rule in Law, That the abusing or misusing of a Franchise, is a Forfeiture of the Franchise.

I answer, This is true in the Sense that the Books do say it; for if a Man misuse or abuse a particular Franchise, he shall forfeit that particular Franchise; but he shall not forfeit any other, except it be depending upon, and incident to it. And the Cases cited prove nothing farther: That when a Man hath divers Franchises not depending one upon another, and misuseth one Franchise, he shall not thereby forfeit the rest, but only that which he misuseth. 22 Aff. p. 34. Br. Fran. 34. And therefore the Cases cited, where the Abbot of Crowland and the Abbot of St. Albans had Franchises of Custodies of Gaols; one would not be at the Cost of a Commission of Gaol-delivery, the other did detain in Prison after legal Discharge, and Fees paid, 8 H. 4. 18. Rep. 9. 96. b. 24 E. 4. b. Inst. 2. 43. This was a Misuser of those Franchises and Forfeitures. So also perhaps if there be a Franchise that hath Incidents to it; as Pypowders to a Fair, Pillory to a Leet: An Abuser of the Incident, as the Court of Pypowders, or the not having a Pillory, may forfeit the Market or the Leet. If the Lord of a Market take outrageous Toll, he shall forfeit the Market, Stat. West. 1. cap. 31. Inst. 2. 219. But doth this prove, that if a Corporation have Fairs, Markets, Gaols, or Leets, and misuseth any of them, that the Body Politick, the Corporation shall be forfeit? If this be so, the Abbots, they being Corporations, in the Cases of the Abbots of St. Albans, and Crowland, should have forfeited not only the Liberties of having Gaols, but the very Corporations, or Bodies Politick, of being Abbots; a Conceit never yet imagined. Can you say the City of London is either dependent or incident to the Markets; or on the contrary, that the Markets are so incident or dependent upon the Corporation, that they cannot be one without the other? Can this be said? If this cannot be said with Reason, how can then the taking these Tolls, admit they were

outrageous, and a Forfeiture of the Market, forfeit the Corporation? The making the Ordinance, supposing they made it, is but the Mean by which they took it. Your Books only prove the Abuse of a Franchise, a Forfeiture of that Franchise, or Incidents to it, and no other: But the Inference in this Case is not the Forfeiture of that particular Franchise, but of the Being of the Corporation that owned the Franchise; which is a plain *non sequitur*, unless you say the Corporation is incident to the Market. Arguments from general Rules are the most fallible, especially in Law; and that this is such, I hope most plainly to shew in the distinguishing the different Nature of Franchises: which I shall do presently, only taking in my way their next Reason that they offer, and answer both together; which is,

Thirdly, That a Corporation is a Franchise; that it commenceth by Grant, and therefore is forfeitable and surrenderable, as other Franchises are; and if they be surrenderable, then also are they forfeitable.

I do agree, that *Franchise* is a large Word, it is of the like Sense of Liberty or Privilege. Therefore in *Quo Warranto*, Franchises, Liberties, and Privileges, seem to be of the same Sense. To be a Subject born, and to have Liberty and Privilege of a Freeman, and no Villain, is a great Franchise; and therefore in Law, when a Villain is made free, we say he is enfranchised, he hath the Franchise, Liberty, and Privilege of being a Freeman. An Alien, he is made Denizen by Letters Patents, a Person attainted is pardoned by Letters Patents, and a Restitution in Blood granted, and made a new Creature. By these Grants the Alien and the Person restored have such Franchises, Liberties, and Privileges granted them, that tho before they were not capable to take, hold, or enjoy, or act as natural born Subjects or Freemen; yet hereby they have such Capacity granted. Next, I think it will be granted that this Franchise, Liberty, Privilege, or Capacity, is not surrenderable or forfeitable, except only in Cases of Treason, or Felony, where they forfeit their Lives: by these Instances this is proved, that it is no true Position, That whatsoever is grantable is surrenderable, and if surrenderable, forfeitable; which is one of the Reasons given by the King's Counsel, why a Corporation is forfeitable; for these Franchises or Privileges are by Grant, and yet not surrenderable or forfeitable: and this also shews that Arguments general and from general Rules are most fallible, and fit only to take weak Apprehensions. But next, consider what it is to be a Body Politick or Corporation. A Body Politick is framed and constituted in similitude or likeness of a natural Body, with Capacity to take, hold, and enjoy, and act as a natural Body; and can no more surrender or forfeit his Being, while the Members of that Body are subsisting, than a natural Body can while alive. It is only a Capacity framed and created in a Multitude to be and act as one Person; they are incorporate and made one Body Politick, that have Power, and Capacity, or Franchise of acting, taking, holding, and granting; this is their Franchise, admit it so, but differs from others. Franchises and Liberties of all other Natures are Estates and Inheritances grantable and conveyable from one to another, as other Estates are; this is no such thing, grantable or transferable; other Franchises and Liberties af-

fect the King's Subjects, and are Privileges claimed, wherein the King and the rest of his Subjects not claiming the Franchise are more concerned than in this of being a Body Politick: for other Franchises either convey some Profit from the King, as Felons Goods, Waifs, Estrays, Wrecks, or the like; or affect his Subjects, as Courts, Gaols, Returns of Writs, Fairs, Markets and the like. But this of being a Body Politick is only a Capacity to be a Person capable of having and holding what may be granted unto it, and of granting and acting as a natural Body; and affects the King, or other his Subjects, no otherwise, than giving Capacity to take, hold, and enjoy what they can get, as other Persons capacitated may. Other Franchises, Liberties, and Privileges are distinct and separate Estates; and if any one be forfeit, as it may for Misuser, the rest are not; except Incidents and Appurtenances. But if the Being of a Corporation be forfeited, all their Estates, Lands, Goods and Chattels are gone at once: So that tho you admit and call this a Liberty or Franchise, it is nothing like in its nature to those Things generally known and understood by the Name of Franchises or Liberties; and general Sayings are generally to be understood of such Things as are generally so taken and called. If then there be such great and apparent Difference betwixt this of the being a Body Politick, supposing it being, in a general and large Sense, a Franchise, Liberty, or Privilege, and other particular Franchises, admitting that which is said, that the Misuser of a Franchise is a Forfeiture, holds generally true, yet it is not in every particular true. Where there is such apparent Difference and Reason to distinguish, as betwixt the Being of a Corporation or a Body Politick, which is only a Capacity, and other particular Franchises, which are Estates; there is also apparent Reason to distinguish betwixt one and the other, they being so much differing one from the other in Nature and Reality. But next, that this was never taken in Law to be such a Franchise, Liberty, or Privilege, as was comprehended under the general Meaning of Franchise or Liberty. By *Stat. of Glost' 6 E. 1. Inst. 2. 278*. Writs were to go to all Sheriffs forty Days before the Eire, of general Summons, for all to come in at the Eire to claim their Privileges; and the second Day of the Sitting of the Justices in Eire, a Proclamation made to the same purpose. In the Comment upon that Statute it appears, *Inst. 2. 281, 282*. that if the Party did not appear, his Franchises were seized into the King's Hands, *Nomine districtionis*; and if not replevied, sitting the Eire, they were forfeit or lost for ever. If the Party did appear, and did not claim, then they were lost for ever. In all the Proceedings in Eire there is no such Thing can be found, that the Corporations did come in and make Claims to their being Corporations or Bodies Politick, or that ever any were seized, if it be seizable, into the King's Hands, or was forfeit for not claiming. *Fulcher and Heyward's C. Palm. 491*. It appears, that the Dean and Chapter there surrendered their Charter, and all their Manors, Lands, Possessions, Privileges, Franchises, and Hereditaments, Spiritual and Temporal, and this with intent to surrender, that there might be a new Corporation erected; as is recited in the Letters Patents of new Erection.

In this Case, *Rep.* 3. 75. *And.* 2. 120. *Jones* 168. resolved, That by this Surrender the old Corporation was not surrendered. This Judgment doth conclude, and must be given, either because by the Word Franchise, and the other general Words, the Franchise of being a Corporation was not comprehended; or if the Word is sufficient, and did comprize it, that it could not by Law be surrendered. This I think sufficiently shews that Corporations were in Law as Persons natural are, and in like manner claimed; and that the being a Body politick, or Corporation, was not to be claimed, comprized, or meant within the general Word Franchises, no more than the Liberty or Franchise of Denizen, or Manumission. Next, no Instance can be given of any Seizure of any Corporation, or Body politick, for any Forfeiture: Seizure of their Liberties, or putting Officers upon them, is quite another Thing, as I shall shew presently. So that these general Sayings in Law Books, that Misuser of a Franchise forfeits the Franchise, neither in Law or Reason extends to the Being of a Body politick or Corporation, but is applicable only to particular Franchises of other Natures; and the other Reason, that that which is grantable is forfeitable, is as fallacious, as before appears.

3. As for the Records cited to prove that the Corporation or Body politick may be forfeited, I will state those that are most effective, and do them Right therein.

Johannes Dennis, Mayor of *Sandwich*, *P.* 9. *E.* 1. and three more, were attached to answer *Domino Regi de placito transgr' & unde Robertus de Stokho*, Sheriff of *Kent*, qui sequitur pro ipso Rege, complains that he had sent his Bailiffs (naming them) to make Execution of the King's Writ, in *Villa de Stanore*, quæ est Baronia domini Regis; and that the Defendants with Swords drawn took away the King's Writ, and trod it under their Feet, and would not suffer it to be executed; unde dicit quod deterioratus est, & damnum habet ad Valentiam 2,000 Marks. The Mayor appears, and pleads to the Jurisdiction, that he ought not to answer this Matter, except in the Court of *Shipway*. The Sheriff replies, that *Stanore* is the King's Barony, belonging to the Barony of *St. Austins*, and relies upon a Record before Justices in *Eire*, where an Amerciament upon that Ville was formerly set. The Mayor refuseth to plead over. Then a Day is given over, then it is entred thus: *Posteaq; coram Domino Rege & ejus Concil' quia Barones de l' Cinq; Ports nec aliqui alii in Regno nostro possint clamare talem libertatem, quod non responderent Domino Regi de contemptu sibi fact' ubi Dominus Rex eas adjornare voluerit; et quia prædict' Barones non protulerunt aliquas Chartas a Regibus concessas, in quibus non fuit excepta Regia Dignitas, consideratum est quod respondeant; & quia le Defendants would not answer any other where than in Shipway, consideratum est quod habeantur in defensionem, pro convictis de prædict. Transgr' & Contempt'. Et quia the said John Dennis is convicted of the said Offence, and the Fact of the Mayor, in those things which touch the Commonalty, is the Fact of the Commonalty, consideratum est quod Communitas de *Sandwich* amittat Libertatem suam, &c. Then follows, *Postea*, in præsentia of the Bishop of *Bath* and *Wells*, then Chancellor, and others, cum Assensu Regis, an Agreement betwixt the Abbot of *St. Austins*, the Men of *Stanore**

and *Sandwich*, de omnibus contentionibus. And then goes a long Agreement betwixt the Abbot and the Men of *Sandwich* and *Stanore*, concerning their Jurisdctions and Courts: *Et si aliqua pars contra concordantiam illam ire vel facere, alia pars habeat suam recuperare per breve Domini Regis de Judicio exeunte de isto Recordo. Et pro hac prædict' homines vadiant prædict' Abbati 100 Marks*, which the Abbot remits for 10 *solis Vini*, pretii 30 Marks, to be paid at the Feast of *St. John* the Baptist. This is the Record at large; and for the Extract in the Collections at *Lincoln's Inn*, whether it be of this Record, or any Execution that went out upon it, non constat: But that I think it could not be upon this Record; for the Record is not 30 Marks annuatim, as the Abstract is, and the Entry of the videtur at the Conclusion, quod Judicium extendit contra Barones quinque Portuum, & eorum Libertates, ut mihi videtur, that is not my Lord *Hale's* Note, nor doth it appear whose it was. Out of this Record how can a Man infer, that a Corporation shall be forfeit for the Miscarriage of the Mayor or Officer? How doth it appear from hence, that they should lose or forfeit their being a Corporation? By amittat Libertatem all that is meant thereby is their Liberty in *Stanore*, or the Liberty they claimed to be impleaded in the Court of *Shipway*; and the Note in the Extract, videtur quod Judicium extendit versus Barones, must be; I think, taken to be as to their Liberty in *Stanore*, or to be sued only in the Court of *Shipway*. I have taken the more notice of this Record, because it hath Countenance of a judicial Proceeding. But as to all the other Records cited;

A Writ to the Sheriff of *Gloucester*, reciting, that the King, for Injuries and Contempts done by the Mayor and Commonalty of *Bristol*, the Liberty of that Ville by *Bartholomew de Baddlesmere*, Custos of that Ville, into his Hands had seized, 6 *E.* 2. *R. Cl. m.* 5. The Writ commands the Sheriff, that the Custos should have the Execution of Writs as the Mayor and Bailiffs used to have. And in the Times of *Henry* the Third, *Edward* the First, *Edward* the Second, and *Richard* the Second, there were frequent Seizures of the Office of Mayor; and the Kings did put in a Custos in the Place of Mayor, or made a Mayor, and these are called Seizures of Liberties.

King *Henry* the Third put in a Custos over *London*, which continued till the 54th of his Reign, and then was taken off, and the City restored to its Election. 49 *H.* 3.

Edward the First put in a Custos, and continued so to do till the 25th Year of his Reign, and then was taken off. 15 *E.* 1.

The 14th of *Edward* the Second a Seizure of the Office of Mayor by *Henry de Staunton*, and his Fellows, Justices in *Eire* in the Tower, and Mayors put in by the King till the 20th of *Edward* the Second, and then restored: But for that of *Richard* the Second, give me leave to digress, and give you the state of it out of the City Registers, which are more full than these cited.

A Writ from the King to the Mayor, Sheriffs, and Aldermen, commanding them to come with twenty four principal Citizens, before the King and his Council at *Nottingham*, in crastino Sancti *Johannis Baptistæ* tunc prox' sui, and to bring sufficient Authority from the Commonalty to answer such things as should be objected. 16 *R.* 2. *July* 22. *Lib. H. fol.* 269. *b.* *City Reg.* They appeared,

ed, and had a Letter of Attorney, *ubi pro diversis defectibus in Commissione sua sub communi Sigillo, & aliis de causis*, the Mayor and Sheriffs were discharged of their Offices, and committed *diversis Prisonis*; and afterwards, the first of July, Sir Edward Dallingrigg, made *Custos* by the King, came to the Guildhall, and his Commission being read, he was sworn before the Aldermen, *secundum quod Majores ante jurare solebant*; the King also made the Sheriffs, and they were also sworn. This is also entred in the City Register, *Lib. H. fol. 270. b.*

It appears that the King first swore the *Custos*, and the Sheriffs, to be true to him, and also turned out the Aldermen. And that the Proceedings were before the Duke of Gloucester, and other Lords, by a Commission to inquire of all Defaults in the Mayor and Sheriffs, in the well governing of the City, awarded upon the Statute made by the King's Grandfather; and that they were convicted by their own Confession, and thereupon the Liberty of the City seized.

The Pardon and Restitution entred, and thereby it is recited, that the Proceedings were upon the Statute; and the Judgment was, That for the first Offence they should forfeit one thousand Marks; for the second, two thousand Marks; and for the third Offence, that the Liberty should be seized. 19 Sept. 16 R. 2. *Lib. H. fol. 272. a. ubi supra.*

The Statute 28 E. 3. cap. 10. enacted, That the Mayor, Sheriffs, and Aldermen of London, which have the Governance of the same, shall cause the Errors, Defaults, and Misprisions in and about the same, to be corrected and redressed from time to time, upon pain, that is to say, to forfeit to the King for the first Default, one thousand Marks; for the second Default, two thousand Marks; and for the third Default, the Franchises and Liberties of the City shall be seized into the King's Hands. And that the Trial of these Defaults shall be by Inquests of foreign Countries, and the Pains levied upon the Mayor, Sheriffs, and Aldermen. Upon this Statute were the Proceedings of R. 2. grounded.

The other Side have likewise much relied upon another Seizure made of the Liberties of the City of Cambridge.

A great Riot committed by the Town upon the University, heard in Parliament by way of Petition, and Form of Articles exhibited by the Scholars against the Mayor and Bailiffs. Upon reading of which it was demanded of them, what they could say, why their Liberties should not be seized? After many Shifts they submitted themselves to the King's Mercy. The King thereupon, by common consent in Parliament, seized the same Liberties into his Hands, as aforesaid; and then granted divers Liberties to the Universities, and certain Liberties the King granted to the said Mayor and Bailiffs, and increased their former. These are the most substantial; it would be too tedious to repeat all, for there have been in those Days, but not since, many like Seizures of Liberties, as these; only general, but nothing particular to our purpose, and tho' not cited, I shall also mention those in Crook. 5 R. 2. Rot. Par. N. 45. Inft. 4. 228.

Certiorari to the Mayor of *Fith*; they disobeyed the Writ, and gave scurvy Words, Cr. 1. 252. *Tindal's Case*, and thereupon Mr. Noy cited two cases of Seizures of Liberties. The Bishop of *Darham* had condemned the King's Process,

and imprisoned the Messenger. An Information exhibited against him, the Offence proved; adjudged he should pay a Fine, & *quod capiatur*, and should lose his Liberties for his time; because *justum est quod in eo quod peccat in eo puniatur*, 33 E. 1. Rot. 101. Another in *Banco Com'* a Prohibition awarded to the Bishop of *Norwich*; and he communicated the Party that brought the Writ; 21 E. 3. Rot. 46. the Party brought his Action, adjudged against the Bishop, that his Temporalities should be seized till he absolved the Party, and satisfied the King for his Contempt, and that the Party should recover 10,000 L. Damages. I answer to them,

(1.) That they were all above three hundred Years ago, except that of 16 R. 2. which is above two hundred and ninety, and no such thing ever was done since; what stress or weight can be given to such Proceedings? To what Rules of Law, since known or practised, can we bring these Proceedings? Are they now legal Precedents for the like things to be done? The Writs out of old Records for the Ship-money, and the Knighthood-money, had as good Respects to warrant them, and much more plain to the purpose than these. The Precedents of *Edward the Second*, and *Richard the Second*, either of their Lives, or of their Deaths, or of the Lives or Deaths of some of the Judges of those Days, ought, as I conceive, to be no examples. And for *H. 3. E. 1. E. 2. and R. 2.* and those Times, they were Times of great Troubles and Disorders; and what was then done is no Rule or Precedent for this Court, or any other Court of Justice, to go by, unless by later Times allowed or approved. No Law-book or Report of any judicial Proceedings, either of *E. 2.* or of *E. 3.* or any later Book of Law, that I have yet heard of, or met with, (and I doubt not but if there had been any, the King's Counsel would have made use of them) hath ever given so much Credit or Countenance to these Proceedings, as to take any notice of them. To make use of old Records or Precedents, the Grounds or Reasons whereof cannot now be known, to subvert any Law or Government established, is neither advisable nor commendable. But for further Answer to them:

(2.) As to that of 16 R. 2. that you see is grounded upon the Statute 28 E. 3. cap. 10. and can signify nothing to the present purpose; for there, according to that Statute, they condemn the Mayor, Sheriffs, and Aldermen, upon their Confession, that they had misgoverned the City. The Mayor and Sheriffs being committed to Prisons; and this done before Dukes and Earls, by special Commission to that purpose appointed, and convicted by their Confession, for the first, second, third Offence, all at once, is this of good Authority in Law? And for the others, that of *E. 2.* was before Justices in Eyre at the Tower, the Office of Mayoralty seized into the King's Hands, and replevied from Year to Year. And that Seizure that was made by King *E. 1.* for what Reasons or Grounds, or by what sort of Proceedings, doth not appear; all that doth appear of it is, that *de facto Custodes* and Mayors were put upon the City, but *quo jure* who can tell? We know these Times were Times of Trouble, in the Barons Wars. The Barons, *Simon Mountford* Earl of *Leicester* being their General, fought a Battle with the King at *Lewes*, and took the King and Prince *Edward* the first both Prisoners.

48 H. 3. The Barons differing among themselves, and the Earl of *Gloucester* joining with the Prince, who got out of Prison, another Battle was fought at *Evesham*, and the great Earl *Mountford* slain; 49 H. 3. and then at *Winchester* by Parliament all his Party, and the Liberties of the City of *London* seized: and in such Times as these, and which followed in E. 1. E. 2. and R. 2. it is not to be marvelled if there were many Seizures and *Custodes* put on the City, it is more a marvel they were not destroyed. The Statutes made in these Times, shew not only the Disorders, but that the Liberties were greatly infringed, or else there would not have been Statutes to confirm them; whether the infringing or seizing were the Cause or Effect, is hard to know: but just before in those Times there were undoubtedly many extravagant Acts of all sides, which produced *Magna Charta*, made the 9 H. 3. for confirming of the Liberties and Privileges not only of *London*, but of all other Towns; and after these Times, in the three Reigns of the three succeeding Kings, how many other Statutes for confirming the Liberties and Privileges of the Cities and Towns were made 1 H. 4. cap. 15? The Penalties and Forfeitures imposed by the Statute 28 E. 3. cap. 10. upon the City of *London*, put into the same Condition with other Cities and Boroughs as to Penalties and Seizures. A Statute confirming to all the Cities and Boroughs the Liberties and Franchises, which they by former Grants or Confirmations had, viz. 4 H. 4. cap. 1. confirmed in like manner by 7 H. 4. cap. 1. Again confirmed in like manner by 3 H. 5. cap. 1. Again confirmed by Statute of 2 H. 6. cap. 1. By which it appears what a Sense and Memory they had of the Seizures that had been of their Liberties and Privileges, that they never thought them sufficiently confirmed: but they were sufficiently confirmed; for from the time of R. 2. to this Day we do not find any Seizure of any Liberties or Franchises, or *Custos* made or put upon them. That which was in those Days of Violence done, shew them the worst of Times, but are no Precedents for the best. But next,

Supposing and admitting these Records of these Times of good Authority, and as authentick Precedents as can be, they are so far from proving against me, that I hope to make it most plainly to appear, that they are strong and plain Authorities and Evidence against them, and for me. It is ordinary in disputing or arguing to lose the Point disputed or argued. That I may not commit so great an Error, but may evince and make plain what I have affirmed, give me leave to look back to the Information and Replication, and from thence to make the Points that we argue, single, clear, and open. The Information, that saith, that we usurped upon the King to be a Corporation and Body Politick, but in truth are none. The Bar sets forth the Title to be a Corporation by Prescription time out of Mind. The Replication, that endeavours to avoid the Bar, by allowing that we were once a Corporation lawfully; but that by our Miscarriages we have forfeited our being a Corporation, and thereby became none, and after that usurp'd to be one. So that, that which the other side maintains, is, That by our Misfeasances we have committed a Forfeiture of our old lawful and rightful Corporation. This I deny; the Affirmation is upon them to prove, and they producing no Record that expresses any

such Forfeiture of a Corporation, but only Records generally saying, that the Liberties should be forfeited or seized, the Question is, What the Meaning is in these old Records of forfeiting and seizing Liberties? Mr. Attorney was pleased to take it, and so did Mr. Solicitor, as I think, that forfeiting and seizing were much one. I shall not dispute that; but whether in any of those Records the Corporation or Body Politick were by these Words taken to be forfeited? Mr. Attorney was so careful to avoid the Consequences of a Forfeiture of a Corporation, which are so great and destructive, that he would not by a Judgment in a *Quo Warranto* against a Corporation have the Corporation determined, no more than he would by the Forfeiture *ipso facto* have it determined, but that there should be some Seizure into the King's Hands; but what that is, or how to be understood, I cannot imagine. For if the Corporation be not to be dissolved and determined, in whom should it rest or remain after such Forfeitures, or during such Seizure? Shall it after Forfeiture remain in the same Persons that it was in? Shall it subsist, live, and act as before? or shall it be in *Limbo patrum*, or in *Nubibus*? Is a Corporation transferable to any other Person or Persons? Can a Corporation be conveyed or transferred? that is impossible; and so it appears in the Dean and Chapter of *Norwich* Case, and *Fulcher* and *Heyward*, and 1 *Inst.* in the Case of the Homage Ancestral before cited. That a Corporation is not transferable from one Body of Men to another; therefore the King cannot possibly have it, nor can he grant it. Ay, but saith Mr. Attorney, it shall be seized, and in the King's Hands; what is meant by these Words? How can it be in the King's Hands, if not transferable? Next, what shall the King do with it, shall he grant it to others? No, that is impossible; by the Cases cited, it so appears the King may make a new, but he cannot grant an old Corporation, because not transferable. Then if he cannot grant, if it be not transferable, if a Corporation or Body Politick be by Law framed in similitude of a natural Body, then it is no more transferable than a natural Body is. The Body Politick cannot be taken out of the Hands of the Persons Incorporate. From hence then, if this be so, it will follow of necessity that the Corporation, if it cannot be transferred to the King, or by the King's Grant, out of the Persons in whom it is, to others, it must remain where it is, or be dissolved. Next, that which I shall shew is,

That by the Words *forfeiting* and *seizing* Liberties in those old Records, it cannot be meant forfeiting and seizing a Corporation or Body Politick; they still continued. But that which is the true sense of these Words, forfeiting and seizing Liberties in those Records was, if the Abuse or Misuse were of a particular Franchise, as of Courts, Prisons, Markets, or the like, the King had them forfeited to him. If the Abuse were by a Corporation, they acted by their active Parts, by their Mayors, Bailiffs, Sheriffs, Coroners, or the like; the King seized these Offices, turned the Corporation Officers out, and put others in to their Places. This was the Course in the *Eires*, where these Seizures in those Days usually were: But for seizing Corporations as forfeit, there hath been no Instance of it in any time; but the contrary is most evident. For the Corporations, notwithstanding the supposed Forfeitures or Seizures, remained

remained still in being; and this is evident even to sense. The Seizures, that have been mentioned, have been of *London, Bristol, Gloucester, Cambridge, and Cinque-Ports, Ipswich and Winchester.*

I offer to your Consideration, whether these Cities of *London, and Bristol, Gloucester, Cambridge, and also the Cinque-Ports, ever since, have not continually in all Pleadings, Claims, and Titles, made themselves a Title by Prescription? Are they not by Prescription to this Day? Do they not claim their Markets, Tolls, and all their Privileges by Prescription? Do not the Acts of Parliament, that immediately follow these Seizures made by H. 4. H. 5. H. 6. in the Times succeeding, all confirm their Privileges? Not a word of granting new Privileges, but confirming the old; which shews plainly, that in those Days the Corporations were not thought or imagined to be determined or dissolved. By these Seizures, or supposed Forfeitures, the Enjoyment or Possession, for the space of three hundred Years, is Evidence sufficient of their remaining and being Bodies Politick by Prescription, which they could not be, if they were forfeited, as pretended. For by Forfeiture they must mean the losing their Corporation, or being divested; no other sense can be, or ever was of Forfeiture. Could they forfeit them, and yet keep them? Could they lose them, and yet have them? If they could not, then it is plain that since they always have had them, they never forfeited or lost them. But for farther Evidence hereof, I shall make it most plainly to appear, that during the very Times of these Seizures the Corporations remained and acted as Corporations; and that at that time it was never thought or imagined that during the Seizures the Corporations were forfeit; all that was done was, that the Election of their Mayor, or of their Sheriff, was *de facto* taken from them, and either a *Custos*, or a Mayor, by the King put over them, and continued till those Kings Displeasures were over, and then they chose their own Officers again: But no thought then of forfeiting the Corporation. By the City Books, as well as Records, this is most evident. The putting a *Custos* by King E. 1. continued for the space of eleven Years, from the 16 E. 1. to the 26 E. 1. and then they chose their Mayor again. By the City-Books it appears, that their Court of Hustings all along continued, as at other times, Aldermen all along. *Lib. A. fol. 50, 51, 135.**

Radulphus de Sandwyco Custos Civitat' London, Henricus le Walleys, and others, Aldermen, (naming them) & universalis Communitas ejusdem Civitatis, make a Conveyance of a House to John de Bangwell, 18 E. 1.

The Court of Aldermen holden before the *Custos* and Aldermen, 18 Ed. 1. *Lib. A. fol. 110.*

With the King's Remembrancer in the Exchequer, *Cives London. venerunt coram Baronibus, & presentaverunt Johannem de Canluar' & Willielmum de Betoyn ad respondend' pro Civitat' predict' & Com' Middlesex, de his quæ ad Officium Vicecomitis pertinent, & ad hoc faciend' præstiterunt Sacramentum, 16 E. 1. Ro. 1.*

Ibidem, The Presentment and swearing two other Sheriffs, 18 E. 1. Ro. 1.

Ibidem, The like, 21 E. 1. Ro. 3.

Ibidem, The like, 23 E. 3. Ro. 3.

Auby le Artheir attachiatus fuit ad respond' Communitat' Civitat' London' de placito, for that he,

being no Freeman, merchandized in the City, 21 E. 1. *Lib. C. fol. 19. b.*

Another like Suit against an Un-freeman. *Lib. C. fol. 7. b.*

A Writ of Right in the Hustings, brought by the Corporation. *Communitas Civitat' London. per Radulphum Pecocks Attornatum suum petit versus Hugonem Episcopum de Bedlam unum Mesuagium, &c. 22 E. 1.*

All the Aldermen, and twelve Citizens were called before the King and his Council, and the King restored them the Election of their Mayor, and they chose *Henry de Gabys* Mayor. And on Monday following comes the King's Writ, whereby the King, for good Services, *reddidimus & restituumus Civibus London' Civitatem, una cum Majoritate & Libertatibus suis, quas certis de causis dudum capi fecimus in manum nostram.* So that hereby it most evidently appears, the Corporation was not forfeit, lost, or dissolved, only a *Custos* put over them, which acted in the Place of Mayor; and when removed, they chose their Mayor again, 26 E. 1. *Lib. B. fol. 38.*

The Liberties not forfeit, only seized into the King's Hands; so saith the Writ *dudum capi fecimus in manum nostram.* The Record of *Cambridge* I have looked upon; it plainly appears in it, that the Corporation was not forfeited and dissolved, as you suppose: For it appears, that when they submitted to the King to do with their Franchises what he pleased; yet it was *salvo* to the Mayor and Bailiffs, their Response to all other Matters. And afterwards, at the same time, the King grants to the same Mayor and Bailiffs divers Liberties: by which it appears that the Corporation was not forfeit, but still in being, notwithstanding the Seizure and Forfeiture.

The Seizure that was by King *Edward II.* was in no sort any Forfeiture or Determination of their Corporation; but either under a *Custos*, or under a Mayor put in by the King.

The *Custos*, Aldermen, and Commonalty appeared, and turned out some of their Aldermen. *Lib. E. fol. 11. b.*

They chose and swore their Sheriffs, and by this Time they had a Mayor again; but the Office of Mayoralty, granted them by the King. *Lib. D. fol. 6.*

The King grants to *Nicholas de Farrington* the Office of Mayor *quamdiu nobis placuerit, 16 E. 2. Lib. E. fol. 146.*

They had a Writ restoring to them the Office of their Mayor again, 20 E. 2.

Then for the Seizure of 16 R. 2. that continued but from the 22d of July unto the 19th of September following; and the Form or Colour of Law that they had for that, was the Statute of 28 Ed. 3. and the *Custos* put in sworn at *Guildhall*, and took the Oath of the Mayor, as appears in the Book which I cited; where it is mentioned to be upon that Statute. *Lib. H. 269. b. 16 R. 2.*

But for farther Evidence; in the Treasurer's Remembrancer's Office in the Exchequer, 4 E. 3. Rot. 2. in *Bago de Quo Warranto in Itinere Northampton & Bedford, Quo Warranto versus Villam de Bedford*; in that Record are these Things: First, that the Village of *Bedford* had not at the last preceding Eire made Claim of divers Liberties, and thereupon in that Eire adjudged, *quod omnes Libertates non clamat' capt' fuissent in manus Domini Regis*, and had not been replevied, but the

the Corporation not seized. Thereupon the Corporation offer a Fine of eight Marks to the King, *pro licentia clamandi* their Liberties, and admitted to fine: But then it appeared, that the Mayor, and the Coroners had sat in Judgment, and condemned Men for Felonies committed out of the Jurisdiction; and thereupon *Consideratum est, quod prædictæ Libertas de Infangtheife, & Officia Major, Ballivorum, & Coronatorum ejusdem Villæ capiantur in manus Domini Regis. Sed quia ceteræ Libertates & Consuetudines Villæ prædictæ absque Ministris pro communi utilitate Populi ibidem nequeant conservari*, the Court puts *Johannem de Tound Custos, Johannem Wymond and Richardum Rounds* Bailiffs, and *Nicholas Astwood and William de Knight* Coroners, who are all sworn to execute those Offices, and to answer the King the Profits. Hereby it appears, that the Course was not to forfeit or dissolve the Corporation: they never were so unreasonable; for hereby all their Lands and Goods, and all the Debts owing by them, or to them, would all be lost: All they did was, they put in Officers to preserve the Corporations. So that I think there is nothing more plain, that tho the Liberties were seized, and that Officers, *Custos*, or Mayors, were put upon them; yet the Corporations, or Bodies Politick, or their Liberties were not forfeit, or determined. If they had been either forfeited, or determined, could the Writs of Restitution have set them up again? The old could never be restored or set up again, but by Act of Parliament; they might have had new Charters, and have been made new Corporations, but the old could never have been restored, if once forfeited, as now imagined. So that the Point betwixt us is, Whether the Records of *E. 1. E. 2.* and *R. 2.* of Forfeitures and Seizures of Liberties, supposing the Causes or Offences for which they were seized were very great and provoking, as in all Probability they were, do prove that thereby the Corporations were forfeit, dissolved, or determined: It appears they were not forfeit. You can never avoid it. If abusing the Franchise or Liberty of being a Corporation be a Forfeiture, as you affirm, and that they were seized for being forfeit; then the Offences that were committed by these Corporations in those Princes times, were Forfeitures, and consequently the Seizures dissolved the Corporations. They could not forfeit and lose their Corporations, and yet keep them. And that they still had their Being, is most evident by the Records of those Times, shewing, that they acted and enjoyed their Corporations under those Seizures, only a *Custos* instead of a Mayor, all other Things the same. That they have in all Ages ever since been allowed to be Corporations by Prescription, never denied or questioned. That the Acts of Parliament immediately following, confirming their Privileges, never questioned their having them. Never any Thoughts of making void any Forfeitures by these Acts, or any new Grants, but always pleaded by Prescription. These things plainly shew, that the Offences committed in those Times did not forfeit the Corporation; and all that dark Authority they have out of those Records is directly against them, proves only that these Abuses gave only Cause of Seizure of some Offices, but no Forfeiture of the Corporation; that still continued.

Having thus answered those old Records, and
VOL. V.

shewn that they are of Authority for me against them; and since it hath been stirred in this Case, whether a Corporation, or Body Politick be surrenderable, or not, and insisted upon by the other Side that it is, and from thence an Argument drawn to prove, that if surrenderable, it is forfeitable: Whether it be surrenderable, or not, perhaps is also doubtful, so that I think a Man cannot argue from it any thing. First, I am sure there is no great Reason why it should be; for since that Men that are of the Corporation take, upon their coming to be made Free, an Oath to preserve the Rights, Liberties, and Privileges of it; and since the active Members are intrusted for all the other Members that elect and choose them, and also for their Successors; I cannot see how a Man can satisfy himself in so doing.

Sir *James Bagg's Case*, Rep. 11. 98. they forfeit their Freedom by doing contrary to their Oath and Trust. If every Freeman by his Oath and Trust be obliged to seek the Benefit of the Corporation, to surrender is against the Oath. The Law seems to have a care of preserving Corporations; and therefore provides that the taking any new Charter, tho there be many Alterations in Offices and Names, yet doth not surrender the old. But were it of any other Franchise, the taking a new of the same thing is a Surrender of the old.

Dean and Chapter of *Norwich Case*, Rep. 3. 73.

Fulcher and Heyward's Case seems a strong one to prove it not surrenderable, *Jones* 266. And tho the Bishop did not in that Case join in the Surrender, that cannot hinder; because the Bishop is no Part of the Corporation, and therefore cannot hinder them to surrender, if they will.

A Ville incorporate by the Name of Bailiffs; 4 *H. 26. 22. b.* The King *de novo* incorporates them by the Name of Sheriffs; are their Privileges that they before had, gone? No, *Dieu defend*, saith the Book. But this being not my Question, I intend not to debate it thorowly, but to keep to the Point of a Forfeiture of a Body Politick or Corporation, and farther to examine the Reasonableness and Justice of this Doctrine of Forfeiture, and see how adequate and just it is; for that is the thing, I perceive, desired.

First, Their Position is, That a Corporation, or Being of a Body Politick, is a Liberty or Franchise, and if abused or misused, is forfeited, determined, and dissolved.

That I may a little understand this Position, and consider of Abuse and Misuse, and of the Extents and Consequences of it: By Abuse or Misuse, every Act that a Corporation doth, that is not justifiable by Law, is, as I take it, an Abuser or Misuser. If a Corporation receive any Money, that is not due to them, if it be by Virtue of any By-law, that is a Forfeiture, tho it be but a Groat. What if they by their Common Seal command their Servant to enter into such Lands, or distrain such a Man's Cattle for Rent not due; is not this a taking upon them to oppress the King's Subjects, and to extort from them their Lands or Moneys where not due? This is a Misuser. A Body Politick, as I have said, is but a Person created in resemblance of a natural Person, to have a Capacity to take, hold, and enjoy to particular Ends and Purposes. And hold or enjoy is not possible, without acting: and all that act must

of necessity be subject to Errors sometimes, in their Actions, as natural Persons are. And must it be so penal to them, that every Error, Misuser, or Abuser, must be a Forfeiture? Can it be reasonable or just in Law that this can be? Laws are made for Preservation, not for Destruction; if every Abuser or Misuser forfeit, be it a small Transgression, is it either reasonable or probable that any Law shall punish it with Destruction of the Body? The greatest Offence, be it Treason or Rebellion, or the least illegal Act, Offence, or Misdemeanour, must have the same measure of Punishment by this Rule; and the Law then doth not distinguish. If a natural Body, or Person, hath a Market, and orders his Servants to take such Tolls, and he takes them; what would this Crime be, besides Forfeiture of his Market? Why should a Corporation then not only in such Case, or for any Offence or Miscarriage to the value of a Penny, forfeit and lose, as in the Case of High-Treason, his Life or Being, Lands, Goods, and all? This cannot be agreeable to any Rules or Reason of our Law; and therefore I take it, it cannot be the Law. The next Thing I design to insist upon is,

Secondly, the Mischiefs and Inconveniences that must attend this Doctrine or Law of forfeiting and surrendring, if the Law be so.

Let us then consider, whether this at one stroke do not make all the Corporations in *England*, of all sorts, forfeit at once, and perhaps many Years since. Is there any Corporation in *England* that hath not offended or transgressed? all manner of Corporations fall under this Rule. If they have transgressed or done any such Act as makes a Forfeiture (as every Miscarriage, for any thing I can see to the contrary, doth) whether the Corporation be *ipso facto* dissolved by the Offence committed, or else by the Judgment, which must relate to the Offence, to avoid all mean Acts done by the Corporation; all that they have done since such Miscarriage, they have done without right; and all that they think they have a Title to, as a Corporation, they are mistaken in, they have none. Perhaps if a Parliament should be called, those forfeited Corporations can lawfully send no Burgesses. I do not know whether I am mistaken, or not, I only offer this to Consideration amongst others: As (give me leave to venture a little farther upon these Considerations of Surrenders and Forfeitures of Corporations) can a Bishop, Dean and Chapter, Prebendary, Parson, &c. surrender his Corporation or Body Politick? If they can, most of them, perhaps, are of the Foundation of the Crown, and had their Lands from thence. We have many Statutes made to restrain their Alienations: Those of Queen *Elizabeth* did not extend to hinder their Alienations to the Crown; but perhaps, out of hope of Preferment, they aliened to the Crown till the Statute of 1 *Jacobi* cap. 3. took away that Power also of conveying to the Crown: Can these forfeit the Corporations? Perhaps we are Sinners all, or at least, as the Balance at some time or other may be holden, may be found too light: We are upon a point that goes to posterity; Fear, and Favour, what may it do, and what may it not do? If they may surrender or forfeit, what effects may this have upon the whole Ecclesiastical Estate? If this had been known in the Days of King *Henry* the Eighth, perhaps there would

have been no great need of Acts of Parliament to make him Head of the Church, or to have dissolved the Monasteries. Suppose that Colleges, Hospitals, and other Corporations founded for Charity, can surrender or forfeit; the present Masters and Fellows, and the Heirs of the Donors may truck; what effect may this have upon them? what ways may they find out? Also Cities and Boroughs; what Divisions and Contentions hath it already produced, some for surrendring, others for defending, what Animosities are about it? The end of the Law is to preserve Peace and Quiet. Divisions and Dissentions frequently end in the Destruction of both Parties.

The Citizens and Burgesses, are, I think, three parts of four of the House of Commons. It is considerable what Effects this may have in Parliaments, our Laws and Posterity perhaps not a little concerned herein; and if so, surely this is a great Case. But if only the City of *London*, give me leave to see what the ill Consequences and Mischiefs will be. Arguments from Mischiefs and Inconveniences are forcible Arguments in Law. So saith *Littleton*, and my Lord *Coke* upon *Littleton*; and Men must be desperate and sensual that despise future Mischiefs and Inconveniences, and many other places there cited. *Inst.* 1. 11. 60.

1. All their Lands will be gone and revert to the Donors, and their Heirs. By Dissolutions of Corporations, all their Privileges are gone, and their Lands revert to their Donors, or Lords, of whom they were holden. *Jones* 190. *F. N. B.* 33. *k. Inst.* 113. *b.*

2. All their Markets, Tolls, and Duties, that they claim by Prescription; whereby the Government, and the Honour of the City, the Publick Halls, Gates, Prisons, Bridges, and other Edifices, are in a great Measure maintained.

3. All the Debts owing to the City, and all their personal Estate, by the Death or Dissolution of the Corporation, will be gone; but who shall have them? Perhaps, *non definitur in jure*.

4. All the Liberties and customary Privileges that the Freemen of the City, their Wives, and Children claim, *viz.* to have customary Shares in their Husbands or Fathers Estates; to be exempt from Tolls in other Towns, Ports, and Markets; to exclude Foreigners and Unfreemen from using their Trades in *London*, and many others.

5. All the Acts of Parliament, that give particular Powers and Authorities to the Lord Mayor and Aldermen, or Common Council, or Corporation, respecting either the Government or Justice of the City; as about Ministers, and Payment of their Dues, Buildings, Paving of Streets, Sewers, Insurance Office, and many others.

6. What shall become of the Orphans, and all the Monies and Debts the City owes, and all the Charities in the City? We have seen the City burnt, and may remember what a Swarm were unhived thereby; but we never yet saw it dissolved, nor are the Consequences measurable. And tho it please his Majesty upon the Dissolution of this, to grant a new Charter, yet it will be impossible any of these Things can be preserved: Their Lands, Estates, Debts, Privileges, Customs, are all Personal, and

and annexed to the Corporation, and must live and die with it; the said Acts of Parliament are all fixed to this Corporation, and so are the Charities, and cannot, as I conceive, be ever transferred to any other to be new created. A new Corporation can be in no Succession or Privity with the old. If a Body politick be once dissolved, tho a new one be founded of the same Name, that can have no Succession to the old, nor come in Privity to it: Therefore is it that in the Dean and Chapter of *Norwich's Case*, and in *Fulcher and Heyward's Case*, the Preservation of the old Corporation is insisted on. *Inst.* 1. 102. *b.* If every Abuser committed by a Corporation be a Forfeiture, Determination, or Dissolution, is there any one in *England* not forfeited and dissolved? Abuse is a Word of a wonderful large Sense: When the Law speaks of a Franchise abused or misused, it is applicable to a particular Franchise, as to a Market, Court, or the like; and if that Franchise be misused, or abused, in Oppression or Misuse, contrary to the Ends of it, some Certainty there is in it: But the Abuse of a Corporation extends to all its Acts, and all Estates of the Corporation; and all the Privileges of all the particular Persons, and all that are concerned in them, are Sufferers for every Abuse, or Misuse, or Mis-act or Trespas, how small soever. Who can tell in the Actions of a Person what may be taken to be ill or illegally done, or an Abuse? Who will trust a Corporation, if its Duration and Existence be so fickle and infirm, that every Abuser or Misuser shall forfeit it? There will be no need of Officers to be amoved, thereby to determine this Corporation at Will and Pleasure, this Position contains enough to do all. These great Consequences, attending this Doctrine of Forfeiture, are Reasons to prove the Law otherwise.

But saith Mr. Attorney (if I understand him) We do not intend to destroy the Corporation, tho we say in our Pleading, that you have forfeited your old Corporation, that you have without any lawful Authority usurped upon the King, and pray in our Replication, that *de Libertate, Privilegio, & Franchesia illa (viz. the being a Corporation abinducantur & excludentur.* These are but Words of Form, we only will lay the King's Hands gently upon it, and seize it, but the Corporation shall not be destroyed or dissolved.

I answer, this is wonderful, and a great Compliment to the City as I take it; let us not flatter or deceive one another. We are not now in the irregular Days in the Records mentioned, nor in such sort of Proceedings as in those distracted Times. Let us not go by blind Conjectures, out of old Records, and bring in unknown Ways. We are now in a *Quo Warranto*, which, as Mr Attorney truly saith, is in the nature of a Writ of Right; and a Writ of Right is the highest Writ that is in the Law; and the Judgment therein, and in this *Quo Warranto* must be conclusive to all Parties. If given against the Defendants, it must conclude them for ever, and dissolve their Corporation; and if given against the King he shall never hereafter bring it in Question for any Cause precedent. *Rep.* 9. 28. *Inst.* 2. 282, 495. *Coke's Entries* 527. *D.* hath a Precedent of it. *Consideratum est, quod* the Defendant *de & in Libertatibus,*

Privilegiis, & Franchesiis præd. in Informatione prædictæ specificat' nullo modo se intromittat, sed ab iisdem penitus excludatur. The like against *Ferrers*, and the *Virginia Company*, and many others may be found. *M.* 21. *Jac.* 1. r. 9. The Court cannot alter the Judgment, it will be erroneous if they do. And to talk of a Judgment of a Seizure, what is the meaning of it, or such Judgment? Is it final, or not final? The Court must give a final Judgment, that the Party, if he think fit, may have his Writ of Error. The Court will not take any of your old Records to go by, if any such are to be found, that would warrant any other Judgment; Therefore a Seizure, without such a Judgment, that determines the Corporation, cannot be any way brought to pass, as I believe, nor can I understand in whom, by your Seizure, you would have the old Corporation to subsist. Transferred from the Persons, in whom it now subsists, I think is impossible, but dissolved by your Judgment it may be: And I hope your Lordship will not be induced by singular unwarrantable Things, that a Judgment should be given that shall neither dissolve the Corporation, nor continue it, that shall neither be for Plaintiff, or Defendant, that shall leave the Corporation neither alive nor dead, but in *Transitu*, or *Limbo Patrum*: A Judgment, *quod capiantur, or quod Libertates & Franchesiæ prædictæ seisiuntur in manus Domini Regis.* Was there ever any the like? What shall be understood by it? Shall we be afterwards a Corporation? Shall our Magistrates continue? Shall we have our Lands, Markets, Tolls, Customs, or Franchises, or not? Or shall we be none, and yet not dissolved? I must confess I am confounded in these Notions.

Next, as to the Authorities in Law for me:

1. I take it to be a great Authority for me; that there is no Precedent, or Judgment, or Book Case produced or found, that ever a Corporation was forfeited. It lies upon the other side to produce it, or shew it; and no doubt they would, if there had been any, but there is none by the Authorities they cite; you may easily perceive, any sort would not be omitted.

2. The Nature of a Corporation, as our Books do describe it, shews it not forfeitable. I take it plain out of the Case of *Sutton's Hospital*, and the other Books there cited. *Rep.* 10. 92. *b.* 21 *E.* 4. 72. A Corporation aggregate is invisible, immortal, and rests only in Intendment and Consideration of Law, cannot commit Treason or Felony, be out-lawed, excommunicate, hath no Soul, cannot appear in Person, cannot do Fealty, cannot be imprisoned, not subject to Imbecillity or Death. *Br. Corp.* 24. 34. They cannot commit any actual Trespas or Disseisin, except under their common Seal, by Command, Precedent, or Assent subsequent: When our Books say, that they are a Body Politick, and rest or have their Being in Intendment or Consideration of Law, thereby is meant, that they are by Law enabled to act to particular Ends and Intents, answerable to their Ends and Creations. Their Ends or Creations are only to be subservient to the publick Good, and Government, and Preservation of the City or Town incorporate, and of the Members thereof. And if there be any Act done by the Members, that are the active part of such Corporation, to any other Intent, End, or Purpose, this is not the Act of the Corporation,

but of the Particular Members, and they only are answerable for it. And as to particular Offences and Miscarriages in this Case alledged, it cannot be denied, but that the particular Members are answerable for it; and if they, then according to all Books, they ought not to be doubly chargeable or answerable in both Capacities. And the Argument cited out of *Bagg's Case*, of a Freeman convict of Perjury, and thereupon disfranchised, doth not prove that they shall be punished in a double Capacity; for the Corporation is not thereby punished, but preserved. The Being of a Body politic is only a Capacity, and in resemblance of a natural Body, and no more forfeitable than a natural Body. It is seizing and forfeiting of Liberties, that we meet with, that is, such as are generally spoken of; as Markets, Courts, Jurisdictions, and the like: And in the old Records; by seizing the Liberties of a Corporation is meant the taking from them their Officers, and putting in others upon them for a Time. But a forfeiting, dissolving, and determining the Body Politick, never was yet done or known, nor, as reasonable to believe, ever entered into any Man's Thoughts till now; for I have already shewn that Offences and Miscarriages, that were committed by the Corporations in those troublesome Times of *E. 1. E. 2. and R. 2.* for which their Liberties were seized, were not Forfeitures and Determinations of those Corporations, they all remain Corporations by Prescription to this Day: And I have also taken Notice, that the Acts of Parliament, that were made in the succeeding Kings Reigns, of *H. 4. H. 5. and H. 6.* are only Acts of Confirmation to the Cities and Boroughs of their Liberties and Privileges. From that Time till within these three Years, I believe it never entered into any Man's Thoughts that a Corporation was forfeitable; for farther Proof whereof divers other Statutes, and the whole Series of Matter is Argument.

The Statute of 15 *H. 6. cap. 6.* that provides against Abuses and Exactions made by Societies incorporate, by their By-laws: and Ordinances, and appoints a Forfeiture of Ten Pounds, and of their Power to make By-laws: To what end should this be, if the Corporations themselves were forfeited, or thought so to be?

The Statute of 19 *H. 7. cap. 7.* recites the Statute of *H. 6.* and the Exactions and Abuses by Fellowships, by their By-laws and Ordinances, and appoints a Penalty of Forty Pounds if they exact Money by an unlawful and unwarranted By-law, not examined and signed by the Chancellor and Chief Justice.

The Statute of 12 *H. 7. cap. 6.* sets forth grievous Exactions by the Fellowship of Merchant-Adventurers, by their By-laws, and imposeth a Penalty for the future.

The Statutes 22 *H. 8. 4.* 28 *H. 8. 5.* shew like Exactions by Corporations upon Apprentices by their Ordinances and By-laws, provide Remedy, and enact Penalty. If in those Times it had been thought or imagined that a Corporation had been forfeitable, every of these Offences forfeited it, what need farther Remedy? In the Case of *Hoddy and Wheehouse*, of excessive Toll by the Town of *Northampton*, *Moore* 474. 39 *Eliz.* In the *Quo Warranto* against a Corporation, tho the Question was concerning their taking Toll, and whether they had for-

feited their Market, or only their Toll; no Thought of forfeiting their Corporation was ever mentioned. So that I think I may conclude with the tumultuous Times of *E. 1. E. 2. and R. 2.* what was then done, doth plainly shew the Corporations were not forfeit or dissolved: That by all the Acts of Parliament and Proceedings in almost all the Reigns of any Length or Duration, from that Time to this very Case, the Opinions and Thoughts of Men were otherwise; as by the Statutes and Transactions appears: Not one Opinion, Book, or Authority, produced, or to be found. The great Concern not only of this great City, but of all other Cities, Towns, and Corporations, Ecclesiastical and Temporal, all depend upon it. And which is more than all, the very Government by Law established will be in great Danger of Alteration by it.

I have argued long, and tried your Lordship's Patience; the weight and length of the Case, and rareness of the Matter, there never having been the like before in any Age, will, I hope, excuse me. But besides the whole Frame and Foundation, that the other side have laid, being all built upon general undigested Notions, as I take it, *viz.* that Abuser and Misuser of Liberties forfeits them, without distinguishing betwixt one thing and another; that the Words forfeiting and seizing Liberties, found in old Records, should be Authorities to prove forfeiting Corporations or Beings of the Body Politick tho no such thing then, or at any time since, till very lately was ever thought on or imagined: It was necessary for me to open and set forth these general Notions, and to explain and distinguish; which, I hope I have done, that it may appear what the sense of them is, how far they agree with Law and Justice, and how far not. And if, in the doing hereof, or the setting out the repugnant or inconsistent Matters or Opinions arising in this Case to maintain this *Quo Warranto*, I have expressed myself in any other manner than became me, I humbly beg pardon for it; and that it may not reflect upon the Cause, nor prejudice it.

Upon the whole Matter, if this Information brought against the Body Politick for usurping to be a Body Politick, ought to have been brought against the particular Persons; if it be repugnant or contradictory, that a Corporation can usurp to be a Corporation; that a Body Politick or Being can usurp to be a Body Politick or Being, before it had a Being, or to be that same Body Politick or Being, which it was when it did usurp; if forfeiting a Franchise, or Liberty, or other Estate, cannot determine or vest that Franchise or Estate in the King, till the Forfeiture appear on Record; then the old Corporation supposed to be forfeited, if it were so, did notwithstanding, and yet doth continue in Being, there being no Record to determine it: and consequently that which is pretended a new one by Usurpation is impossible. If by Seizure into the King's Hands (as pretended) the Continuance of the Corporation be intended, how inconsistent is it with Law or Justice to continue any thing in the King, that is wrongfully usurped, and the Parties to be punished, fined, and committed for usurping? If Mr. Attorney's Replication, taking Issue upon our Prescription to be a Corporation, and going over, and alledging several distinct Causes of Forfeitures, cannot by Law be

be maintained, and in the Example doth introduce a way to bring all Mens Estates subject to Mr. Attorney's Will and Pleasure (for, let any Man's Right be as good as can be, it will be scarce possible to defend it, if such Pleadings as in his Replication be allowable by Law) then be the matter in Law as much against us as possible, yet Mr. Attorney can have no Judgment for him upon this Information. Next, Supposing the Information all good in Law; yet, if the Judgments, Records, and Authority, that have been cited by them for Seizures, do plainly shew that Seizures and Forfeitures are very different in their Natures; that the Corporations all continued notwithstanding the Seizures; and the Seizure was only the King's putting in Mayors and Officers to act in them instead of the others elected or constituted by the Corporation, and they remain Corporations by Prescription to this Day, and never were forfeited, dissolved, or determined by such Seizures; if the general Authorities in Books, that the misusing or abusing a Franchise be truly applicable to Franchises (that are Estates and Interests grantable or conveyable from Man to Man) and never were intended of such a thing, as is rather a Capacity or Being, than a Franchise; if there be no Case, or Precedent, or Opinion to be found for it; if, on the contrary, the particular Cases cited prove, that where the Corporations have by Miscarriages forfeited particular Franchises, they do not forfeit their Corporations; if there be scarce any Corporation in England, that have not at some time or other done something they should not, or omitted to do something they should, and thereby forfeited their Corporation, and consequently all are Usurpers, and their Corporate Acts since done all void: If the Corporation here hath done nothing, but that the Mayor, Aldermen, and Common Council, are only Delegates, Deputies, or Ministers of the Corporation for particular purposes; if Servants, Deputies, or Delegates, do that which they have no Authority to do, they must answer for it in their own Persons; but their Masters, or those that deputed or delegated them for another purpose, they are innocent; they shall not suffer by it, tho no Acts of Parliament had been in the Case; if the Acts of Parliament against seizing the Liberties of the City, for or by reason of any Miscarriage of their Officers or Ministers, extend to these Acts of the Mayor, Aldermen, and Common Council; if so be that these Acts were the Acts of the Corporation; yet, with Submission, if they have shewn a good and legal Right, by their Custom and Title, to make By-laws for regulating and settling the Markets and Tolls, and that which they have done be, as pleaded, reasonable, and that there was reasonable Ground at that time for their Petition which they have set forth; if all these Particulars, that I have now summed up, be against me, then Judgment must be against me; tho I know not what that Judgment can be. But if any one of these Particulars, thus repeated, be for me, and against Mr. Attorney; then Mr. Attorney can have no Judgment against the City; but Judgment must be for them: which I humbly pray.

THE next Term, viz. Trin. 35 Car. 2. (Chief Justice Saunders dying the Day of the Judgment given, or the next Day after) Mr. Justice Jones, Justice Raymond, and Justice Wi-

thens, being in Court, Justice Jones pronounced the Judgment of the Court, and Justice Raymond and Justice Withens affirmed, that Chief Justice Saunders was of the same Opinion with them, and that they all agreed,

1. That a Corporation aggregate might be seized. That the Statute 28 E. 3. c. 10. is express, that the Franchises and Liberties of the City, upon such Defaults, shall be taken into the King's Hands. And that Bodies Politick may offend and be pardoned, appears by the general Article of Pardon, 12 Car. 2. whereby Corporations are pardoned all Crimes and Offences. And the Act for regulating Corporations, 13 C. 2. which provides that no Corporation shall be avoided for any thing by them misdones or omitted to be done, shews also that their Charters may be avoided for things by them misdones, or omitted to be done.

2. That exacting and taking Money by the pretended By-law, was Extortion, and a Forfeiture of the Franchise of being a Corporation.

3. That the Petition was scandalous and libellous, and the making and publishing it a Forfeiture.

4. That the Act of the Common Council was the Act of the Corporation.

5. That the Matter set forth in the Record did not excuse or avoid those Forfeitures set forth in the Replication.

6. That the Information was well founded.

And gave Judgment that the Franchise should be seized into the King's Hands, but the Entry thereof respite till the King's Pleasure was known in it. Justice Raymond and Justice Withens declare, that they were of the same Opinion in omnibus.

And accordingly after Entry made by Mr. Attorney, That as to the Issue joined to be tried by the Country; as to the claiming to have and constitute Sheriffs; as to the having the Mayor and Aldermen to be Justices of the Peace, and to hold Sessions, *quod ipse pro Domino Rege ulterius non vult proseguere*; Judgment is entred:

Ideo consideratum est, quod prefatus Major & Communitas ac Cives Civitatis Lond' as to the Issue aforesaid, betwixt our Lord the King and them joined, and as to the Liberties and Franchises aforesaid by them claimed, to have and elect Sheriffs, and to have their Mayor and Aldermen to be Justices of the Peace, and hold Sessions, eant inde sine die, salvo jure Dom. Regis, si al' &c. Et quoad dictas separales materias in lege unde tam prefatus Attor Gen' quam prefatus Major & Communitas & Cives Civitatis prefatus posuerunt se in Judicium Curia, the Court advise till Trinity Term; and then pro eo quod videtur Curia hic quod prefatus Major & Communitas ac Cives Civitatis prefatus forisfecerunt Domino Regi nunc Libertatis Privileg' & Franchises. prefatus ob causas in Replicacon prefatus Attor Gen' superius specificat, quod Placita prefatus Major & Communitas ac Civium Civitatis prefatus superius rejuugendo & repellendo in ea parte placitat, materiaq; in iisd' content' minus sufficien' & invalid' in lege existunt ad praeludend' dict' Dom' Reg' a Forisfactura prefatus aut ad Major' & Communitas ac Cives Civitatis prefatus ad clamand' Libertatis Privileg' & Franchises. prefatus sibi allocand' & adjudicand' manutenend' maturaq; deliberacione superinde prius habit' Considerat' est, quod Libertatis Privileg' & Franchises. prefatus fore de seipsis unum Corpus corporat' & Politic' in re, facto & nomine per nomen Majoris Com-

Communitatis & Civium Civitat' Lond' ac per idem nomen placitare & implacitari, respondere & responderi per eosd' Majorem Communitatem, ac Cives Civitat' London præd' superius clamat' capiantur & seisciantur in manus Domini Regis; & quod præfat' Major & Communitas ac Cives Civitat' Lond' præd' capiantur ad satisfaciend' dict' Dom' Reg' de Fine suo pro Usurpatione Libertat' Privileg' & Franchies. prædict'.

Thus was the Metropolis of the Kingdom deprived of its Charter and Magistrates, till the Year 1688, when King James terrified at the News of the Prince of Orange's intended Invasion, thought fit to restore it, October the 6th, and ordered Lord Chancellor Jefferies to carry it back himself; whereupon Sir George Treby was restored to his Place of Recorder, and the rest of the Magistrates, according to the antient Constitution of the City.

P O S T S C R I P T.

THE Question concerning the Surrender of Corporations, or Bodies Politick, not being directly in the Case, but in the Arguments on both sides insisted on, it may not be unnecessary to state that Point, and collect what hath been in the Debates or Arguments alledged on either side, that the easier View and Judgment may be made of it. By Surrender in this Question is, by both sides, meant and intended some Deed or Instrument in Writing, whereby a Body Corporate or Politick can surrender and dissolve itself. It is agreed that a Body Politick may be dissolved, either by the Death of the Persons incorporate, or their Refuser to act, nominate, or elect Officers or Ministers, so as there remain not sufficient, authorized or enabled by their Charter or Constitution, to preserve their Being: This is admitted to be a Cesser, or Dissolution of the Corporation, and such a sort of yielding up, or Surrender, is admitted possible. But whether by any Deed or Instrument in Writing it can be done, that is the Question intended. For the Surrender, it hath been alledged,

1. That the Being of a Body Politick is a Liberty, Privilege, and Franchise, that had its Commencement by the King's Charter, or by Prescription, which supposes a Charter; and if it have its Beginning and Creation by Charter, which is the King's Deed that grants it, by Deed again it may be regranted and surrendered: And it is a Maxim in Law, *Unumquodque dissolvi potest eod' modo quo ligatur.* And instances in Fairs, Markets, Leets, and such like Franchises, granted by Charter, which, say they, may be surrendered by Deed, or Regrant.

2. That it is necessary that it should be dissolvable by Surrender. Perhaps a Town may come to decay, and not be able to defray the Charge that the Support and Maintenance of the Corporation may require; for every one sees that Ornaments and Officers must be, and these cannot be bought or maintained without Estates; and poor Men are not able, without Ruin to their Families, to bear the Magistracies and Offices; and therefore it is necessary there should be a Power in them to surrender.

3. That the Books and Cases in Law do prove, that a Corporation, or Body Politick, may surrender itself, and thereby be dissolved.

Dy. 273. There the Case is thus stated: The Deanry of the Cathedral Church of *Wells* was dissolved by the Surrender of *Fitz-Williams*, tempore H. 8. And the Prebend of *Currey*, in the same Church, was also surrendered by *Goodman*, Prebendary there, 1 E. 6. And in this Year the Dissolution of the Deanry was confirmed, and the Deanry extinct by Act of Parliament, and a new Dean erected and created, to which new Deanry the Lands and Possessions of the old were annexed, amongst other Possessions, and the Nomination of the new Dean and Successors given by that Act to the King, and that he should have the same Power in *Choro & Capitulo* as the old Dean had; saving to all Strangers, other than the Bishop of *Bath and Wells*, the old Dean, and the old Prebendary, and their Successors. In this case it is admitted, and taken for granted, that the Deanry, and also the Prebend, were surrendered.

Dy. 282. There the Archbishop of *Dublin* had two Chapters, viz. the Dean and Chapter of *St. Patrick*, and the Dean and Chapter of *Christ-Church*, and both these used to confirm the Bishop's Leases. The Dean and Chapter of *St. Patrick*, by Deed under their Common Seal, gave and surrendered all their Church, Houses, Lands, and Possessions, to the King, without License or Consent of their Bishop, being their Ordinary, and Patron of the most part of the Prebends. After this Surrender their Church was used as the Common Hall, for the four Courts in the Term there; and a Lease is made by the Archbishop, confirmed by the Dean and Chapter of *Christ-Church* only; and whether the Successor of the Archbishop were bound by this Lease, was the Question. The Judges in *Ireland* were divided in Opinion, and thereupon the Case was sent over for the Opinion of the Judges here; and the Opinions and Resolutions of five Justices, viz. *Catlyn, Dyer, Saunders, Welsh, and Carus*, certified to the Lord Deputy of *Ireland*, under their Hands, were, *Quod non fuit aliud Capitulum in esse tempore confirmationis Dimissionis præd' nisi Christ-Church tantum, quia Corporatio & Capitulum Sancti Patrick fuit per donum & sursum reddition' Decani & Capituli præd' legitime dissolutum absque consensu Archiepiscopi.*

Jones 168. The Opinion of Justice *Jones* there, that a Corporation may be dissolved by an Act proper, viz. by Resignation.

On the other side, it hath been answered,

1. Admitting it to be true, that to be a Body Politick is a Liberty, Privilege, and Franchise, created by Charter, which is the King's Deed; yet it doth not follow that it may be surrendered by Deed: For the Charters that incorporate the Citizens, or Inhabitants of such a City, Town, or Place, and make them a Body capable of taking and having Lands, Goods, or Chattels, to sue and to be sued, and to have a Common Seal, and to act according to the Powers, Ends, and Purposes in their Charters contained, only give them a Capacity for those Ends. The Liberty, Privilege, and Franchise, that they have, goes no farther. They cannot transfer this Privilege, or Franchise, to any other Persons. These are only personal Franchises or Capacities, fixed in the Persons, to whom they are granted, like to Patents of Denization granted to Aliens, whereby a Capacity is granted to have, hold, and act, as a natural born Subject; Grants of enfranchising

enfranchising a Villain; these are Grants that cannot be surrendered; these are Franchises and Capacities like this; these are Exceptions to the General Rule, *Unumquodque dissolvitur eodem modo, &c.* So also Fairs, Markets, Courts, &c. they are created by Charter, they may be granted over, or granted to the King; but if they be regranted to the King, they are not extinct, but remain in the King.

Abbot of *Strata Marcella's* Case, *Rep.* 9. 25. *b.* shews the difference thus: When the King grants Franchises, that were in the Crown before the Grant, as *Bona Felonium*, Deodands, Wreck, &c. and these come again to the Crown, they are merged in the Crown, and the King is seized of them *Jure Corona*; but when a Privilege, Liberty, Franchise, or Jurisdiction, was at first erected or ordained by the King, there, by the coming of it again to the Crown, they are not extinct; and instanceth in Fairs, Markets, Hundreds, Leets, & *similia*. They are not dissolved or gone, for thereby Subjects would be prejudiced: For if the Court should be so granted, and thereby dissolved, the Subjects Judgments and Suits in those Courts would all be lost. These are other Exceptions to that general Rule, *Unumquodque, &c.*

2. That the Reason given for the Surrenders of Corporations from the Poverty that may happen, for the Conveniency of some Corporation, is answerable; for that doth not very frequently happen: But when it doth happen, if they are weary of it, they may let it alone, and not act, or choose Officers; it will cease of itself, they need not be at the Charge or Trouble of a Surrender: But on the other Side, the Inconveniences are very great, and are some of them before specified. The Establishment of the Church is all in Corporations, Bishops, Deans, Chapters, Prebends, Parsons, Vicars; if these be surrenderable, as by the Cases cited, without Consent of Bishops (a Prebend is, as to his Being, but as a Parson or a Vicar) the Universities, Colleges, Hospitals, all the Cities, considerable Towns, Trades, and Mysteries, are Corporations; if these be surrenderable, it affects our old Government.

3. As for the Books and Authorities. *Dy.* 273. the Dissolution of the Corporation thereby surrendered is only mentioned in putting the Case, it is not debated, nor was it material in the Case: For the Act of Parliament there settled the new Dean and Chapter, and the Prebendary; and the Matter of the Case ariseth upon the Deprivation of Dean *Goodman*, and the Appeal and Reversal of that Sentence: there is not as much as any Opinion in the Case concerning the Dissolution or Surrender, whether good or bad. But what may reasonably be inferred from that Case is, that the Surrender and Dissolution thereby was not good in Law; for if it had, what needed the having an Act of Parliament to secure against the old Dean and Prebendary? which yet appears in the Case was had.

And, *Co. Rep.* 3. 75. *b.* in the Case of the Dean and Chapter of *Norwich* this Case of *Dyer* is cited, and there it is expressly said, that that Surrender was not thought good, till confirmed by Act of Parliament.

And as for the other Case, *Dyer* 282. of the Surrender of the Dean and Chapter of *St. Patrick*, the Opinion of the Judges there given

is, by all the Judges 3 *Car.* 1. in the Case of *Heyward* and *Fulcher*, in *Jones* 168. denied to be Law, and said to be a private Resolution. So that these two Cases in *Dyer* having been by those later Authorities denied, remain no Authorities: And as for the other Authority, *viz.* The Opinion of Justice *Jones* 168. that a Corporation may be dissolved by a proper Act, *viz.* by Resignation, that is true, taken in the Sense he speaks it: It is spoken of a Dean and Chapter resigning to the Ordinary, *viz.* the Dean resigning his Place of Dean, and the Prebendaries of the Chapter resigning their Prebends to the Ordinary, whereby their Churches and Prebends became void, and to be supplied by the respective Patron, collating or presenting, as in Cases of Resignation, by any Parson or Vicar to his Ordinary. But this is nothing of a Surrender of the Body Politick to the King, and thereby dissolving the Corporation, and destroying all Supply, by new Presentments or Collations. And this appears by the very Words of Justice *Jones* there; for when he saith they may be dissolved by a proper Act, *viz.* by Resignation; the next Words are, or by Death of the whole Corporation; and the King being Patron, it is in his Election whether he will collate *de novo*, or not, and till he collates the Corporation is in suspense; but if the Bishop be Patron, then the Bishop, upon the Resignation, hath Power to collate, and thereby to continue the Corporation: So that it is very plain, that the Resignation he speaks of is not meant for any Surrender to the King, or any thing that determines the Corporation, except the Patron will not collate, and thereby suffer the Corporation to cease. But on the contrary, that a Corporation cannot be dissolved by any Surrender.

The Suppression and Dissolution of the Abbies, Priors, and Monasteries, by *H.* 8. was no Dissolution of their Bodies Politick. *Br. Extinguishment*, 75. *Br. Corporation*, 78. *Davies, Rep.* 1. *Moore's Rep.* 282. Tho their Houses and all their Possessions were gone, and the Persons either discharged of their Orders, or sent into other Houses; yet resolved, that the Corporations remained. And it can scarce be imagined; but in some of those Cases it would have been practised, or at least something said about surrendering their Body Politick, if it had been then thought surrenderable. But the Case of the Dean and Chapter of *Norwich, Rep.* 3. 41 *Eliz.* before cited, and the Case of *Heyward* and *Fulcher* before mentioned in 3 *Car.* 1. *Jones* 168. *Palm. Rep.* 500, 501. *Andersf.* 2. 120. have been cited as Judgments against Surrenders by all the Judges of the King's Bench. The Case was, That the Dean and Chapter of *Norwich*, 3 *Junii* 1 *E.* 6. surrendered to the King their Cathedral Church, and all their Manors, Lands, Tenements, Hereditaments, Franchises, and Liberties, Spiritual and Temporal, by whatsoever names they are known, or which they have or ought to have in the Right of their Church. And by the Case 41 *Eliz. Co. Rep.* 3. 74. and the Opinion of all the Judges of the King's Bench, 3 *Car.* 1. adjudged, that this was no Surrender of the Corporation.

They object, That the Words of the Surrender do not shew any Intent to surrender the Corporation, but only the Possessions.

I answer, The Being of a Corporation is a Franchise or Liberty; and there is an express Surrender of all Franchises and Liberties, Spiritual and Temporal, by what Name soever known, which they have in the Right of their Church: And this was a Spiritual Franchise, which they had in right of their Church.

Next, This Surrender was made with intent to dissolve the Corporation, and to have a new one erected: this appears by the new Charter of Erection, made in November following; which recites the Surrender made to that Intent. It is not any where in the many Arguments of that Case alledged, that there wanted Words in the Surrender to do it, which would have been, if that had been the Ground of their Judgment.

In the Case cited out of *Dyer* 282. there the Words of the Surrender were, that they surrendered their Church, Houses, Lands, and Possessions, which are not half so large and ample Words as in this Surrender are contained; and the other side cite that as an Authority to prove a Corporation surrendered, and admit the Words there sufficient, and deny them to be sufficient

here, tho much more large, express, and general. The arguing there in *Palmer* 501. that it is against the Nature and Constitution of Corporations, that by the Words put in their Charters, by their very Constitution, are to have perpetual Succession, *perpetuis temporibus duratur* and which by their Oaths they are sworn to preserve, or they should be *felo de se*. And the express Words of the Judges reported in these Books shew their Opinion, that the Corporation could not be surrendered. *Jones* 168. *Dodderidge* Justice, there saith, that the Dean and Chapter cannot surrender their Corporation. *Palm.* 501. *Whitlock Just.* there saith, For that the Dean and Chapter are Counsel to the Bishop instituted to that purpose, they cannot dissolve themselves; for the Politick Corporation is the Soul to the Body, that cannot be granted or sever'd; tho the King can create a Corporation, he cannot dissolve it. And *Jones Just.* there 502. saith, that the Dean and Chapter were Counsel to the Bishop, and cannot destroy themselves; if they could, great Inconvenience thereby will ensue to the Church.

N. B. These Proceedings should have been inserted, according to the Order of Time, after the Trial of Colonel Sidney, in Vol. III. Some Account of which may be seen in Burnet's History of his own Times, p. 533.



The Trial of WILLIAM SACHEVERELL, and Nineteen others, at the King's-Bench, for a Riot committed at Nottingham, May 2, 1684. Paschæ. 36 Car. II.

The Defendants having before pleaded Not Guilty, were now brought to their Trial.

Cl. of Crown.



ALL the Defendants, William Sacheverell Esq; and others.

Mr. Pollexfen. We appear.

Cl. of Cr. Gardez vostres Challenges. Swear Sir Humphry Miller.

Which was done, and the Twelve being sworn to try the Cause, being Gentlemen of the County of Kent, werethese following:

Sir Humphry Miller,
Sir Henry Bosville,
William Lambert,
Charles Wheeler,
Richard Maysh,
Edward King,

Humphry Stiles,
Walter Hooper,
James Masters,
Richard Britton,
Ralph Petly, and
Edward Bathurst.

Cl. of Cr. Gentlemen of the Jury, hearken to the Record: Sir Robert Sawyer Knt. His Majesty's Attorney-General, has exhibited an Information in this Court against William Sacheverell Esq; George Gregory Esq; Richard Mansfield Esq; Henry Plumptre Esq; Charles Hutchinson Esq; John Greaves Gent. William Greaves

Gent. Samuel Richards, Robert Green, Francis Salmon, Arthur Riccards, Ralph Bennet, John Sherwin, William Wilson, Clerk, Samuel Smith, Thomas Trigg, Richard Smith, John Hoe, William Smith, Joseph Turpin, Nathaniel Charnell, Humphry Barker, and Joseph Astlin; For that whereas the Twenty ninth Day of September, in the Thirty fourth Year of the King, there was an Assembly at Nottingham, in the County of the said Town, duly summoned, and called, and met before Gervas Wild, then Mayor of the said Town, for the electing and swearing of a Mayor of that Town, for the Execution of the Office of Mayor of that Town for the Year then next following, according to the Effect and Tenour of certain Letters Patents in that behalf before granted, by our Sovereign Lord the King that now is, unto the Mayor, Aldermen, and Burgesses of the Town of Nottingham, in the County of the said Town; and that in that Assembly, the said Gervas, being then, as aforesaid, Mayor of the said Town, began to proceed to such Election; and that then and there the said Mayor made, and caused to be made, a publick Proclamation for the Departure of all Persons from

from that Election that were unconcerned therein, and for keeping the King's Peace; and that nevertheless, they the said *William Sacheverell*, and the rest of the Defendants, being Persons well knowing the Premises, and unconcerned in that Election, but being ill-disposed Persons, and to disquiet, molest, and trouble the Peace of our Lord the King that now is, and the common Tranquillity of that Town, and the aforesaid Election wholly to hinder, did during the Time of the said Assembly, and after publick Proclamation made as aforesaid, viz. the said Twenty ninth Day of *September*, in the aforesaid Thirty fourth Year of this King, at the aforesaid Town of *Nottingham*, in the County of the said Town, with Force and Arms, &c. riotously, routously, unlawfully, and seditiously, together with many other ill-disposed Persons, and Disturbers of the Peace of our said Lord the King, to the Number of Five hundred Persons, to the said Attorney-General as yet unknown, assemble, congregate, and unite themselves together, and themselves together continued, to disturb the Peace of our Lord the King that now is; and that then and there the said *William Sacheverell*, and the other Defendants, the aforesaid unlawful and ill-disposed Persons so assembled, congregated and united then and there, with Force and Arms, &c. riotously, routously, unlawfully, tumultuously, and seditiously, by the space of Seven Hours, to disturb the Peace of our said Lord the King, and to continue the said Riot, did excite, move, persuade, and procure, and then and there, by the whole time aforesaid, made, and caused, and excited to be made, great Rumours, Clamours, terrible Shouts, and unusual Noises; and then and there, with Force and Arms, &c. riotously, routously, unlawfully, and seditiously, one Mace, being the Ensign of Office to the Sheriffs of the County aforesaid belonging, from one *John Malin*, the said *John Malin* being then one of the Sheriffs of the Town and County of the Town of *Nottingham*, against the Will of the aforesaid *John Malin*, took, had, carryed away, and detain'd, to the inciting of great Danger, and moving of Tumults, and Effusion of much Blood, to the great Terror, Disquiet, and Fear of all the Liege Subjects of our said Lord the King, to the evil Example of all others in like Case offending, and against the Peace of our said Lord the King, that now is, his Crown and Dignity.' To this Information all the Defendants but *Richard Mansfield* and *Henry Plumtre*, have pleaded not Guilty, and for Trial put themselves on the Country. But the Defendants have alledg'd that the Inhabitants of the Town and County of the Town of *Nottingham* ought not to be drawn out of the said County, and that the County of *Kent* is the next County to the County of the Town of *Nottingham*, and therefore have pray'd that a Jury of the County of *Kent* might try the Issue; to which the King's Attorney has agreed: And you being Freeholders of the County of *Kent*, and returned, and sworn to try this Cause, your Charge is to enquire whether the Defendants, or any of them, are Guilty of the Offence in this Information, or Not Guilty. And if you find them, or any of them, Guilty, you are to say so; and if you find

them, or any of them, Not Guilty, you are to say so; and hear your Evidence.

Then Proclamation was made for Evidence in the usual manner.

Mr. Holloway. May it please your Lordship, and you Gentlemen of the Jury, This is an Information preferr'd by Mr. Attorney-General, against *William Sacheverell* and others, for a most notorious Riot: And it sets forth, That upon the Twenty ninth of *September*, in the Thirty fourth Year of this King, at the Town of *Nottingham* there was an Assembly duly summoned before *Gervas Wild*, then Mayor of the said Town, for the Election and Swearing of a new Mayor of the said Town for the Year ensuing: That the Mayor began to proceed to Election, and made Proclamation for all Persons to depart that were not concerned in the Election: That the Defendants being no way concerned in the Election, but being ill-disposed Persons, to disturb the Peace of that Place, and set the Town together by the Ears, did in a riotous manner assemble themselves with many other ill-disposed Persons to the number of Five hundred, and continued in their Riot for the Space of Seven Hours, with a great deal of Noise and Tumult, and with Force and Arms did riotously carry away and detain a Mace from one *John Malin*, then one of the Sheriffs of the Town, against his Will, to the great Terror of his Majesty's Subjects, to the evil Example of all others in the like Case offending, and against the King's Peace. If we prove all or any of these Defendants who have pleaded Not Guilty, to be Guilty, you will find them so.

Mr. Recorder. May it please your Lordship, * and you Gentlemen of * *Sir Thomas* the Jury, I am of Council in this *Jenner.* Cause for the King, This is an Information against a matter of Twenty one Persons, for being in a notorious Riot, and continuing in it for two Days together. If it please you, Mr. *Sacheverell* he is in the Front of them, and he and Seven more of these Defendants, very considerable Persons, were not at all concern'd either by any Old Charter, or by the New Charter in this Election, but mere Strangers; and yet they must needs come on purpose to inflame and set on the others. I shall name them that were not concern'd in the Election, *William Sacheverell*, *George Gregory*, *Charles Hutchinson*, *William Wilson*, Clerk; *Joseph Turpin*, *Nathaniel Charnell*, *Humphry Barker*, and *Joseph Astlin*. These Persons, Gentlemen, had no manner of Pretence to be at this Place upon the account of an Election. The Matter of it was thus: *Michaelmas-Day*, 1682, the Mayor that then was, *Gervas Wild*, was at his own House, with some of his Brethren, in order to go to Church that Morning, according to the usual Custom of that Place, at the Day of Election; but having Notice that there was a Charter coming down, and expected every Moment, truly the other Side, Mr. *Sacheverell*, and the rest that werethere, for he was present himself, were very zealous to go to Church very early, but I believe not so much out of Zeal to go to Church, but more to come to a speedy Election if possible, before the New Charter came down. The Mayor at the same time desir'd them to stay a little, but could not prevail, and thereupon they go to Church, and while they were there, the New Charter comes,

and then the Mayor having got the New Charter, goes into the Council-Hall, and sends for the Books from the Clerk, who was then in the Church, and he came and brought them. When they came to the Council-Hall, the Mayor was proceeding in order to have himself sworn upon this New Charter, and they having some Notice what was doing at the Council-Hall, were willing to make all the haste they could out of the Church, and come down to the Council-Hall: And when they came there, the Mayor tells them his Business, that he had a New Charter, and was going to be sworn according to the King's express Commission; and *Sacheverell* stands up in the Front of them, and says, We will have no New Charter; we will have no such Mayor as you would have, but we will have a *Greaves* Mayor, and that was the Outcry, a *Greaves* Mayor, a *Greaves* Mayor; to that degree that all the Mayor and Sheriffs could do, could not pacify them. But thus they made a Tumult and an Uproar, by the help of a Parson, *Wilson*, who I believe will give you an account by and by, what he had to do there, and how he was concern'd in the Election of a Mayor. At length the Mayor was forced to withdraw, and did go down out of the Council-Chamber into the Common-Hall, where he got himself sworn; and by that time he had got that done, they came out of the Council Chamber into the Common-Hall, and acquaint the Mayor, that truly they had chosen *Greaves* Mayor in the Council-Chamber, and required him to swear him. Mr. Mayor said, they had nothing to do to choose a Mayor, it was no Election, and they would proceed to Election according to the Charter, he having now taking the Oath. This rais'd the Tumult higher, and now there were got together about Five Hundred Persons, so that at last some of the Aldermen that attended the Mayor, were fain to withdraw for fear of Mischief, the Tumult was so outrageous, some crying out the New Charter was not worth One Groat, others crying out, No New Charter, and all crying, A *Greaves*, a *Greaves*; and this they stood upon. The Mayor withdrew to his own House, with much ado he got out of the Hall, and when he was got thither, there he proceeds to an Election, and while he was doing that, truly they having gotten one of the Maces away by Force, they went to the Cross and there they proclaim'd their Mayor, with great Shoutings and Outcries, rejoicing for the New Mayor they had gotten, and the New Charter that they had defeated. While they were there, the Mayor having chosen another according to the New Charter, regularly came down, and proclaim'd that Mayor at the Market-Place, as is usual in such Cases, and made Proclamation that the rest should depart; but instead of that, they withstood him, and would not suffer the Cryer to make Proclamation, that any body could hear him; but a great Riot they committed in an outrageous manner resisting Authority, defying it, and despising it. After this, this would not satisfy them yet, but the next Day, being Market-Day, they must proclaim their Mayor again, which is a Practice never known upon any Election; but at the open Market there before all the People they proclaim him, with great Rejoicings for the New Mayor they had gotten, and wishing the

People to stand by them: And for their parts, if they had not right done them now, they did not doubt but to meet with a Parliament that should do them right. In this great Disorder was this Town by this Tumult, which was thus headed by Persons of Eminency, and popular Persons, who helping to carry on such a Faction as this was, it was great odds there had not been real Fighting, and Battle in good earnest; but it did happen to be better appeas'd, and they went Home, but ever since their whole Business has been to uphold this Power, and attend him up and down constantly since as their Mayor, and opposing the Authority of the Mayor by the King's New Charter. We will call our Evidence, my Lord, and they will every one of them speak to the several Defendants, and the several Parts of this famous Riot; and when we have done this, we hope you'll be satisfy'd, Gentlemen, to find them Guilty.

Mr. *North*. Will your Lordship please to spare me a Word of the same Side for the King? My Lord, this is a Proceeding of an extraordinary Nature, and if not taken notice of, it will be thought there's no Law in *England*; for it is a Method to have Authorities question'd, not in *Westminster-Hall* by the Rules of Law and Justice, but decided by Noise and Rabble, and going together by the Ears. My Lord, this Surrender of the Old Charter, and the sending down of a New One, was not secret, but well known, and that occasioned the great Congregation of these Gentlemen that had nothing to do in the Town, and so it was a premeditated Design to give a Disturbance in the Place, in Opposition and Affront to His Majesty's Charter. My Lord, I do suppose they very well knew that Matters of that nature were properly determinable in a way of Law; and if the Mayor had no Authority by the New Charter to do what he did, they knew very well how to question him, and them that join'd with him, for it: But they did not think that so effectual for their purpose; they did not think fit to take that Course, but rather chose to proceed in the Methods of Disturbance, and that occasioned all that Mr. Serjeant has opened. The first Step they made, my Lord, was to appear in the Town-Hall, there to make an Election of their own, and there to cry up a Mayor of their own choosing, without the Authority of the present Mayor; which was all irregular from the beginning to the end. When they had done that, then this Mayor must be proclaim'd up and down the Town upon Market-Days, when the Country came in, with great Noise and great Rabble. We shall call those that were present, who will give you an Account of the Proceedings of all this Matter, and shew it to be a thing so enormous, that there has not been the like, nor can be parallel'd by any thing, unless by that not far off, the Common-Hall at *London*.

Mr. *Jones*. My Lord, if the Persons that had been concern'd in Election (for the Town of *Nottingham* consists of particular Persons that are to come and act in this Matter of the Election of the Mayor) had been the only Persons that were met in this Assembly, possibly it might have had some sort of Mitigation and Excuse; but, my Lord, here are mere Foreigners, People that have nothing to do in the Matter nor in the Corporation, but Gentlemen that come out

of the Country with an armed Multitude, and for them to come where they had nothing to do, and make such a Riot, in such an outrageous tumultuous manner, is the next A&I know to the highest Rebellion. For they knew very well what the Matter was, by the Cries of a *Greaves*, a *Greaves*, no *Toplady*, no *Toplady*, no New Charter, and you see who were the Abettors. In truth the Insurrection spread so far, that if the Duke of *Newcastle*, who is Lord Lieutenant of the County, had not come with Force, they had gone downright to Blows, and been all in Blood. And if such Proceedings be not publickly punish'd, the King's Authority, and the Peace of Corporations can never be preserv'd. We shall call our Witnesses to prove it; *Sacheverell* was the Captain of them, and we shall begin with him.

Mr. *Powis*. My Lord, we shall make it short, for we shall shew without meddling with the Old Charter or the New Charter, it was a Riot.

Mr. *Recorder*. Swear Mr. *Wild*, Mr. *Edge*, and Mr. *Hall*.

Mr. *Pollexfen*. There will be one thing necessary to be settled in this Case, my Lord, concerning the Witnesses; they call *Wild* and other Persons, they are Members of the New Corporation, and we object against them as being Witnesses in this Case, and our Objection, my Lord, arises thus: It will appear in this Case, that there's a Controversy betwixt the Old Charter and Corporation, and this that the Information is brought upon, the New Corporation, whether the Old Corporation be still in being, or was at this Time in being; and whether this New Charter be a good Charter in Law: The Matter depends both in this Court and in Chancery; a *Scire Facias* is there brought against the New Charter, and a *Quo Warranto* here against the Old. Now, my Lord, it will so fall out, that if so be the New Charter, upon which this Information is founded, be not good in Law, we think it goes with the Defendants. So now they call the Members that claim under the New Corporation to be Witnesses, and thereby they would have a Privilege by their own Testimony, to maintain their Interest in the new Charter, which we think by Law they ought not to do.

L. C. J. * Look you, Mr. *Pollexfen*, * Sir George *Jefferies*. tho it is not fit for us to interrupt Gentlemen when they are making

Harangues, yet we must tell you, we do not take notice much one way or other of the difference between the Old Charter and the New; for our Business is to mind that which is before us upon the Information, and we must set by all Things that are not before us, and not take notice of them one way or other. Do you think we intend to try the New Charter or the Old Charter upon an Information for a Riot? If in case there were a doubt whether the Old one be gone or still in being, take the Proper way for the determining those things. You shall not think to be let in upon the Business of a Riot, to try the Validity of your Charter; if you have a *Scire Facias* to repeal the New Charter, or if you have a *Quo Warranto* against the Old Charter, in God's Name go on in a Regular Way. But do you tell me that supposing the New Charter is an ill Charter, and the Old one a good one, that Right or Wrong is to be tried by Rabble and Noise? No, the Business we are to try

is, whether here were a Riot committed by these Defendants against the publick Peace or no.

Mr. *Holt*. My Lord, we are upon the Point of Exception to the Witnesses; and they open it themselves that there is such a Controversy in the Town:

L. C. J. We will not try that Controversy here at this Time.

Mr. *Holt*. My Lord, the Information is Special, it is grounded upon the New Charter, and sets forth that this *Wild* being Mayor by virtue of this New Charter.—

L. C. J. He was Mayor *de facto*, and I don't know but he was so *de jure*. But suppose a Man do take upon himself to be Mayor, and it may be according to the Rules of Law he is not Mayor, the Way to know whether he be Mayor or no by Law, is to take the Methods and Proceedings that the Law has appointed; but not by Tumults and Riots: we must have none of those Things to decide Controversies, there must be nothing of plucking out one anothers Throats.

Mr. *Just. Withens*. Pray, Mr. *Holt*, If the King sends down a Charter to make a Corporation, shall all the People rise in a Body against it? No, satisfy yourself for that; if the King sends down his Charter, the People shan't fly in the Face of them that bring it. It is not come to that yet; nor I hope never shall.

L. C. J. No, no, for the Matter of Right, we are not upon this Information to determine whether the Old Charter be in being, or the New one be in being; but for that you must go according to the Rules of Law, and take your regular Course; and I'll tell you by the way, 'tis not he that has the most Company, that has always the greatest Right: We all know very well, and I have been in a Place that has been hinted at the Bar, and there indeed he that had most Noise, had always most Right, as they thought; but we will have none of these things: go on for your Right in a regular Way in God's Name; we must keep to the Business before us, this Riot.

Mr. *Pollexfen*. My Lord, we are in a Place now where we hope such things will not be, and we desire to have Right settled by Law.

Mr. *Recorder*. Swear Mr. *Wild* (which was done.) Pray give my Lord and the Jury an Account what happened at *Nottingham*, upon *Michaelmas-Day* (82.) Tell the whole Matter of it.

Wild. My Lord, and you Gentlemen of the Jury, I was then Mayor when this Business happened. When the King's New Charter came down, as soon as it came to my hands, I went straight to the Town-Hall, thinking to be sworn by the New Charter, that so I might be capable of swearing others in their rooms that were turn'd out. When I came there, I desir'd Alderman *Parker* and *Rippon* to go for Alderman *Edge*, who was at the Church, that we might be sworn regularly, he being Town-Clerk, who sent me word that he would not come; but in some little time afterwards he came, with a great many Persons with him, as Mr. *Sacheverell*, and a great many others that had no business there.

Mr. *Recorder*. Pray name as many of them as you can.

Wild. Mr. Sacheverell, Mr. Hutchinson, Mr. Plumtree, Mr. George Gregory, Mr. Green, Mr. Sherwin, Sir Thomas Parkins.

Mr. Pollexfen. He is not nam'd here.

Mr. Recorder. Don't disturb him, pray let him go on.

Mr. Pollexfen. We only take notice he names some that are not down in the Information.

L. C. J. Can't you be contented, what if he does name others that are not there, What hurt is that to you?

Wild. There were several others, but these Gentlemen did not belong to the Town, nor had no Business there; some of them were no Burgesses, and they that were Burgesses had no Votes there. Sir, as soon as these Gentlemen came into Court, I was a little amaz'd to see so many Gentlemen; I took the King's New Charter out of the Box, and Alderman Rippon took it by one side, and I by the other. Gentlemen, said I, here's the King's New Charter, which he has been pleas'd to grant to the Town of Nottingham; and said I, Mr. Serjeant Bigland, will you be pleas'd to cast your Eye upon it, and satisfy these Gentlemen whether it be a New Charter, and what are the Contents of it? Sir, says he, do you ask my Opinion as Recorder, or as a Counsel? Says I, I ask your Opinion as a Friend. Then says he, I won't give you my Opinion. Then said I, Mr. Alderman Edge, will you look upon it, and give your Opinion, it's your Duty to read it as Town-Clerk. Sir, says he, I know what I was by the Old Charter, but I don't know what I am by the New. Says I, 'tis your Duty so to do. No, says he, I will not. So, my Lord, and Gentlemen of the Jury, the rest of the People that were in the Room, cried out, No New Charter, No New Charter. Then spoke Mr. Sacheverell, Sir, says he, this is not our Business here now, we come here for the Election of a Mayor by the Old Charter. Sir, said I, I know not any Business you have here, nor a great many Gentlemen that are here; it would better become you to be in another place. Sir, says he, will you proceed to Election or no; Sir, says I, I have a great deal more to do before I can proceed to Election; I was to be sworn myself, and to swear half a dozen, before I could proceed to Election, in the Room of those that were turned out, to make them capable of electing. And so they cry'd, No New Charter, No New Charter, a Greaves Mayor, a Greaves Mayor. Then they cry'd, Mr. Alderman Edge, take your Book, and proceed to Election. Who are you for, Mr. Mayor? Said I, you cannot proceed to any Election without my Consent, and I disclaim it; and so, Gentlemen farewell. My Lord, that was in the Council-House next to the Guildhall.

L. C. J. What Day was that?

Wild. It was Friday, Michaelmas-Day, (82.)

L. C. J. Well go on.

Wild. So, my Lord, I adjourn'd the Court into the Guildhall, which was a Room adjoining to that where this Matter happened, and we sat a while upon the Bench, and made a little Speech to the Burgesses of the Town, and told them the King had granted a New Charter, and if they pleas'd to be silent, they should hear it read. This was after I was sworn; for as soon as I came there, they gave me my Oath, and swore me Mayor by the New Charter. We

commanded Silence there several times, but the Burgesses were very tumultuous, and it was occasioned, as I believe, my Lord, by the coming in of two Gentlemen, Mr. Gregory and Mr. Hutchinson, who came to tell me, the Gentlemen in the other Room had elected Mr. Greaves Mayor, and desired me to come and hear him sworn. Said I, they can't elect without my Consent, and I disclaim it, I will have nothing to do in the Business. With that the Burgesses began to be so extraordinary tumultuous and outrageous, and keep such a Noise and Stir, that we were afraid they would have plucked us off the Bench; infomuch, as one that was by, my Brother Parker, whispered me in the Ear, says he, Will you stay here to be knocked on the Head? I told him, I hoped there was no danger of that. We commanded Silence again and again, for the Reading of the New Charter; and there was an honest Gentleman in Court, one Mr. Bawd, a Barrister at Law, that took it and read it very distinctly to the Burgesses and the Company, as far as they would give him leave. I made Proclamation for Silence, and keeping the Peace divers times, and for all, that had no Business there, to depart; but they were so outrageous, that Alderman Parker went away: He was afraid of his Life, as he told me. I staid some little time after Alderman Parker went away; but finding there was nothing to be done for the Noise, I adjourned the Court to my own House, and did all the rest of the Business there, electing and swearing the Mayor and other Officers. My Lord, presently after I was come to my own House, comes Mr. Charles Hutchinson, Mr. George Gregory, Mr. Samuel Richards, and Mr. Arthur Riccards; and they came very impudently and saucily to demand the Mace: They said they were sent to demand the Mace: Said I, I think you have nothing to do with it.

L. C. J. Were they concerned in the Election by the Old Charter?

Wild. No, my Lord, they were not by the Old nor New, nor none at all? Said they, Will you please to give us your Answer, whether you will give us the Mace or no? Said I, I received it from a very good Authority; I received it by the King's Authority, and to the King's Authority I will give it again. Said they, Is that all the Answer you will give us? Yes, said I, that is my Answer: So they went away. After we had sworn all the Men that were in the New Charter, we went to the Election of a New Mayor, and we chose Mr. Toplady; and when we had chose him, we went to proclaim him, as the usual Manner was, and proclaim'd him at the Market-Cross, the Week-Day Cross, as we call it; and as we were proclaiming our New Mayor, there comes Sherwin and Green with a great many more, about forty I believe, or thereabouts; and as it grew towards Night, they shouted and threw up their Hats, and we thought they would have run in upon us, and they cry'd out, No New Charter, No New Charter, a Greaves Mayor, a Greaves Mayor.

Mr. North. What became of the Mace?

Wild. I kept it.

L. C. J. What is this Gentleman's Name?

Mr. North. Mr. Wild: He was Mayor then. Have you no more to say, Sir?

Mr. Just. Withens. Pray who was at the Head of all this Rabble? Who was the Chief of them?

Wild.

Wild. I believe if Mr. *Sacheverell* had not been there, and those other Gentlemen, we had had no Disturbance.

Mr. Pollexfen. Pray, Sir, let me ask you, had these Gentlemen their Swords on?

Wild. Yes.

Mr. Just. Withens. Did they abet and countenance the Tumult?

Wild. Yesthey did abet it.

Mr. North. Did any Body strike or threaten?

Wild. There are some in Court can tell you something of that, I know nothing of it.

L. C. J. I would know of you how many Persons were present at this time when this Tumult was. Pray name as many of them as you can. You have named *Sacheverell*, *Gregory*, and *Hutchinson* for the first Part: You have named about the Business of the Mace, *Samuel Richards* and *Arthur Riccards*.

Wild. And Mr. *Green* and Mr. *Sherwin* were there at the Market-Cross.

L. C. J. Who else.

Mr. Powis. Was Mr. *John Greaves* there?

Wild. Yes.

Mr. Powis. Was *William Greaves* there?

Wild. Yes.

Mr. Powis. Was *Ralph Bennet* there?

Wild. He was there.

Mr. Powis. Was *William Wilson* there?

Wild. I can say nothing to him.

L. C. J. Was *Samuel Smith* there?

Wild. Yes.

L. C. J. Was *Thomas Trigg* there?

Wild. Yes.

L. C. J. Was *Richard Smith* there?

Wild. Yes, he was there too.

L. C. J. Was *John Hoe* there?

Wild. Yes.

L. C. J. Was *William Smith* there?

Wild. Yes.

L. C. J. Was *Joseph Turpin* there?

Wild. He was in the Hall throwing up his Hat, but I did not see him in the Council-House.

L. C. J. Did he abet the Tumult?

Wild. Yes, he cried out, No New Charter, No New Charter, a *Greaves* Mayor, a *Greaves* Mayor.

L. C. J. Was *Nathaniel Charnel* there?

Wild. Yes.

L. C. J. Was *Humphry Barker* there?

Wild. I can say nothing to him.

L. C. J. Was *Joseph Astlin* there?

Wild. I can say nothing to him neither.

L. C. J. Then these Three you say nothing to; *William Wilson*, *Humphry Barker*, and *Joseph Astlin*.

Mr. North. Pray, Sir, favour me with one Word; I would ask you this Question: Was there any Proclamation made by your Order to have those depart that had no Business?

Wild. My Lord, I did order it so; and I think the Serjeant is in Court; I sent him into the other Room, and did order him to make Proclamation; he will give you an account of that.

Mr. Recorder. How came it about they were got to Church before you came from your own House? Pray tell us what you said to them before they went to Church. Were there any of them before that at your House that Morning, and what did you say to them?

Wild. May it please your Lordship, my Lord, and Gentlemen of the Jury, the New Charter

was not come till something late in the Day: they had been at my House about Eight or Nine of the Clock, to have me go with them to Church, and they were impatient of staying, but I persuaded them to stay, for, said I, we shall have a New Charter by and by. Some of them were my Friends, and I spake to them to persuade the rest to stay. I did persuade them to stay a great while, and went out from them, and came to them again. At last News was brought me that the New Charter was within the Limits of the Town, (for we had a Spy at the Top of the Houses) and that half a score were come with it; so I went to Alderman *Edge*, and told that now the New Charter was come within the Bounds of the Town. When they heard me say so, they cry'd, Away, away, let us go to Church, and they said Mr. *Sacheverell* was in the Street, and so they followed him to Church. Away they went from my House; but a little before they went, I said to them, Gentlemen, if you will give but a little time, the Charter will be here in a Quarter of an Hour or less, therefore pray be pleased to stay and see it before you go, for I tell you I must act by the New Charter, and not by the Old.

Mr. Just. Withens. When you ordered them to make Proclamation of Silence, how did they behave themselves?

Wild. They were as tumultuous as ever they were.

Mr. Just. Holloway. If you have any thing more, speak your full Knowledge of it.

Wild. My Lord, I did perceive a great deal of Danger there was; I knew not how 'twould be the next Day, we were afraid of being knock'd on the Head, so I dispatched a Messenger on *Saturday* to my Lord Duke of *Newcastle*, that he would please to come to us and assist us, for I believed we were in a great deal of Danger. My Lord came to us on *Saturday* Night, and staid there till we were pretty quiet again.

Mr. Recorder. What did they do on *Saturday*, the next Day?

Wild. It was the Day of proclaiming the Mayor at the other Cross, the Malt-Cross, it being upon the Market-Day, when the Country People came in, that so they may be satisfied who is Mayor of the Town.

Mr. Recorder. Did they proclaim their Mayor that Day?

Wild. Yes.

Mr. Recorder. Pray speak out, and tell how that was?

Mr. Just. Holloway. Pray, Mr. Mayor, by the Custom and Usage of your Corporation, is the Mayor proclaimed any other Day than when he is elected?

Wild. Yes, the next Day after, to satisfy the Country who are Mayor and Sheriffs of the Town.

L. C. J. Were both the Mayors proclaim'd that Day?

Wild. Yes, after we had proclaim'd our Mayor, presently there came a great many Gentlemen, and proclaimed their Mayor.

L. C. J. Name them who they were.

Wild. My Lord, I was not so near them, as to tell particularly who they were; but they threw up their Hats, and made a great Noise: There are enough in Court can tell who they were.

Mr.

Mr. Lovell. Pray, Mr. Mayor, will you tell us by whose Authority and Direction this Assembly was called.

Mr. Thompson. Sir, he ask'd you a plain Question, pray answer it; by whose Direction was the Assembly called?

Wild. Sir, I do not know; they had no Summons from me.

Mr. Holt. Is it not usual to meet of course, without Summons, on the Day of Election?

Wild. Never that I knew of without Summons; but our New Charter not being come, I durst not give any Summons.

Mr. Lovell. Is it not usual for the Burgesses to go and wait upon the Mayor to Church?

Wild. Yes, those that are summoned; but not without Summons.

Mr. Just. Withens. Is it usual that the Multitude should make the Mayor go to Church before he has a mind to it?

Mr. Lovell. Did you make any Summons at all for that Meeting?

Wild. I sent no Summons.

Mr. Pollexfen. 'Tis all laid in your Information, that the Assembly was summoned by you.

Wild. All that ever I sent for, as I know, was Mr. Serjeant Bigland. There were two or three Gentlemen at my House that ask'd me to send for him, he having been Recorder by the Old Charter. Said I, if Mr. Serjeant Bigland has a mind to come, he may come if he will; so I sent for him: but there were none of those Gentlemen that I nam'd before, that I sent for.

Mr. Pollexfen. I think you say that you went from the Council-House, and afterwards went into the Hall, and there you were sworn, and then you did proceed to read the Charter; pray, were any of the Defendants, or which of them, in the Hall?

Wild. Sir, I told you that Mr. Gregory and Mr. Hutchinson came into the Hall, and Mr. Charnell, and Mr. Turpin were there in particular.

Mr. Pollexfen. What did Mr. Gregory and Mr. Hutchinson do there?

Wild. They came, Sir, to desire me to go into the Council-House, for the Gentlemen had chosen Greaves Mayor, and desir'd me to hear him sworn.

Mr. Pollexfen. Was Mr. Sacheverell or any there but those that you say came to tell you what they had done in the Council-House?

Mr. Holt. Who staid behind in the Council-House?

Wild. All but those that came out with me.

Mr. Jones. Pray, to satisfy them, tell them how far the Council-House and the Hall stand at a distance: How far asunder are they?

Wild. But just over the Door Threshold from one another.

Mr. Jones. Are they contiguous to one another?

Wild. Yes, Sir.

Mr. Jones. Can they come into the Council-House, but they must go thro' the Hall?

Wild. No, no, they must come from the Hall first, and so go into the Council-House.

Mr. Pollexfen. You were speaking of some of the Company that had Swords by their Sides?

Wild. Yes, the Gentlemen had.

Mr. Stanhope. Did you observe Mr. Sacheverell and Mr. Gregory had their Swords by their Sides?

Wild. Yes, to the best of my knowledge they had.

Mr. Stanhope. To the best of your knowledge; do you swear they had or no?

Mr. Recorder. Would you have him swear beyond his knowledge?

Mr. Stanhope. Had Mr. Plumptre a Sword, when he came from Church to the Hall?

Wild. I see his Face among the rest, but they were so many I can't speak particularly who had their Swords on, and who not; I believe they might have all their Swords on.

L. C. J. Pray, Sir, what do you mean by that Question? Plumptre is not here before us.

Mr. Stanhope. He is in the Information.

L. C. J. You had as good ask if Mr. Peartree was there.

Mr. Stanhope. My Lord, he said he was there, and his Name is in the Information.

L. C. J. You had best ask us whether every Man in the Town had his Sword on. Let us keep to the thing before us, and not ask such impertinent idle Questions of People we have nothing to do with.

Mr. Stanhope. Is Mr. Sacheverell a Burgess of the Town?

Wild. Yes, he was a Burgess by the Old Charter; but tho he was a Burgess, he was not one of the Electors. He had nothing to do there, nor Mr. Gregory, nor Mr. Plumptre.

Mr. Fuller. Who are the Electors?

Wild. The Electors are the Mayor, Aldermen, Coroners, and the rest of the Council, by both Charters, and so he had nothing to do there.

Mr. Just. Withens. He was not concerned in the Corporation, but only a Gentleman-Burgess.

L. C. J. How long have you been of the Council of that Town?

Wild. I have been there a great while, a dozen or sixteen Years.

L. C. J. Have you been present at the Election of Mayors before that time?

Wild. Every Year.

L. C. J. Who were the Persons that used to come to elect Mayors before that time?

Wild. The Old Mayor, the Aldermen, the Council, the Coroners, and the Sheriffs, and those that have been Sheriffs.

L. C. J. Did the other Burgesses use to come?

Wild. No.

L. C. J. Did Mr. Sacheverell and Mr. Gregory use to appear for the Election of Mayors before that time?

Wild. No, My Lord, they had no business there.

Mr. Recorder. At this time they had, it seems.

Wild. They made themselves Business.

Mr. North. Pray swear John Malin. (Which was done.)

Mr. Stanhope. Mr. Wild, Pray be pleas'd to tell the Court how Mr. Hutchinson express'd his Sauciness, for you are pleas'd to say, he and Mr. Gregory came saucily to you.

Wild. So he did, Sir; he came saucily to demand the Mace, which he had nothing to do withal.

L. C. J. Is Mr. Hutchinson here?

Mr. Stanhope. Yes he is: Did he demand it himself, pray, or did he tell you the other Mayor demanded it.

Wild. He came to demand it.

Mr. Stanhope. Did he tell you from whom he came?

Wild.

Wild. He said he came from Mr. *Greaves*.

Mr. Stanhope. Then he did not demand it for himself?

L. C. J. And if Mr. *Greaves* had demanded it, he had talked saucily; for it was not in his Power to demand it. If he had any Right to it, there was a proper Place for him to apply to, if it were detained from him.

Mr. Stanhope. My Lord, with Submission, I understand no such great Sauciness in it to make a demand of an Ensign of Office.

L. C. J. But I say it was saucy, and I tell you you had been saucy if you had done it; for every Man that meddles out of his Province is saucy: You may carry that away with you among your other Observations. Every little prick-ear'd Fellow, I will warrant you, must go to dispose of the Government. Let Mr. *Hutchinson* and Mr. *Gregory* be as good Men as they will, they had better have studied to have been quiet and meddled with their own Business. And I will tell Mr. *Gregory*, *ad Concilium ne accedas antequam voceris*, is a Rule, and ought to be observed: But we are wonderfully afraid, forsooth, to tell our Minds: No, I tell you it was saucy, and if you had gone upon that Errand, you had been saucy.

Mr. Stanhope. It may be I should have known better than to have gone on such an Errand.

L. C. J. So you would done well to do, and you should know better than to ask such insignificant impertinent Questions as you do. It was very saucy I tell you; and if the best Man of your Party had gone, it had been saucy. You shall know our Minds if you put us upon it, because you are so big of it. We are come to a fine pass, that every little prick-ear'd Fellow must come to demand Maces that are the Badges of Authority, and they must not be told, forsooth, that they are saucy.

Mr. North. Pray, Mr. *Malin*, will you give an account what you know of this Matter?

L. C. J. We are trying People's Rights by Club-Law; but by Grace of God it shall not be so, so long as I sit here.

Malin. I was then Sheriff at that time.

L. C. J. What time?

Malin. The time of the Riot, on *Michaelmas-Day*. I then being Sheriff, went out to meet the Charter that was coming at that time, and I went as far as *Leicester*, and came back with it about Eleven of the Clock, as near as I can guess. I came with the Charter on the one side of him that brought it, and another that is concerned with us that we left behind, on the other side: I met these Gentlemen that stand in this Cause, I'll name them if you please.

L. C. J. Do so.

Malin. Mr. *Sacheverell*, Mr. *Gregory*, Mr. *Hutchinson*, Mr. *John Greaves*, Mr. *William Greaves*, *Samuel Richards*, *Robert Green*, *Francis Salmon*, *Arthur Riccards*, *Ralph Bennet*, *John Sherwin*, *Samuel Smith*, *Thomas Trig*, *William Smith*, *Joseph Astlin*, and *Nathaniel Charnel*. I met these Men.

L. C. J. Where did you meet these Men?

Malin. At the Gate called *Rye-Smith-Gate*. They were a-coming with a great many more, and I suppose they went before, for I went forward to Mr. Mayor by the New Charter and by the Old Charter too; and I met him, and delivered the Charter to him, and staid there, and the rest of the Gentlemen that were concerned

of our Party by the King's New Charter, and we went from thence to the Guildhall, and from thence we went into the Council-House, and when we were in the Council-House, Mr. Mayor sent for Mr. *Edge* as Town-Clerk. They were gone then to Church, I was one that went. He was concerned in the New Charter both as Alderman and Town-Clerk. I went for him to come to see the Charter read, and that was all. I see them sit in order, in that manner and form as they had used to do before in former times, ready to go to the Election in the Vestry, after the way it used to be in, by the Old Charter, for I have been concern'd in Elections the former Way six or seven Years; but I never saw any Gentleman in all that time appear there. There used to be none but the Mayor, the Aldermen, and the Cloathing. There were none of these Gentlemen, as ever I saw, and I am of seven Years standing, six I am sure, I suppose seven, but only one Gentleman once, which was a Gentleman that Alderman *Edge* brought in to see the Formality, a Gentleman of the Six-Clerks Office as I remember. This being done, I acquainted Mr. Alderman *Edge* with our Errand, but he did not come to us; but some time after we had sat there in the Council-House, these Gentlemen came with a great many, I know not how many Hundred came there, and when they saw the Mayor was going to read the New Charter, these Gentlemen began to stir; and when they came in, we wonder'd to see such a Bustle of those that had nothing to do there: And the first thing that was said, was spoke by Mr. *Sacheverell*, as I do remember, for I saw him there; We come here for to elect a Mayor by the Old Charter. Says Mr. Mayor then to them, I know no Business you have here Gentlemen any of you; and upon that he made Proclamation, and told them they had nothing to do there, and he would have nothing to do with them. So then they called out for a Poll, and did proceed on as far as their Party went, and one or two of those that were concerned in the New Charter, but not as to any of their Party. There was one of them, Mr. *Hardy*, that gave a Vote for Mr. *Edge*, and this was all. But they would not depart at all; but Mr. Mayor told them they had no Business there, and he had nothing to say to them: And with that he took up the Mace, and went with some of the Aldermen into Guildhall. And when they saw him going away, they began to cry out, and he had much ado to escape, they were so busy to keep him in there. And as they laid their Hands upon the Mace to stop it, the Serjeant got away with it, and went out with the Mayor. Then says Mr. *Sacheverell*, Stop the Books, stop the Books, two or three several times. With that there was one of the Coroners, Mr. *Woolhouse*, laid hold on one of the Books; and whether there was any pulling or tugging, I cannot tell: but I suppose some of the Books were stopped.

Mr. *Powis*. Then what was done as to the Mace that belong'd to you as Sheriff?

Malin. I was crouded out, and I could not lay Hands on my Mace; but the Mace lay upon the Board, and was left there among them: And I was crouded out, and followed Mr. Mayor, for there was no Quietness there, unless you would stay to be knocked on the Head.

Mr. Powis. What became of the Mace ?

Malin. I sent the Serjeant for it, and he told me he demanded it, and they would not let him have it.

L. C. J. But speak your own Knowledge, not what another told you.

Malin. I came in afterwards there ; when he told me he had been there, and laid his Hand upon it, and they rescued it from him, and he could not have it, I went in myself, and demanded the Mace of the Gentlemen. There was Mr. Salmon, Mr. Richards, Mr. Arthur Riccards ; there were four of them that told me they had as much right to the Mace as I had. Gentlemen, says, I, that is strange, I am by your Charter-Sheriff still, there is no body elected in my room, and our usual Way, is to deliver our Maces, you know, in another Place, and not to rescue them away, and detain them by Violence. Likewise the Mace was a thing that I had paid for ; I was so much Money out of Pocket upon it ; for that is our usual Way, it being bought lately, every Sheriff lays down such a Sum, and loses ten Shillings by it at the Year's end. I told them then too I was Sheriff by the King's new Grant, and therefore the Mace belong'd to me.

Mr. Powis. What is that Arthur Riccards ?

Malin. An Attorney at Law.

Mr. Powis. He is none of the Aldermen, is he ?

Malin. No, no.

Mr. Powis. What is Salmon ?

Malin. He is a Fellmonger, or a Glover, he makes Gloves.

Mr. Powis. What had he to do there ? was he one of the Aldermen ?

Malin. He was one of the Old Council. And there was one Bennet too.

Mr. Powis. What is Richards ?

Malin. He is a Bookbinder. He was one of the Old Council. He was Coroner.

Mr. Powis. What did you say of Bennet ?

Malin. Ralph Bennet was one that told me he had as much Right to the Mace as I.

Mr. Recorder. Well, go on to what was done the next Day, the Market-Day, Saturday.

Malin. I can't say much to that ; for I was with Mr. Mayor making Proclamation of those that were by the New Charter, but I did not see them proclaim any thing.

Mr. Recorder. Was you by when Proclamation was made ?

Malin. I was by when we were all proclaimed, but not when they were ; but then—

L. C. J. Brother, let him go on to tell us what happened on the Friday.

Malin. Then Mr. Alderman Wild, who was the Mayor, when he came out thence, went into the Guildhall, where there were abundance of Burgesses gather'd together ; and seeing them so unquiet, he was satisfying them as far as he could : says he, if you will hear, you shall have the Charter read, either in *English*, or, as it is in *Latin*, and then you will see that none of your Privileges are diminish'd from you, but increased rather : And he was about to read it, and shew'd the Broad Seal to them ; when in comes Mr. Hutchinson and Mr. Gregory, to desire, or request or command, or something, Mr. Mayor to come into the Council-House ; they told him they had chosen *Greaves* Mayor, and he was to come to

hear him sworn. With that the Burgesses that had been quieted before, and was so civil as to hearken, and were about to hear the Charter read, flung up their Hats and cry'd out, No New Charter, a *Greaves* Mayor, a *Greaves* Mayor. Then Alderman Parker durst not stay any longer ; says he, I won't stay to be knocked on the head. Then every one was frightened, and the Mayor took up the Mace and ran away.

Mr. Recorder. How many might there be in the Hall ?

Malin. I believe, three or four hundred.

Mr. Recorder. Did they restore the Mace to you ?

Malin. They came the next Day, and would have tender'd me Money for the Mace.

Mr. Recorder. What did you say to them ?

Malin. I told them I knew no right they had to the Mace, and I would take no Money for it. It was one *Rayner* that came and tender'd me Money for it.

Mr. Just. Holloway. Pray, Sir, let me ask you, in the electing of your Sheriffs, do the Sheriffs return the Mace ; or can any body require the Mace before the Goal is turned over ?

Malin. Yes, my Lord, The Goal may not be turned over in a Month ; but the Ensigns of Authority are deliver'd to them presently after they are sworn.

Mr. Holt. Pray, Mr. Malin, do you know which of these Defendants were there at that time when there was tossing and throwing up of their Caps, as you say ?

Malin. A great many of them were in the Council-House ; they had taken that Room to themselves, and thrust us out, and none of them came into the Hall but Mr. Hutchinson and Mr. Gregory ; and the Burgesses were very quiet, till they came and demanded Mr. Wild to come and hear their Mayor sworn.

Mr. Holt. How long did Mr. Gregory and Mr. Hutchinson stay in the Hall ?

Malin. I do not know ; they staid so long as to demand the Mayor to come.

Mr. Holt. Did they carry themselves peaceably and civilly while they were there ?

L. C. J. What had they to do there ? I ask you that, Mr. Holt ; and in case you have a mind to have some Questions asked and answered, I'll put you in mind of a Case of a Parcel of Apprentices in London, that were met together about pulling down some Houses in *Moorfields* : And in case you ask me another Question, I can tell you the Resolution and Opinion of all the Judges about that Case. There is Law for recovering every Man's Right, but Club-Law is not the Way to determine Right.

Mr. Recorder. Swear Mr. Rippon.

(Which was done.)

L. C. J. You know what became of some of those Apprentices, Mr. Holt.

Mr. Jennings. Mr. Rippon, pray will you tell the Court what you know of this Riot at *Nottingham*.

Rippon. Upon *Michaelmas*-Day, (82.) about Eleven of the Clock, the Charter came to Town ; I was then with Mr. Mayor, Mr. Wild, so we went straightway to the Hall forthwith, and we desir'd that he wou'd be sworn by Mr. *Beverley* that was Steward. No, says he, I have no mind to it, till Mr. *Edge* that was Town-Clerk came to do it according to his Office ; so he desir'd me and

and Alderman *Parker* to go to the Church to desire him to come and do his Office. We did so, and spake to Mr. *Edge*: Says he, if they will please to come hither, well and good, I shall not concern myself any further: Then said we, will you give us the Books that concern us? they are there, said he, what wou'd you have more? Nay, said I, I am satisfied; so we came away. As soon as we came back to the Hall, we told him the Message that Mr. *Edge* had sent; so Mr. *Wymondsell*, that was Deputy-Recorder, was reading the Charter. Says Mr. Mayor, if you please I will be sworn, and proceed to Election. Presently comes a great company, Mr. *Sacheverell*, Mr. *Hutchinson*, and a great many; if you please to give me leave to look upon my Paper I can tell you; there was *William Sacheverell Esq;* *George Gregory Esq;* *Charles Hutchinson Esq;* *John Greaves Gent.* *William Greaves Gent.* *Samuel Richards Gent.* *Robert Green Gent.* *Francis Salmon Gent.* *Arthur Riccards Gent.* *Ralph Bennet Gent.* *John Sherwin Gent.* *William Wilson;* I don't know, I must beg your pardon, I cannot speak particularly to him; *Samuel Smith*, *Thomas Trigg*, *Richard Smith*, *John Hee*, *William Smith*, *Joseph Turpin Gent.* *Nath. Charnell*: I cannot say any thing of *Humphry Barker*, but there was *Joseph Astlin*, *Taylor*. These Gentlemen came in with Swords by their Sides, several of them; really to the terrifying of those that were there; I was very much afraid myself. So Mr. Mayor look'd upon Mr. *Edge*, and says he, Mr. Alderman *Edge*, will you take the Charter and read it, for the satisfaction of yourself and these Gentlemen? Says Mr. *Edge*, I do not know what I am by that Charter; whether I am any thing or not; I know what I am by the Old Charter. Says Mr. *Sacheverell*, that is not our Business at present, we come to elect a Mayor by the Old Charter; and very hot they were, and called out, to Election, to Election, *Salmon* and these Fellows; so that Mr. Mayor could not be heard, and to Election they went; and I ask'd Mr. *Wild*, who was then Mayor, who he was for: Says he, I do not understand by what Authority some of these Gentlemen come here: They are excluded by the Old Charter, and I think it were better for you to be elsewhere. Then they ask'd who he was for; says he, I am for none: Then they ask'd Alderman *Parker*, and he said the same; and when we see they wou'd have nothing done but that, we withdrew into the Hall, and fell upon swearing the Mayor. We swore him, and just finish'd the Oath, and the People were very silent, and he drew out the Charter, and shew'd the Broad-Seal, and said, Here is the King's New Charter, I am very confident none of your Immunities and your Privileges you are depriv'd of: and there being some little stir, said I, pray be quiet and silent, while you hear it read; at last they were very silent and quiet, and we thought it wou'd have been a very fair Business; when in comes Mr. *Hutchinson* and Mr. *Gregory*, to tell Mr. Mayor that they desired his Company; as the Custom was, to be at the Swearing of Mr. *Greaves* Mayor; for so the old Mayor ought to be, or else he is no Mayor, unless he be sworn by the preceding Mayor. Says he, I have nothing to say to him, I know no Mayor that he is; we are about our own Business, obeying the King's Authority, and his Charter. This was no sooner said, but they had animated the Multitude of

People that were there, that they flung up their Hats in a very irreverent Posture, as I never saw the like, shouting, and crying out; no New Charter, a *Greaves* Mayor, I was fain to secure the Charter; and a Farrendine Wastecoa that I had on, was all rub'd to pieces; to save the Charter, and I had much ado to save it. My Brother *Parker* he was so afraid, he got off the Bench; prithee, said I, stay; for certainly they dare not do these things; says he, I am afraid of my Life, and fare you well. Mr. Mayor and I sat a while, for we knew not which way to take, but at last we got away thro' them: But if I touch'd Ground, I wish I might never see my Wife again.

L. C. J. Now whether that be a Curse that thou layest upon thyself or no, I can't tell.

Rippon. Had you been there, Sir, you wou'd have been afraid too.

Mr. Recorder. Pray speak that again.

Rippon. I say again, when I went away down with Mr. Mayor, I did not touch the Ground for Eight or Nine Yards together; for they wou'd not make way, and they pull'd me by the Gown, several of them; and if any body else had been there, he would have been afrighted.

Mr. Powis. How long did they continue the Rabble up?

Rippon. So, Sir, we got strait away to Mr. *Wild's* House, that was then Mayor, and we did swear him accordingly as the usual way was: For the Charter impower'd us, as Mr. *Wymondsell* told us that we might elect any where; so we fell to the Business of the Day, and by that time we had three parts done, they had done, and proclaim'd their Mayor. But then they come and send Mr. *Hutchinson*, and Mr. *Gregory*, *Samuel Richards*, and *Arthur Riccards*, to demand the Great Mace for Mr. *Greaves*, as he was Mayor: Said Mr. *Wild* what shall I do? Why, said I, go down and give them their Answer; tell them they are saucy Fellows to do any such thing: Says he, they are Gentlemen; why then; said I, tell them they might know better than to do so. So he went down and told them; said he, I receiv'd it by good Authority, and will never part with it, but to as good an Authority as I receiv'd it. So we staid, and went on and did the Business of the Day; and afterwards, between five and six of the Clock, we went to the Cross, and there proclaim'd the Mayor by the New Charter, according to the Custom, and return'd every one to our own Houses. The next day we were afraid of making a Disturbance, but about Nine of the Clock we went and proclaim'd the Mayor, and about Eleven there came all these Gentlemen, and there they proclaim'd Mr. *Greaves* Mayor, which was upon the *Saturday*, accompanied by all these Persons, as near as I can say.

Mr. Powis. Was Mr. *Sacheverell* there then?

Rippon. Yes.

Mr. Powis. Were all the rest there?

Rippon. To the best of my Knowledge they were.

Mr. Holt. Can you say Mr. *Sacheverell* was there?

Rippon. Yes, he was.

Mr. Holt. Who was there?

Rippon. There was the two *Greaves's*, and *Green*, and *Richards*, and *Bennet*.

Mr. Holt. Did you see them there?

Rippon. Yes, I did.

Mr.

Mr. Recorder. Rippon, Pray will you recollect yourself, and tell the Court who was there on the Saturday.

Rippon. Mr. Sacheverell, William Greaves, John Greaves, Samuel Richards, Salmon, Arthur Richards, Ralph Bennet, John Sherwin, William Wilson.

Mr. Recorder. Was Wilson there?

Rippon. Yes, I see him myself.

Mr. Recorder. What rejoicing?

Rippon. Yes, he was rejoicing as the rest did, to the terrifying of us all.

Mr. Recorder. Was he in the Crowd?

Rippon. Yes.

Mr. North. Will you ask him any thing, Gentlemen?

Rippon. I know nothing, if it please your Lordship.

Mr. Holt. Pray, Sir, this; Can you say that Mr. Sacheverell had his Sword on, on Michaelmas-Day?

Rippon. Yes, certainly he had one on.

Mr. Holt. Can you take it upon your Oath he had?

Rippon. Nay, there will be several that will swear it, I will warrant you; and I am sure you wou'd have been afraid if you had been there.

L. C. J. Were Mr. Hutchinson, or Mr. Gregory, Burgesses, either by the New or Old Charter?

Rippon. No, they were not.

L. C. J. Were Mr. Sacheverell, and any of these Gentlemen ever present at any other Election?

Rippon. It is possible, after the Election is over, they might invite Gentlemen to feast at their Houses, but never to have any Concern in the Election in the least.

L. C. J. How many Elections have you been present at?

Rippon. I came into the Council at the King's Coming-in, and I have been Alderman five or six Years.

Mr. Powis. He came in by the Regulation.

Mr. Pollexfen. Pray whereabouts was it the Mayor was sworn?

Rippon. At his own House.

Mr. Pollexfen. Whereabouts were the Sheriffs sworn?

Rippon. What Sheriffs?

Mr. Pollexfen. Malin, the Witness that was before.

L. C. J. He was the Old Sheriff.

Mr. Holt. And where was the New Sheriffs sworn?

Rippon. At the Mayor's House.

Mr. Pollexfen. Was Mr. Malin Sheriff by the New Charter?

Mr. Holt. Was it before the Election of Mr. Greaves Mayor, or after?

Rippon. After.

Mr. Pollexfen. Was Mr. Malin by the Old Charter, or by the New, Sheriff?

Rippon. By the Old.

Mr. Pollexfen. And not by the New?

Rippon. No.

Mr. Pollexfen. He says he was, and you say he was not.

Rippon. For that Day he was so, but then he went out.

Mr. Pollexfen. Did the Mayor return to the Hall after he was sworn, or after you left the Hall in the Fright?

Rippon. We went first to Mr. Wild's before he was sworn, and then we swore him there.

Mr. Pollexfen. But the Question ask'd you, is, Did Mr. Wild return back to the Hall, after he had taken his Oath, and was sworn in his House?

Rippon. No, he staid in his House; it is not usual for the Mayor to go back to the Hall.

Mr. Pollexfen. Did he go to the Cross afterwards?

Rippon. Yes.

L. C. J. It was on Michaelmas-Day that he was sworn; and it was by their Proclamation made at the Cross, that he was sworn Mayor that Day?

Rippon. Yes, my Lord.

L. C. J. And was it the Day after that they proclaim'd Greaves to be Mayor?

Rippon. Yes, My Lord; 'tis true, to the Terror of us all? I will assure you it was a wonder there was no more Mischief done.

Mr. Pollexfen. These Gentlemen were not in Town that Day.

L. C. J. Take you your Liberty to make your Defence afterwards; but you must distinguish, there are two Days, and some People were one Day, and some the other; some People were at the Time of the Election, that were not at the Market-Place; and some were at the Market-Place, that were not at the Election.

Mr. Just. Holloway. That Day Greaves was thus chosen Mayor in that tumultuous Manner, did any of these Persons take upon 'em to swear Greaves, when they had thus chosen him?

Rippon. We went out into the Hall, and in that time they did swear him.

Mr. Recorder. Was Mr. Greaves sworn that Day by the pretended Election, Malin?

Malin. Yes, by the Coroner.

L. C. J. But I perceive by their Old Charter, there was no Mayor to be sworn, but by the Old Mayor that went out.

Mr. Stanhope. Did not the Coroner use to swear the Mayor by the Old Charter?

Rippon. Yes, but in the Presence of the New Mayor; he was by always.

L. C. J. What do you mean by swearing of him by the Coroner? Hark you, upon your Oath, was there ever any Mayor of Nottingham, in your Time, sworn but in the Presence of the Old Mayor?

Rippon. No, never, my Lord.

L. C. J. Do you call that Swearing, because he reads the Oath to him?

Mr. Holt. The Coroner has Authority so to do, as we shall shew you by and by.

Mr. Powis. Then swear Reynolds. (Which was done.)

Reynolds. I brought down the Charter, my Lord.

Mr. Recorder. I would ask Rippon a Question before he goes out: Let us know of you where the Old Mayor was sworn by virtue of the New Charter.

Rippon. I can't tell that, the New Mayor was sworn by the New Charter, at the Old Mayor's House.

Mr. Recorder. The other two Witnesses did swear, That the Old Mayor was sworn in the Hall; but he says he was by, when the New Mayor was sworn in the Old Mayor's House.

L. C. J. It is understood upon the Receipt of the Charter, Wild, who was the present Mayor, was sworn in the Hall; but afterwards, by reason of the Hurly-Burly, and Noise they went away,

away, and chose the New Mayor at *Wild's* House; that is the Fact that is sworn.

Mr. Recorder. It is right, my Lord.

Mr. Powis. Pray, *Reynolds*, will you tell my Lord the whole Story; for you, it seems, brought the Charter down.

Reynolds. My Lord, I brought the Charter from *London*; and when I brought the Charter, I was sent by Mr. Mayor, to acquaint Mr. *Edge*, that the Charter was come, and the Mayor desired him to come and hear it read; Mr. *Edge* asked, if the Mayor would not come to Church? I told him he was at the Town-Hall. When we came to the Council-House, proceeding to have the Charter read, and all those things, Mr. *Sacheverell*, and a great many others, came to the Council-House; and there the Mayor offered to Mr. *Bigland* the New Charter, that if he would, he might read it. Mr. *Sacheverell*, after some little Discourse, told him that was not their Business, they were come to elect a Mayor by the Old Charter: Says Mr. Mayor, I do not know any Authority you have to elect a Mayor: Says he to me, make your Proclamation for all those to depart that have no Business; which accordingly I did; and then came along, and caught up the Mace; and Mr. Alderman *Rippon*, and Mr. Mayor, came into the Common-Hall; and there told the Burgesses that were met, that the King had granted them a New Charter, and there was none of their Privileges diminished; and if they would, they should have it read in *English* or in *Latin*. Then they went to swear Mr. Alderman *Wild*, according to the New Grant: Presently Mr. *Hutchinson* and Mr. *Gregory* came in, and told him they had elected Mr. *Greaves* Mayor, and if he would, he might come and hear him sworn: He said, he knew no Authority they had for it, and denied any such Election. Then there were such Shouts, as soon as ever the Mayor had given him that Answer, No New Charter, No New Charter, a *Greaves* Mayor, a *Greaves* Mayor; that tho Silence was proclaimed divers times, yet there was no hearing him speak: Whereupon he adjourn'd the Court, and we went to the Mayor's House, and there they chose the New Mayor, Mr. *Toplady*, and he was sworn; and then we came to the Cross, where they used to proclaim the New Mayor, and then came down Mr. *Sherwin* and *Green*, with a great many others, shouting, No New Charter, No New Charter, a *Greaves* Mayor, a *Greaves* Mayor. The next Saturday following, a great many of them went to proclaim him at the Cross again, among the rest Mr. *Pierpont*.

Mr. Recorder. Was *Gregory* there too?

Reynolds. Yes, I think so.

Mr. Jones. Did you make Proclamation at the Common-Hall, for all to depart that had no Business?

Reynolds. At the Council-House I did, before we came to the Common-Hall.

Mr. Jones. Do you remember who was there?

Reynolds. Mr. *Sacheverell* and *Gregory*, and others.

Mr. Jones. Did they continue there?

Reynolds. Yes.

Mr. Pollexfen. Did Mr. *Sacheverell* make any Noise there?

Reynolds. There was a great Noise in the Hall.

Mr. S. Ward. Did you hear any thing concerning the stopping of the Books?

VOL. V.

Reynolds. I heard Mr. *Sacheverell*, cry out, Stay the Books, stay the Books.

Mr. Fuller. What Books did he mean?

Reynolds. They were some of the Books that belonged to the Town.

Mr. Stanhope. Were they the Poll-Books?

L. C. J. What do you mean by Poll-Books? there was no need of a Poll that I can hear of.

Mr. Powis. What do you know about their coming to demand the Mace?

Reynolds. Yes, there was Mr. *Gregory* and Mr. *Hutchinson* came to the Mayor's to demand the Mace, and he asked them who sent them; they said, Mr. *Greaves* the Mayor that was chosen, had sent them.

Mr. Holt. You speak of a Proclamation, where was it?

Reynolds. Yes, I did make Proclamation in the Council-House, to bid all depart that had no Business.

Mr. Just. *Witbens*. How came you to make that Proclamation?

Reynolds. The Mayor bid me, and I did it.

Mr. Holt. Was the Mayor sworn then?

Reynolds. It was before any thing was done.

Mr. Holt. Was it before he was sworn upon the New Charter, upon your Oath?

Reynolds. It was in the Council-House.

Mr. Recorder. It was when you were crying up your *Greaves* Mayor.

Mr. Powis. Afterwards, did you observe they headed the Rabble at any time afterwards?

Mr. Recorder. Swear Alderman *Parker*. (Which was done.)

Mr. Jones. Are you sworn, Sir?

Parker. Yes.

Mr. Jones. Why then will you please to give my Lord and Jury an Account of what you know of this Matter?

Parker. At Michaelmas-Day was Twelvemonth, I came to Mr. *Gervas Wild's* House, who was then Mayor. It was about Eleven of the Clock that I was there. There were a great many met that used to meet that Day, in order to the chusing of a New Mayor, and there were a great many others that the Mayor did not know of their coming there; for he gave no order, he said, for several of them that came, to appear there. They did importune him very much to be gone, in order to the Election of a Mayor. Said I to the Mayor, We do expect a Charter, and if we should go on to the chusing of a Mayor, we should be all in Confusion. So after a while, the Dissenting Party withdrew out of the House. Some Gentlemen it seems met with them, and went forward towards St. Mary's Church. Immediately after, came the Charter down by him that was last sworn. We were sent up to the Church to desire Alderman *Edge*, that was the Town-Clerk, to come and read the Charter, and to let us know how we were to proceed in relation to the Work of the Day. He said he would not come. Afterwards we went to the Town-Hall, into the Council-Chamber; and after some little time, says Mr. Mayor to me, Brother *Parker*, I would desire you, and Mr. *Rippon*, and Mr. Sheriff *Malin*, to go up to the Church, and desire and command my Brother *Edge* to come down, and assist us in this Business; so we did go up and spake to my Brother *Edge*; said I, Mr. Mayor desires you to come down, the Charter is come, and he would have you come and read

read it; and said I, if Mr. Serjeant *Bigland*, and Mr. Alderman *Greaves* will come down, they may be satisfied there is a Charter, and we cannot act otherwise than by that Charter. Alderman *Edge*, said, He knew there was an Old Charter, and what he was by that Charter; he did not know of any New One, and would act by the Old Charter, and not by the New One. When we came down to Mr. Mayor, said I, my Brother *Edge* will not come down among you; here is a special Commission in the Charter directed to four of us, or any two of them, to swear you Mayor; we must do that the first thing we do, and go forward in that, for we can do nothing till you are sworn Mayor. By and by comes down a great many Persons, Mr. *William Greaves*, my Brother *Edge*, Mr. *Sacheverell*: If you please, I will look in my Paper, and read their Names, that I may be more certain.

L. C. J. Ay, look upon your Paper, to refresh your Memory.

Parker. There was *Sacheverell*, *Gregory*, *Hutchinson*, the two *Greaves's*, *Samuel Richards*, *Robert Green*, *Salmon*, *Arthur Riccards*, *John Sherwin*, *Ralph Bennet*, and *Wilson* the Rector of *St. Peter's*—

Mr. Recorder. Was he there?

Parker. Yes, *Samuel Smith*, *Richard Smith*, *Trigg*, *Hoe*, *Barker*, *Charnel*.

L. C. J. Was *Barker* there?

Parker. Yes, I have his Name down in this Note.

L. C. J. Well, go on.

Parker. First they forced into the Council-House, and forced us out: So I told Mr. *Sacheverell*, said I, you have nothing to do here.

Mr. Recorder. What said he?

Parker. Said he, I have to do here, I am concerned if I am a Burgefs. Said I, no Burgefs acts here but a Gown-Man; for it is only the Mayor, Aldermen, and Clothing that are concerned in the Election, and we never have any Gentlemen among us.

Mr. Powis. Did they behave themselves so, as that you were afraid of Mischief?

Parker. Said I to some of our Friends, Gentlemen, take the Mayor's Mace into your Hands, for they were for seizing the great Mace that belongs to the Mayor. And, said I, take care of the Books. Said Mr. *Sacheverell*, Stop the Books. There was Coroner *Woolhouse* taking them in his Hands. Said I, take notice who dares take the Books; and said I to Mr. *Sacheverell*, you have nothing to do with the Books, the Books belong to us. Says he, take notice, I will—in a menacing way, and then held his Tongue. Said I, I am sorry to see things here this Day: I have been a Member of the Corporation, and been present at these Elections for Eighteen Years, and I never see such a thing as this; and said I, I profess I could almost cry to see these Dissensions made among us. Said I, I must go, being one of those that was in Commission to swear the Mayor, my Brother *Hall* is not here, and my Brother *Edge* is with them; if they keep me here, the Mayor cannot be sworn; so I pulled off my Gown, and at last when they see I was resolved to go, with shoving and crowding I got thro'. But when the Mayor was sworn, said I, you must now act as Mayor, and give order for the People to depart: So he did. Says he, will

you stay: No, said I, I dare stay no longer; the Rabble are buoyed up to that Height, that I am afraid we shall be knock'd on the Head. So I went to my Brother *Hill's*, and I said to his Wife, Sister, either give me a Glass of Wine or Sack, for I am e'en spent.

L. C. J. That was to recover his Heart again that was sinking; for an Alderman's Heart generally sinks in such a Fright.

Parker. We did proceed on then, and I went back again: Said I, if they must be knock'd on the head, I will go and be knocked on the Head with them.

L. C. J. Ay his Courage came to him again, when he had a Glass of Wine.

Parker. I met them half way: Said I to the Mayor, let us go to your House now, and let us proceed on to chuse a Mayor, and swear him, and all other Officers: But, said I, we have no body to assist us, we must do as well as we can. And we went thither, and proceeded to chuse a New Mayor, and then New Sheriffs, and Coroner, and Chamberlain, and we gave them their Oaths. And after all this, we went, according to the antient Custom, to the Week-Day-Cross, and there we gave Orders for Proclamation to be made, to give notice to the Corporation who was then Mayor, who were then Aldermen, who were then Sheriffs, who were then Coroners, and who was then Chamberlain for the Year ensuing. Whilst this was doing, Mr. *Sherwin*, Mr. *Green*, and a great many of them came down hollowing and shouting, No New Charter, No New Charter; they car'd not for the New Charter, it was not worth a Groat.

L. C. J. Who said that?

Parker. *Sherwin*, a Man of a good Estate. They were going fast away: No, said I, pray go on the old rate, we are in a good Cause, and we don't fear them a Pin; if they do lay on, it will be to their cost.

L. C. J. Well said, thou had'st drank a good Glass of Sack, I perceive, for thou wer't in a horrid Fright before.

Parker. The next Day they could command all the Council in the Town to attend them with their New Mayor, *Greaves*. There was *Ralph Edge*, *John Sherwin*, and a great many Gentlemen, with Swords by their Sides, walked to the Market-Cross, and made Proclamation. And after that was done, they continued this on Sunday; for on Sunday Mr. *Greaves*, the Mayor, came with abundance of People at his Heels, not Gentlemen, but Gown-Men, those that were of that Party, and offer'd to come into the Seat where the Mayor was; and we were so fearful of Disturbance, that we were forc'd to have a Guard to preserve the Mace, and to secure it from being taken away by Violence; and we writ a Letter to *London* to my Brother *Hall* to acquaint him with it, and sent Post to my Lord Duke of *Newcastle*, to let him know how it was, that we were afraid of being knock'd on the Head; and his Grace was so kind, that he immediately came to us, and was there about four or five of the Clock, and then we begun to be a little in hope.

L. C. J. Then you began to be in heart again?

Mr. Recorder. How have they behaved themselves since?

Parker. They have had such Cabals, and Meetings, and Clubs, that we have often been afraid of them.

Mr.

Mr. Holt. I suppose they can drink Sack as well as you.

Mr. Jennings. Pray, Sir, had the Burgesses at large any thing to do with the Election by the Old Charter?

Parker. No.

Mr. Powis. Mr. Alderman, you have been a long time in that Town.

Parker. My Grandfather was an Alderman of the Town.

Mr. Powis. Did you ever know in your Life, that these Gentlemen ever used to interpose themselves, or concern themselves in the Election?

Parker. No, we always went into the Council-House, and were call'd, one by one, and the Gentlemen never came in among us, but only one Gentleman that my Brother Edge brought in out of Curiosity, to shew him the Formality; but never any Burgesses came, but those that were of the Council, or Clothing, as we call them. I never saw it otherwise, and I have known a great many.

Mr. Jennings. Did not Mr. Sacheverell, nor none of the Out-Burgesses, use to come in?

Parker. No, I told them, says I, this Charter cuts you off, you have nothing to do.

Mr. Jennings. Did Mr. Hutchinson and Mr. Gregory use to come?

Parker. No, they were no Burgesses. But now you talk of that, if you please, I would speak to that: Mr. Hutchinson, Mr. Gregory, Arthur Riccards, and Samuel Richards came to my Brother Wild's, the Old Mayor, and demanded our Mace. Said I, what have you to do with the Mace? They said, Mr. Greaves the Mayor had sent for it. Said I, if the Mayor took a little Spirit upon him, he would do well to secure you, to ask such a thing, for this requires the good Behaviour, said I, and if I was Mayor, I would secure them, and let them take their Advantage against me; I would try it with these Gentlemen.

Mr. Lovell. You speak of something that was done at the Cross the next Day after the Election; was Mr. Sacheverell there?

Parker. I believe he was.

Mr. Lovell. Did you see him?

Parker. I was in my Chamber, but I cannot say positively he was there.

Mr. Lovell. What at the Cross?

Parker. There were all those that I named, there: And I tell you, Sir, the Riot continued there on Sunday; for all that bore Office on their Side, came and attended Mr. Greaves to Church, and Mr. Greaves clapped his Hand on the Mayor's Seat: Said I, Mr. Mayor, keep your Seat, and do not stir out; and he did not.

Mr. Blencow. Pray, tell which of the Defendants were at the Cross on Saturday, or at Church on Sunday.

Parker. There was Mr. Gregory and Esquire Thyme his Brother, and William Greaves, and John Greaves, and Samuel Richards, and Arthur Riccards, and the Smiths, and Sherwin.

Lovell. Were all these at Church?

Parker. Yes.

Mr. Recorder. Did they use to come to Church before?

Parker. Sir, It is a Custom to wait upon the Mayor the next Sunday, and they waited upon him in their Formality.

Mr. Holt. Did not you give your Vote for electing a Mayor according to the Old Charter, upon your Oath?

Parker. I will tell you what I did; when they called to the Election, and to the Poll, and ask'd who I was for, I told them there was no Man capable of being voted for, unless it were Ralph Edge.

Mr. Holt. But did you give a Vote for such an Election, or no?

Parker. I tell you, I said there was no Man capable of a Vote but him, and I could give my Vote for none but Ralph Edge: And said I, if you will have it, I will give my Vote for Ralph Edge.

Mr. Lovell. Was there an Election for Mr. Greaves, and Poll taken, pray?

Parker. I cannot tell that, but I was by almost to the latter End; for I could not get out, the Crowd was too great, till I had pulled off my Gown, and crowded out.

Mr. Lovell. Who took the Poll?

Parker. Mr. Alderman Edge.

Mr. Lovell. Was Mr. Turpin in the Council-Chamber at that time, or not?

Parker. Yes, he was.

Lovell. Are you sure of that?

Parker. Yes, indeed am I.

Mr. Lovell. Was Barker there?

Parker. Yes, he was in the Hall, 'tis all under one Roof.

Mr. Recorder. The Books that you speak of, that Mr. Sacheverell would have secured, what Books were they?

Parker. My Brother Edge can give a better Account of that than I; for he kept them.

Mr. Recorder. You can tell what they were?

Parker. They were Books that belonged to the Mayor.

Mr. Stanhope. Mr. Parker, You say Mr. Wilson was there?

Parker. He was in the Hall.

Mr. Stanhope. You know it?

Parker. Yes.

Mr. Stanhope. Are you sure of it?

Parker. Yes, you know it, Mr. Stanhope.

Mr. Stanhope. I was not there, Sir, how should I know it? Pray how did Mr. Wilson behave himself.

Parker. He was among all the Rabble when they were shouting, and crying out, No New Charter, no New Charter; he was an Abettor among them, so I give it you sworn.

Mr. Recorder. He exhorted them to it, I will warrant you.

Parker. Yes, and has encourag'd it in his Pulpit since.

Mr. S. Ward. Did you hear any thing of a standing-Club to carry on this Opposition?

Parker. I hear there is a Publick Purse among them, and they have gathered several Sums of Money for this Business.

Mr. S. Ward. Does any of the Defendants spend Money at Alehouses, that you know of, to keep up the Spirit of the Rabble?

Parker. I have heard so.

L. C. J. That is nothing to the Business; What do you talk to us of any such thing?

Mr. Powis. Swear Somner. (Which was done.) Were you sent by the Sheriff to demand the Mace? and pray what happened?

Somner.

Somner. Sir, at that time I was the Sheriff's Serjeant, and am still, at Nottingham; and so there was a great Clutter, the one Side going out, and the other calling to Election, and stop the Books; and my Master the Sheriff coming out, I got in as fast as I could, and got hold of the Mace that was upon the Council-Table. Mr. Ralph Bennet, Mr. Salmon, and Mr. Arthur Riccards took it from me again, and told me I had nothing to do with it. So I went and told my Master Malin, and he went and demanded it; but they bid him get him gone about his Business. But before I went from the Mayor's House, the Mayor call'd me in, and said, Robin, do not give any occasion of Offence to Man, Woman, or Child, to Day.

Mr. Recorder. The Jury desire to know who it was took the Mace from you.

Somner. They did take it from me.

Mr. Recorder. Who did?

Somner. Mr. Ralph Bennet, Mr. Salmon, and Mr. Arthur Riccards; them Three laid hold on me, and told me I had nothing to do with it.

Mr. Jennings. Did they force it from you?

Somner. Yes.

Mr. Jennings. And they did refuse the Mace to Mr. Malin afterwards?

Somner. Yes, they did.

Mr. Stanhope. Where was the Mace?

Somner. It lay upon the Table.

Mr. Stanhope. I thought you said they took it from you?

Somner. Yes, after I had laid hold of it, and taken it off the Table.

Mr. Powis. Were you sent for it by the Sheriff?

Somner. I was Serjeant to the Sheriff, and it belong'd to me to carry the Mace.

L. C. J. Well, go on.

Somner. When the Mayor came into the Hall, and desired to have the New Charter read, and heard in Peace; comes in Mr. George Gregory and Mr. Hutchinson, and after they came in, they fell a shouting.

Mr. Recorder. What did they say?

Somner. They told the Mayor they had chosen Mr. Greaves Mayor, and if he would come and hear him sworn, he might. He made them some Answer, but I did not hear what he said, the Noise was so great. There was one that stood by me, one Martin Chambers, whom I spake to, and said, Prithce be quiet, or hold thy Tongue, do not make such a Noise; and with that he up with his Hand, and hit me a full Swop over the Face.

L. C. J. Who was that?

Somner. One Martin Chambers; and that Man they have brought up to be a Witness for them.

Mr. Powis. Swear Wortley. (Which was done.)

Mr. Recorder. Pray will you give an Account whether you saw Wilson there, and in what Place, and what he did?

Wortley. Yes, I saw him in the Council-House, my Lord.

Mr. Recorder. In the Council-House, or in the Hall do you mean?

Wortley. In the Hall.

Mr. Recorder. What did you see him do there?

Wortley. Nothing.

Mr. Recorder. Was he in the Crowd?

Wortley. Yes.

Mr. Powis. Did you see the Mace taken away?

Wortley. No.

Mr. Powis. What did you see any of them do? Or what did you hear any of them say?

Wortley. Mr. Sacheverell bid them stop the Books.

Mr. North. My Lord, I hope we have sufficiently proved our Issue.

L. C. J. Did they make any Noise, or Hubbub, or Outcries in the Hall?

Wortley. Yes.

L. C. J. Did they make any Noise in the Council-House?

Wortley. I heard him bid them stay the Books, that is all.

L. C. J. How many might there be of them, good Sir?

Wortley. There might be a Hundred.

L. C. J. Were there two Hundred?

Wortley. I can't tell how many there might be.

Mr. Holt. Pray, Mr. Wortley, before you go, did you give no Vote for the Election of a Mayor upon the Old Charter?

Wortley. No, Sir.

Mr. Pollexfen. Did not you give a Vote at that time in the Council-Chamber?

Wortley. Yes, there was a Vote, but I gave it for Mr. Toplady.

Mr. Jennings. Pray swear Mr. Richard Wright. (Which was done.)

Mr. Recorder. Pray will you give an account what you know of this Business?

Wright. As far as I can give an account, it was thus: I saw when the New Charter came, and was carried to Mr. Mayor's House, and it was given to the Mayor, and it was met before that by the Company that was going to Church, and they were acquainted there was a New Charter, and desired to return back again; but they would not, but went to Church. Then they were sent to by Christopher Reynolds, and one Mr. —, and desir'd to come and hear it read, but they would not.

Mr. Recorder. What did you do in the Council-Chamber?

Wright. I was not there, but in the Hall.

Mr. Recorder. What did they do in the Hall?

Wright. I'll tell you what they did: They had the Charter before them, and it was going to be read, and the Burgesses were all very quiet, till such time as Mr. Hutchinson and Mr. Gregory came to acquaint the Mayor that they had chosen a Mayor, and desired him to come and hear him sworn. To which Mr. Mayor answer'd, he could not, neither did he know by what Authority they did it. After this, there was a great Tumult there, and some cried out, A Greaves, A Greaves, and others, No New Charter, No New Charter. Several times they were begg'd and perswaded to be silent and quiet, but they would not, but continued in a tumultuous manner for a long time. After this, I was at Mr. Mayor's, when Mr. Hutchinson and Mr. Gregory, Mr. Arthur Riccards, and Mr. Richards, came to demand the Mace, whereupon Mr. Mayor told them he would not deliver it but to the same Authority by which he had it, otherwise he would not deliver it. There was in this Company Mr. Ralph Bennet, Mr. John Sherwin, Mr. Samuel Smith, Mr. Thomas Trigg, and John Hoe; these I took particular notice of. Afterwards, when they came to proclaim the Mayor at the Cross, there came down this Hoe, and Sherwin, and

and several others, in a great Body, that they could not proclaim the Mayor thoroughly as they should.

L. C. J. Pray, what Number were they when they came into the Council-Chamber?

Wright. There might be fifty of them, I believe.

Mr. Recorder. Who was the chief Man among them?

Wright. Mr. *Sacheverell*.

L. C. J. When they were in the Hall, how many were they?

Wright. When they were in the Hall, I believe they were two hundred.

Mr. North. My Lord, we rest it here: We think we have given a satisfactory Proof as to all the Defendants named in the Information.

Mr. Pollexfen. May it please your Lordship, and you Gentlemen of the Jury, I am of Counsel in this Case for the Defendants; and, my Lord, notwithstanding any thing that has been proved, we hope we shall make it plainly to appear, that we have done nothing but what became loyal good Subjects and honest Men, and that we were far from stirring or inciting any Tumult and Disorder in this Town, or any thing that may be called a Riot. And, my Lord, I must beg leave a little to open their Information, that we may come to the Question upon which this Matter does stand. My Lord, they have in their Information charg'd a tumultuous Assembly upon the Defendants, to disturb the Election of the Mayor upon the New Charter, and that this did continue by the Space of seven Hours upon that same Day, and there is nothing more spoken of any other Day; and so all that they talk of which happened the next Day, is a matter wholly out of the Information. My Lord, there is another Matter, another Passage, in this Information, about the taking away the Mace from *Malin*, who was then Sheriff. Now, my Lord, our Case as to that will stand thus: *Malin* was Sheriff by the Old Charter, and not by the New; and then if *Malin* were Sheriff by the Old Charter, then by the Surrender he was out of Office, and was not Sheriff, and so the Information fails: For I suppose they themselves would not have both Charters to be in Force at one time; and if they would have this to be after the New Charter was granted, then was not *Malin* Sheriff by the New Charter. So that then all the Fact that is laid concerning the taking away the Mace from *Malin* that was then Sheriff, is quite mistaken, for *Malin* was not Sheriff then, if so be the Old Charter was not then in Force, for he was not in the New Charter, or any way elected or sworn Sheriff: So that therein also, my Lord, we think it impossible for them to maintain that Part of their Information. My Lord, the next Matter stands upon the Assembling and Acting of those Persons that did assemble and act under the Old Charter; and therein, my Lord, it will fall out thus: By the Old Charter the Mayor is to be elected, and take his Place on *Michaelmas*-Day, upon which this Fact is alledged to be. *Greaves* was elected before this time, upon the 14th of *August*, according to the Usage of the Old Charter. Then, my Lord, according to the Constitution of that Old Charter, a Copy whereof we have here to produce, if the last Mayor be not present, the Coroner has power to swear the New one; and that will shew that this is the right Day, and all

things were done by the Old Corporation, as is usual and accustomed in all respects. There is one thing they say, some of these Persons are not of the Corporation by the Old Charter, and others had no Voice in the Election; my Lord, for that, supposing they had not a Voice in the Election, yet to be there was no Crime; for if a Man be a Burgess of a Town, and be present at the Election of Offices for the Town, and does either advise or assist in the Election (and he is not altogether unconcerned in it neither) this of itself will make no Crime. Why then the Day that was *Michaelmas*-Day, that was according to the Usage; and the Place and Proceedings were all according to the Custom that they always used upon the Old Charter. For first, they go to the Old Mayor, from thence to Church, from thence to the Council-Chamber, where they used to establish the Mayor that was before chosen; thither they went, there they did elect this *Greaves* to be Mayor, and when they had elected him to be Mayor, he did send, according as is proved by their Witnesses, to the Old Mayor who was then in the Hall, to come and be present at the swearing of the New Mayor; so that still all was done as is usual according to the Old Charter; and if that Charter be in force, all is legal, and the Answer that the old Mayor does give, is also prov'd. My Lord, for the Defendants, all, besides four, were not in the Hall, but only in the Council-Chamber, for any thing that appears by the Evidence; but if the Evidence be otherwise, we have Witnesses to prove it. When we were in the Council-Chamber, and the Mayor came and brought the Charter, we were far from opposing, but did desire the New Charter might be read, the Mayor refus'd the reading of it, but took it away with him, and went into the Hall: upon which they proceeded upon their Old Charter. My Lord, the Controversy concerning which is the right, and which is the wrong, that is now depending; but this must be the Consequence in this Cause; If the Old Charter were then in force, then to act according to the Old Charter, to make an Election, to swear their Mayor, to go and demand the Old Mayor to swear him, and to demand the Mace must be regular, if so be that be true, that the Old Charter was still in force. To go afterwards to the Cross the other Day to proclaim him, was also lawful, if that be so. And if there were nothing but what is usual in Matters of this Nature, and according to Custom, then there is no Offence, no Violence nor Force, nor any thing offer'd by any of these Defendants: And that which they speak, of the crying A *Greaves* Mayor, a *Greaves* Mayor, is but a sort of an Applause which in Elections is very usual; why then if there are but orderly Proceedings, such as are usual in things of this Nature, I hope it will not be construed to be any Riot, or Breach of the Peace, or Offence in us. My Lord, the Questions that will arise upon this Information, are those that I have mentioned; for if so be this Mace was not *Malin's* Mace, then they having laid it in the Information, that we did take away from *Malin*, then Sheriff, a Mace, that belong'd to him as the Ensign of his Office, if he were not then Sheriff, they are quite out in their Information. That he could

could not be Sheriff by the Old Charter, that will be pretty plain; for the Old Charter they say was surrender'd. That he could not be Sheriff by the New, is as plain, for he was not named Sheriff in it: But if he were Sheriff by the New Charter, yet at this Time he had not the Authority of Sheriff, for he had not taken upon him the Office by the New Charter, nor was not sworn: And there is an express Clause in it, that neither the Sheriff, nor any other Officer, shall take upon him their Office, till they have taken their Oaths. Now all that was done in the Council-Chamber, of which this about the Mace is part, was before these Men had taken their Oaths, and the Oath was taken in the Hall by the Mayor, and where the rest took them, *non constat*: But they were not to act till then, nor could act by their New Charter, and so their Information falls short as to whatsoever was done in the Council-Chamber, and we proceeded right upon the Old Charter. For it is expressly said in the Information, that the Assembly was duly summoned by *Gervas Wild*, then Mayor of the Town, for the electing and swearing a Mayor of that Town, for the executing the Office of Mayor of the Town for the Year ensuing, according to the Effect and Tenor of certain Letters Patents, on that behalf granted, by our Sovereign Lord the King that now is. Then, if so be whatever was done, was before he was sworn as Mayor, then it could not be an Assembly duly summoned by him, he having till then no Authority to summon it; nor could what the Defendants did, be in Hindrance or Disturbance of him in the exercising of his Office; and so their Information is quite varying from the Fact. Then there is this further besides, my Lord, the assembling and meeting, and going on according to the Old Charter, was on the 29th of September, the New Charter bears Date the 28th of September, and comes down as you see the next Day, which was *Michaelmas-Day*, at Eleven of the Clock. And we have it in Proof, that the Surrender of the Old Charter, which they pretend, was not enrolled till the 7th of October after; and under favour, my Lord, the Old Charter could not be determin'd, till the Surrender was enrolled, which was not till the 7th Day of October; and till that Time the Old Charter continuing in Force, it was fit for them to act under it, as it so did continue; and if they had omitted their Election on that Day, they had been faulty, in not proceeding according to the Old Charter. My Lord, we will call our Evidence, and make out our Fact.

L. C. J. But *Mr. Pollexfen*, as to that you talk of about *Malin*; Was he Sheriff, or was he not Sheriff?

Mr. Pollexfen. He was not Sheriff according to this Information.

L. C. J. But was he Sheriff, or not Sheriff?

Mr. Thompson. Not Sheriff by the New Charter, say we.

L. C. J. But I pray answer me, Was he Sheriff, or not Sheriff?

Mr. Pollexfen. I believe he was Sheriff by the Old Charter.

L. C. J. What had you then to do with the Mace?

Mr. Pollexfen. Yet say we, you are mistaken in your Information; for if so be you lay it to be an Offence, the taking away the Mace from *Malin*, that was Sheriff by such a Charter, and he is not so, then the Information is mistaken.

L. C. J. There is no such thing as his being Sheriff by such a Charter.

Mr. Lovell. My Lord, we do come here to justify—

L. C. J. Ay, but let him come here first, and answer the Objection.

Mr. Pollexfen. My Lord, it is expressly said in the beginning of the Information, that *Wild* was Mayor, and that he had summoned an Assembly to chuse a Mayor, according to the Charter granted by this King; that the Defendants did disturb that Meeting, and that Election; and that they did take away the Mace, being the Ensign of Office, to the said Sheriffs of the County aforesaid belonging, from one *John Malin*, being then one of the Sheriffs of the County of the Town of *Nottingham*.

L. C. J. All that is true.

Mr. Pollexfen. Then they must make it to be by one or t'other Charter. We say he was not by the New; they deny the Old to be in being, and speak only of the New.

L. C. J. Ay, but I wou'd fain know of you whether he was Sheriff, or not Sheriff.

Mr. Pollexfen. I think they that will charge us with an Offence, ought to make out that Charge.

L. C. J. They say he is Sheriff, and you say he is Sheriff yourselves.

Mr. Pollexfen. That cannot consist with this particular Question, as I conceive.

L. C. J. Why now then let us come yet a little further; it is said, that such a one being Mayor, and so he was, take it which way you will; for if the New Charter have no effect till the Surrender of the Old be enrolled, then *Wild* was Mayor by the Old Charter; and if he was Mayor, it was enough: And then he was met to chuse a New Mayor by virtue of the second Charter; it is true it is so said, tho perhaps, according to Strictness, it could not take Effect till the Enrollment of the Surrender; yet what is that to this Offence? I would fain know of you, is it not true in Fact, that he was then Mayor, and met in an Assembly for the Election of a New Mayor?

Mr. Pollexfen. It is true; but that we conceive will not support this Information.

L. C. J. Then I desire to know, how comes *Mr. Sacheverell*, and these sort of People to meddle in it?

Mr. Pollexfen. If it be insisted upon that he was Mayor by the Old Charter, then we hope we have done nothing but what by the Old Charter we may justify.

L. C. J. What had *Mr. Sacheverell*, *Mr. Hutchinson*, and my Parson *Wilson* to do there?

Mr. Pollexfen. By the Old Charter, *Mr. Sacheverell* was a Burgefs.

L. C. J. If he were, was he capable of Electing?

Mr.

Mr. Pollexfen. He might be present at an Election, and was concerned as a Burgefs.

L. C. J. But could he meddle with the Election?

Mr. Pollexfen. Then, good my Lord, what have we done——

L. C. J. Wonderfully done! those things you can never answer: In London, for the purpose, it was not an Offence for any Freeman to be present at the Election of the Mayor; but if a Parcel of Freemen come that are not Livery-men, and run themselves into the Business to give Voices, and give Direction about that they have nothing to do with, and cry out, pray stop the Books, and pray, good Sir, deliver the Mace; then they had concern'd themselves, and meddled with an Authority to which they had no Pretence, which is an Offence; and if Men will busy themselves in that which does not concern them, they must suffer for it. Mr. Sacheverell, and the rest, were as capable of giving them Advice about an Election, seven Years before as now; what Reason had they now to come and make this Hubbub? But some Men will shew themselves such wonderful Advisers before their Advice is ask'd or needed.

Mr. Lovell. Will your Lordship please to spare me one Word——

Mr. Pollexfen. Prithee give me leave: My Lord, when you see how the Fact does appear upon the Evidence, I suppose we shall not be thought guilty of any Disorder.

L. C. J. It doth appear very plain, Man, it has been very fully sworn; it has indeed.

Mr. Pollexfen. We hope to satisfy you otherwise by our Evidence, as to the Fact.

Mr. Lovell. Your Lordship is pleas'd to object that upon us, which doth lie upon us, and requires an Answer——

L. C. J. It does indeed.

Mr. Lovell. As to *Malin's* being Sheriff. But, my Lord, I conceive he was not Sheriff; for if the Old Charter was in force, then he was not Sheriff; for there was a New Sheriff chosen and sworn, before the Mace was requir'd of him: If the New Charter were in force then he was not Sheriff; for he was not named Sheriff in it.

L. C. J. Who chose the New Sheriff?

Mr. Lovell. He was not chosen by any body, he was named in the Charter.

L. C. J. *Malin* was Sheriff before that time, and was indeed Sheriff till a New One was chosen in his Place; and therefore the detaining the Mace was unlawful, that is our Opinion; and if your Opinion be otherwise, it is as idle as the Opinion of the New Charter.

Mr. Holt. Will your Lordship please to spare me a Word for the Defendants? My Lord, the Information doth consist of two Matters; the first is, the disturbing the Election that was appointed by the Mayor, by virtue of the New Charter; the next is, the taking away the Mace, being the Ensign of Office, of *Malin* the Sheriff. Now, with Submission, my Lord, I think they have fail'd in the first Part of the Information; for they have laid it Special, that *Wild* being Mayor, he had at that time, when these Defendants did thus assemble themselves, appointed an Election by virtue of the Letters Patents of this King; and after he had so appointed it, these Defendants did assemble themselves in di-

sturbance of that Election, and after Proclamation made, continued their Disturbance. Now if this *Gervas Wild* had no Authority to make or appoint this Election, by virtue of any Charter, then had he no Authority to make this Proclamation; and then these Defendants are not guilty of this Information: supposing what they did was not justifiable in the main, yet as here laid, they are not guilty; for it is not, nor can be to the Disturbance of the Election, or Contempt of his Authority.

L. C. J. Come, that has been said, and answer'd over and over again. Call your Witnesses.

Mr. Holt. As to this Business of *Malin*, and the Mace, we say it did not belong to him; and it is an Usurpation upon the King, without Authority by any Charter or Grant, and a Novelty: No Man can have any Ensign of Authority, but by Grant from the King.

L. C. J. What is that to you? why did you take it away? What Authority had you for that?

Mr. Holt. This is laid to be an Affront to the King's Authority, and it was not, for the very Mace was an Usurpation.

L. C. J. He was in Possession of it, and that is the same thing as to you, whether it be of right or not: You never pretended to keep it for the King.

Mr. Holt. If so be they among themselves——

L. C. J. Pray go on to your Witnesses, and don't spend our Time in such trivial Stuff; for this is all Stuff, mere Stuff.

Mr. Holt. My Lord, we wou'd make out our Defence——

L. C. J. Do so if you can, call your Witnesses; we must not give Liberty to every one of the Council to make Speeches of the same thing, over and over again, and all to no purpose.

Mr. Holt. This Mace did not belong to *Malin*.

L. C. J. How do you know that? Can you tell whether the King had not given them such Power?

Mr. Holt. It was never given by the King.

L. C. J. Does the King question them for it?

Mr. Holt. We will prove it an Usurpation, and can shew the Time when it was first usurp'd.

L. C. J. This way of Behaviour by Riots, looks more like the Times of Usurpation, when Rabbles meet to meddle with Government.

Mr.——My Lord, I desire to offer only one Word that has not been yet said.

L. C. J. No, I will hear no more Speeches; call your Witnesses, if you have any: Sure you take yourselves to be in your Common-Halls, and Council-Houses, making Speeches.

Mr. Holt. Call *Edward Higley*, and *Sir Thomas Parkyns*.

Mr. Pollexfen. May we read the Old Charter, my Lord?

L. C. J. Ay, read what you will, and offer what you will in Evidence for yourselves; but let us not have such Doctrines preach'd among us, as settling Governments, and trying Rights, by Club-Law.

Mr. Pollexfen. God forbid, my Lord, I am sure nobody here desires any such thing.

Mr. Holt. Swear *Edward Higley*. (Which was done.)

L. C. J. Well, what do you ask this Man?

Mr. Holt. (*Shewing him a Paper Book.*) Is that a true Copy of the Old Charter?

Haley. Yes, it is.

Mr. Pollexfen. We desire it may be read.

L. C. J. What wou'd you read it for?

Mr. Pollexfen. By that it will appear the Election was regular, according to the Old Charter, which we say is still in force, and so we in no fault.

L. C. J. Shall we enter into a Question of that Nature here, Which is in force? No, we will not. Why did you commit this Riot? answer that.

Mr. Pollexfen. By the Old Charter, my Lord, the Mayor and Burgeses are to elect.

L. C. J. Ay, Mr. Pollexfen, and you know the Old Charter of London, was to the Mayor, Commonalty, and Citizens of London, to chuse a Mayor; and we know that the Mayor, Commonalty, and Citizens of London, have not chosen a Mayor this many hundred of Years. We know very well, that that Election is made by Livery-Men: Now you come and say, pray let us see how it is by the Charter; why as well may not all the Citizens of London claim to be at the Election of the Lord Mayor? If you can shew me that heretofore, before this time, that there were other Persons that us'd to be present at Elections, you say somewhat: But if you have only an ancient Right to be present, and they have ravished this Right from you, you had done exceeding well to have asserted your Right in a legal Course. But do you think you are to regain your Right by Club-Law, and throwing up your Hats, and Noise, and Riots, and opposing the King's Authority?

Mr. Pollexfen. My Lord, we were never for opposing the King's Authority; we never were against the King.

Mr. Just. Withens. Who was that against, I pray, when you said, No New Charter, No New Charter? Was not that against the King?

Mr. Lovell. That was none of us who cry'd out so.

L. C. J. Who knows in a Croud, what Person in particular makes a Noise, or does not? you were where you should not have been.

Mr. Pollexfen. My Lord, we pray the Charter made to this Town, in the Reign of Henry VI. which provides, that the Mayor shall be chosen by the Burgeses, and sworn by the preceding Mayor; but if he was not present, he should be sworn by the Coroner. Your Lordship objects the Case of the Livery-Men of the City of London; that is by Virtue of a particular By-Law: But in our Case, the Old Charter having prescribed this Method, you will not take it out of that Method, without their producing some By-Law for it.

L. C. J. Yes, yes, we shall go according to the constant Usage within Memory, because we will not, upon this Information, try the Right one way or other. Shew us by the Usage that there was a Pretence for such Persons as Mr. Sacheverell, and the others here, to be present at the Elections.

Mr. Just. Withens. In this Case it shall be presum'd there was a By-Law.

Mr. Pollexfen. I hope you will presume nothing to make us guilty of a Crime; they ought to shew the By-Law if they have any.

L. C. J. I think we need not trouble ourselves about that, what By-Laws have been made;

but we find these Persons in Possession of this Usage, and so they have been for these eighteen Years past.

Mr. Pollexfen. My Lord, that will not make them a Title.

L. C. J. We will not allow the Right to be try'd upon this Information.

Mr. Just. Withens. Mr. Pollexfen, What do you speak of Swearing by the Coroner? That could not be in this Case, for the Old Mayor was there.

Mr. Pollexfen. Not at the Swearing of Greaves.

Mr. Farewell. My Lord, I would only observe one thing; the Crime charg'd upon us, is for not departing after the Proclamation made; now I do not observe that they prove that Mr. Sacheverell was ever there after the Proclamation.

L. C. J. I thought indeed you were very full; you were so eager to speak; but your Observation is very much in the wrong, for the Proof is positive, that Mr. Sacheverell, and the rest of the Company staid after; but because you shall observe it better, call Reynolds again; you were so full, you could not let it alone till you were tapt. Reynolds, upon your Oath, did you make Proclamation that all Persons that were not summoned, or were unconcern'd in the Election, should depart?

Reynolds. Yes, my Lord, I did.

L. C. J. Did Mr. Sacheverell, and the rest, stay there afterwards?

Reynolds. Yes.

Mr. Stanhope. My Lord, the Mayor, I think, swears he did not summons any one: The Information is laid, that there was an Assembly duly summoned and called before him.

L. C. J. He told you he sent to Alderman Parker, and Edge, and two or three more, to come away and hear the Charter read; and he spoke to Serjeant Bigland, and he was huffish, and did not reckon himself concerned in the New Charter; for it seems he was not continued in his Place of Recorder by it. He tells you that the Charter was read to them, and with much ado, he that read it, did go thro' with it: But he was mightily interrupted by the Noise that was made by the Defendants and their Rabble; this prov'd that there was an Assembly summon'd before him, sure.

Mr. Just. Withens. Mr. Stanhope, don't you observe too, that he sent to Church to summon them to come to him, and they would not come when he sent for them?

Mr. Pollexfen. My Lord, they should produce their New Charter, I humbly conceive.

L. C. J. I tell you before-hand, we are not trying the Validity of the New Charter, or the Old, but whether you are guilty of a Riot or no.

Mr. Holt. My Lord, if they were in Possession of Government by their New Charter, they should shew that New Charter: We shall shew you an Old Charter to the Mayor and Burgeses there—

L. C. J. Can you shew a Charter that the Defendants were Mayor, Aldermen, and Burgeses?

Mr. Holt. Swear Luke Oldham. (*Which was done.*) Look over that Book Mr. Oldham, is that a true Copy?

Oldham. This is a true Copy of the Charter that I examin'd at the Tower.

Mr. Recorder. When did you examine it?

Oldham. I can't tell you the particular Day, Sir.

Mr.

Mr. Recorder. How long ago is it that you examin'd it?

Oldham. 'Tis about a Twelve-month ago.

Mr. Holt. Upon your Oath, is it a true Copy?

Oldham. Yes, I read it over three Days ago.

Clerk reads. This is dated— of H. 6th.

Mr. Just. Withens. Where would you have it read?

Mr. Pollexfen. We desire he may read that part of the Incorporating the Town, and the Power of chusing the Mayor.

Clerk. Whereabouts is it, Sir?

Mr. Pollexfen. Folio 81. (Which was read.)

Mr. Holt. Call Sir Thomas Parkyns. (Who appear'd and was Sworn.)

L. C. J. What do you ask this Gentleman?

Mr. Holt. Pray, Sir, were you by in the Council-Chamber at Nottingham on Michaelmas-Day was Twelve-month?

Mr. Recorder. Pray Sir Thomas Parkyns, let me ask you one Question; Have not you laid out any Money in this Cause?

Sir Tho. Parkyns. No, Sir, not that I know of.

Mr. Stanhope. Pray, Sir, were you present in the Council-Chamber, when Mr. Wild, the Mayor, was there; and did you see Mr. Sacheverell, and Mr. Hutchinson come in?

Sir Tho. Parkyns. Yes, I was there.

Mr. Stanhope. Pray how did they demean themselves there?

Sir Tho. Parkyns. Very civilly, for any thing I did perceive, without any disturbance to the Court or any body else.

Mr. Stanhope. Did they use any Gestures, or Behaviours, to occasion the Mayor to go away?

Sir Tho. Parkyns. Not as I know of at all, Sir.

Mr. Stanhope. Pray, Sir, will you tell all your Knowledge how the thing pass'd.

Sir Tho. Parkyns. I understanding there was to be an Election of a Mayor for the Town of Nottingham, upon Michaelmas-Day, as has been accusom'd Time out of mind, a very long while, as I have been inform'd at the Church, I was there, and went to the usual Place in the Chancel, and there we staid some time till after Prayer; and after Prayer, there they thought to have gone to a new Election of a Mayor: There was Notice of a New Charter coming, but then I believe it was not come; but, as they were called, the Old Charter-Men, Alderman Greaves, and the Recorder, Serjeant Bigland, and Alderman Edge, and several others, forty I believe I could name, did send to Mr. Wild, the Mayor that then was, and Mr. Rippon, and others, who were then at the Town-Hall, and desir'd them to come up to the Chancel, as I am inform'd, in order to an Election of a New Mayor; but they did not come, but, as I heard, they sent Word back again, to desire Alderman Greaves, and the rest, to come down to the Town-Hall, which accordingly was done.

Mr. Pollexfen. And what happen'd there?

Sir Tho. Parkyns. I was there along with them, and went into the Town-Hall, and so into a Room, which I conceive they call the Council-Chamber; and there upon several Discourses, there were some were for going to voting for a New Mayor; and there were some that did say, they had a New Charter, and they must have a Mayor according to that New Charter; whereupon they desir'd it might be read, but there was no Answer, I think, made to that:

VOL. V.

I did see the thing they said was the New Charter, in a Box; I think it was so, but I did not see it out.

Mr. Combs. Then it was not read while you were there?

Sir Tho. Parkyns. I did not hear a Word of it read; but I think there was Alderman Edge did say, I do not know how I am to act by the New Charter; but I understand what I have to do by the Old Charter very well, therefore we will proceed to the Election of a New Mayor; and then upon that Account they did go to voting, and several Votes there were for several Persons, as particularly for Mr. Edge himself, and some for Mr. Toplady, but the most for Alderman Greaves; and when they did understand, as I conceive, that Alderman Greaves had the Majority of Votes, then they did rise up and went away.

Mr. Pollexfen. Who did?

Sir Tho. Parkyns. The Mayor Mr. Wild, and Alderman Rippon.

Mr. Stanhope. Pray Sir, did the Mayor stay all the while the Poll was?

Sir Tho. Parkyns. He was there, I am sure, while they voted; that I am certain he was; I can't say he was there all the time.

Mr. Pollexfen. Did he oppose the Election?

Sir Tho. Parkyns. No.

Mr. Pollexfen. Was there any Proclamation made for any body to depart.

Sir Tho. Parkyns. None that I heard of.

Mr. Holt. When the New Charter was produc'd, was it desir'd by any body there, that it might be read?

Sir Tho. Parkyns. Yes, Sir, there was some that desir'd it might be read.

Mr. Lovell. Why was it not read?

Sir Tho. Parkyns. I can't tell that; but I did hear they should shew Mr. Edge his Name in the New Charter; and they did believe he was continued in his Place: and I think Mr. Edge replied he had his Place by the Old Charter during Life; and by that Charter he knew how to act; he could not tell what he was in the New Charter.

Mr. Farewell. Pray, Sir, did any of the Old Charter-Men oppose the reading of the New Charter?

Sir Tho. Parkyns. No, indeed Sir, not that I know of.

L. C. J. Pray, Sir, let me ask you a Question or two, you are a Burgefs of this Town, are you not?

Sir Tho. Parkyns. Yes, my Lord.

L. C. J. How many Years have you been a Burgefs?

Sir Tho. Parkyns. Several Years.

L. C. J. Were you ever at an Election before?

Sir Tho. Parkyns. No, but I have been at several of their Meetings.

L. C. J. How came you to be there at this time?

Sir Tho. Parkyns. Upon no Invitation by any body, but upon my own accord.

L. C. J. How came you to accord upon that time more than upon another?

Sir Tho. Parkyns. Truly, my Lord, I cannot answer you to that.

L. C. J. No, I believe not; but let me ask you another Question: Who gave their Votes there?

Sir Tho. Parkyns. Several gave their Votes.

Z z z

L. C. J.

L. C. J. Did you give any Vote?

Sir Tho. Parkyns. No, my Lord, I gave no Vote.

L. C. J. What did you do there?

Sir Tho. Parkyns. There were several other Gentlemen of the Country there besides me.

L. C. J. Ay, there were several there that had nothing to do there, and which should not have been there: Did not you hear any Proclamation made at all?

Sir Tho. Parkyns. No, my Lord, I did not.

L. C. J. Did you hear no crying out in the Council-Chamber, a *Greaves* Mayor, a *Greaves* Mayor, No New Charter, No New Charter?

Sir Tho. Parkyns. I did not hear any Outcry at all.

L. C. J. Did you hear nothing said, pray stay the Books, pray stay the Books?

Sir Tho. Parkyns. No, my Lord, I did not.

L. C. J. Pray, did you observe any thing in the World about the Mace there?

Sir Tho. Parkyns. Yes, I did.

L. C. J. Pray let us hear that, for I see you did not hear a great deal, nor any thing indeed that other People heard; now let us know what you did see.

Sir Tho. Parkyns. The Old Mayor went away with Two of the Maces, I think, and one was left behind; and presently after comes back Mr. *Malin*, and demanded the other Mace.

L. C. J. Of whom?

Sir Tho. Parkyns. Indeed, I can't tell, my Lord.

Mr. Just. Withens. What Answer was given?

Sir Tho. Parkyns. There were several, I can't tell the particular Names, that said they had as much Interest in it, as *Malin* in the Mace; and the Reason was this, it was bought by several Contributors.

L. C. J. Who was that said so?

Sir Tho. Parkyns. Indeed, my Lord, I can't tell particularly.

L. C. J. Alack-a-day! now we have forgot all again. Pray did not you see the Thing call'd The New Charter, as you express'd it?

Sir Tho. Parkyns. No, I did not see it out of the Box.

L. C. J. Did you observe when Mr. *Edge* call'd to read the Charter?

Sir Tho. Parkyns. No, my Lord, I did not.

L. C. J. I mean, when he spoke to my Brother *Bigland* to read it.

Sir Tho. Parkyns. My Lord, I was there from the beginning to the end. If you please to hear me, my Lord, I will answer you to what you ask me: I think the Mayor, Mr. *Wild*, did speak to Serjeant *Bigland*, and ask'd him something of Advice, but what it was I cannot tell; it was something concerning the New and the Old Charter; and Serjeant *Bigland* answered him, do you ask me as Recorder, or as Counsel? Truly, I forgot what Reply was made.

Mr. Pollexfen. This Gentleman, my Lord, was not in the Hall.

Mr. Recorder. Did you see any Struggling about getting the Mace away?

Sir Tho. Parkyns. No, I did not, Sir.

Mr. Recorder. How came *Somner* to leave the Mace behind him?

Sir Tho. Parkyns. I don't know, I can't tell.

Mr. Recorder. Did you hear any thing said by Mr. *Sacheverell*?

Sir Tho. Parkyns. No, I did not.

Mr. Just. Withens. Did not he say, hold the Books, stop the Books?

Sir Tho. Parkyns. No, I don't remember it.

Mr. Holt. Pray did you stay as long as Mr. *Sacheverell* staid?

Sir Tho. Parkyns. I staid as long as they all staid.

Mr. Just. Holloway. Did you observe no Noise nor Uproar?

Sir Tho. Parkyns. No, by my Soul, not I.

Mr. Just. Holloway. That is strange.

Mr. Holt. He was not in the Hall where the Noise was.

L. C. J. But could he be in the next Room and not hear the Hubbub?

Sir Tho. Parkyns. My Lord, I said I was in the Place called the Council-House, and I did not stir till they all went out together.

Mr. Recorder. Was not you at the Proclamation at the Market-Place? and was there no throwing up of Hats?

Sir Tho. Parkyns. Yes, they did, when they said, God save the King, the People said *Amen*, and threw up their Hats.

Mr. Stanhope. Pray did you hear Mr. *Sacheverell* desire them to be quiet and peaceable?

Sir Tho. Parkyns. Yes, I did so.

L. C. J. Did you hear Mr. *Sacheverell* when he spoke to the Mayor in the Hall?

Sir Tho. Parkyns. No, I was not in the Hall at all.

L. C. J. Did you hear him when he spoke to the Mayor in the Council Chamber?

Sir Tho. Parkyns. No, not that I do remember.

Mr. Just. Holloway. You say you heard Mr. *Sacheverell* speak to them to be quiet and peaceable?

Sir Tho. Parkyns. No, not there, but it was at Mr. *Greaves*'s own House.

Mr. Just. Holloway. Was there any Uproar then there?

Sir Tho. Parkyns. No, my Lord, but I'll tell you; there was a Multitude of people there, and a great deal of Rabble like to be, and Mr. *Sacheverell* desir'd the People to do their Business with all Modesty; and I think there never was so great a Number of People that ever carried themselves more civilly than they did. I did not hear, by the Oath I have taken, one angry passionate Word, or any thing of that kind.

Mr. Recorder. They were all of a Side then.

Mr. Stanhope. Were you by when Mr. *Hutchinson* was sent with Mr. *Gregory*? What was he sent for?

Sir Tho. Parkyns. I can't tell that, but I did hear they did go.

Mr. Stanhope. Was he sent to demand, or desire the Mace?

Sir Tho. Parkyns. Indeed I can't tell how it was.

L. C. J. He can tell nothing.

Mr. Recorder. I believe he was worse frightened than Alderman *Parker*, he has forgot all.

Mr. Pollexfen. Swear Mr. *John Thinn.* (Which was done.) Pray, Sir, were you present on *Michaelmas-Day*, at the Election of the Mayor of *Nottingham*?

Thinn. My Lord, I hear there are several Gentlemen indicted for a Riot at that Time, I hope I shall receive no Prejudice for giving my Information here.

L. C. J. What do you mean, Mr. *Thinn.*

Thinn.

Thinn. My Lord, I understand by some Persons, that there is like to be an Information brought against me, if I give my Evidence here.

L. C. J. Prithee, Man, we know nothing at all of the Evidence or Information; if you will evidence, you may.

Mr. Pollexfen. Pray, Sir, were you present when this Matter was transacting on *Michaelmas-Day*?

Thinn. I happen'd to be in the Country at that time, about a Business between Mr. *Edge* and myself; we are Copartners in an Estate, and we were then upon a Partizion; and on *Michaelmas-Day* I went to Church, and being at Church, and seeing a great deal of Company in the Chancel, I went to see the usual Ceremony of chusing the Mayor, and so forth. I was there then, and while I was there in the Church, I staid there near an Hour, I believe; after Prayer was done, and there was an Expectation of the Old Mayor, and others, to meet together upon the Election, but no body came; but at last there was some Message came down; I know not by whom, nor from whom, but the general Vogue was that it came from Mr. *Wild*, the Old Mayor, and that he had sent down to desire the Company to come down to the Hall; but I can't say who brought the Message; and upon this all the Company went from the Church, up to the Hall, and I went with Alderman *Edge*, who was the Person I had Business with; we went thro' a great Room, the Town-Hall, and then there is a little Room within, I think they call the Council-Chamber, and a great Table within a Rail, as this may be; and I remember I sat down behind the Alderman: I could observe nothing of Hear among them at all, nor the least Word, that I observ'd, of Jangling. There was a Box upon the Table, which they said was the New Charter, but it was not read; but Mr. *Edge* was offer'd to read his own Name, to shew that he had Power to act in it; but he did not know how far he might act by that, and therefore he was proceeding to swear the Officer according to the Old one.

Mr. Pollexfen. Was there any Cry, or any Noise there?

Thinn. I don't know that I heard any one say any harsh or ill Word; there was not so much as a Shout.

L. C. J. Did you hear any Hubbub, or Tumult?

Thinn. No, my Lord, not in the Room where we were.

L. C. J. Did you in any other Room?

Thinn. I can't tell that; there was a great many People about the Window.

Mr. Holt. Did the Old Mayor, *Wild*, stay there while they elected Mr. *Greaves*?

Thinn. He stay'd there some of the time.

Mr. Stanhope. Was he there all the while?

Thinn. I cannot say but that some of the Aldermen staid all the time, and some of them gave their Votes for Mr. *Greaves*.

Mr. Lovell. What did *Edge* do?

Thinn. He took the Poll, and to the best of my Remembrance, Alderman *Parker*, that is one of the Aldermen that has been here, gave his Vote for Mr. *Edge*.

Mr. Lovell. Did the Mayor, *Wild*, stay till the Poll was cast up?

L. C. J. Poll, we hear nothing of a Poll: Who gave you Authority to Poll?

Mr. Lovell. He that was in the New Charter appointed Mayor, yet staid to see the Election and then went away.

Mr. Pollexfen. Sir, did you hear any Proclamation made in the Council-Chamber?

Thinn. No, Sir; I came from Church with Mr. *Edge*, and the rest of the Gentlemen.

L. C. J. Were you there when *Greaves* was sworn?

Thinn. Truly, my Lord, I don't remember that I was.

L. C. J. I desire to know by what Authority Mr. *Edge* swore him: let him look upon the Statute of *Premunire*, and consider with himself about it a little.

Mr. Just Withens. As far as I find, this Gentleman was not much concern'd, and did not mind what was done.

Thinn. No truly, Sir, not I, much.

Mr. Holt. Did Mr. *Sacheverell* go with you, or stay behind?

Thinn. We went all together.

Mr. Blencow. Pray swear Mr. *Pole*. (Which was done.)

Mr. Stanhope. Pray, Sir, were you in the Council-Chamber at Nottingham on *Michaelmas-Day* was Twelve-month? Pray tell us what happened there.

Pole. I have lived in Nottingham about twelve Years. I used to go and see the Mayor and other Officers sworn: Upon this Day I was at Church, and they went to Prayers, and after Prayers was ended, I think there was Mr. *Gregory* and Mr. *Hutchinson*, as I take it, sent by some to desire the Mayor, that was *Wild*, to come to Church, that they might proceed to an Election according to the Old Charter; but what answer was returned, I cannot say: but after that, as I take it, there was Alderman *Parker* and Alderman *Rippon* did come and speak to the Company, and said, the Mayor desired them to come down, for they had the New Charter, and he was to have their Advice how to proceed upon it. While they sat there, I walked from the Church to the Town-Hall; and in a little while the Company from Church came to the Town-Hall: When they were there, the Mayor desired Serjeant *Bigland's* Advice how to proceed upon the New Charter; says he, do you desire my Advice as Recorder, or as Counsel? and I think as to that he gave no Answer. The like Question he put to Mr. *Edge*; and Mr. *Edge* referred it to Serjeant *Bigland's* Answer, and I think it was a very good one. After a while, some of the Company that used to be the Electors of Mayors and Sheriffs, being of the Cloathing, cried, let us go to the Poll; and I think Mr. *Edge* began to take the Poll, and there was several that did vote, but that was the General Cry of those that were inclined to the New and to the Old Charters. Some that were in the New Charter, gave their Votes, but not for *Greaves*; I don't remember any one did when the Poll was taking.

L. C. J. Who directed the Poll, pray?

Pole. I think it was some that were for the Old Charter; but I think it was the general Desire to go to the Poll.

L. C. J. Who took the Poll?

Pole. Mr. *Edge* took it.

Mr.

Mr. *Holt*. Did the Old Mayor propose the Election, or the New Mayor, or no?

Pole. No, I don't know he proposed it, but it was put to him.

Mr. *Stanhope*. Was he present at the Election?

Pole. Yes he was.

Mr. *Stanhope*. Was he present when the Poll was taken?

Pole. Yes he was.

Mr. *Stanhope*. Did he contradict it?

Pole. I cannot say he did contradict it.

L. C. J. How many of these Elections have you been at before?

Pole. I was not by at the Nomination, that I could not be, for they excluded all but those that had Votes.

L. C. J. How came you to be so busy as to be there at this time?

Pole. I went of my own accord, I was not desired by any body, any more now than other Years, but used as much as I cou'd to endeavour to be at the swearing of them; for they excluded all People usually out of the Chancel, where the Election used to be, if they were not of the Cloathing.

Mr. *Stanhope*. Who gave the Oath to the Person elected usually?

Pole. The Coroner used to give the Mayor his Oath.

Mr. *Lovell*. Who used to take the Poll at other Elections?

Pole. I can't say who took it, because we were excluded the Chancel; but it has been reputed that Mr. *Edge* used to take it.

Mr. *Blencow*. Who came to fetch you from Church?

Pole. I think Alderman *Rippon* and Alderman *Parker* did desire them to come to the Town-Hall, and I think *Malin* was there, but I cannot tell what he said.

Mr. *Blencow*. Who was at Church then?

L. C. J. Pray were you desir'd to come?

Pole. No, I was not,

L. C. J. Was Mr. *Sacheverell*?

Pole. No, I don't know that he was.

Mr. *Stanhope*. When these Gentlemen came, did they behave themselves civilly?

Pole. Yes; I saw nothing but civil Behaviour: There was a great Concourse of People, I believe most of the Well-Wishers to the Old and New Charter were there that Day.

L. C. J. Can you say you did not hear a great deal of Noise and Hubbub?

Pole. I cannot say so, nor truly can I say I did.

L. C. J. Do you believe you did or not?

Pole. But I believe I might hear some Noise; but I was in the Council-Chamber, not in the Hall.

Mr. *Just. Holloway*. Was Sir *Thomas Parkyns* there?

Pole. Yes he was.

L. C. J. Was Mr. *Thinn* there?

Pole. Yes, I think I sat next him when they came from Church: I did desire to see the Proceedings of the Day, and I think I dined with the Company, and went in with the first.

L. C. J. Did you see any thing about a Mace?

Pole. Yes, I think I did see something about a Mace.

L. C. J. Why then prithee tell me, as near as thee canst guess, what thee didst see about the Mace.

Pole. When they went out, *Wild* and his Company, the Room was full of Company; and, as I take it, Mr. *Malin*, or whoever it was that was to take it, did forget the Mace behind him; and somebody coming for the Mace, I think there was one of the Gentlemen of the Council did put it from him, and would not let him have it.

L. C. J. Ay, come, who was that one Gentleman of the Council?

Pole. I can't be positive, I believe it might be Mr. *Salmon*, or Mr. *B*——

L. C. J. But, prithee, wilt thou tell me that there was no Shouting, nor Noise nor Hubbub?

Pole. In the Council-Chamber, I am satisfy'd as to myself, I heard none, and believe there was none; I won't say there was not in the Hall, for I was not there.

Mr. *Just. Holloway*. Did you hear any one cry stop the Books?

Pole. I think there was at that time a Dispute about the Books.

L. C. J. Ay, tell me now who that Dispute was between.

Pole. I think it was among the Gownmen that were of the Council.

L. C. J. You say well, name me some of them now.

Pole. I cannot indeed, my Lord, name any particular Person.

Mr. *Just. Holloway*. Did you hear Mr. *Sacheverell* speak any thing about the Books?

Pole. I think I did not, I believe it was one of the Cloathing.

L. C. J. Prithee, canst thee not guess who that Man of the Cloathing was?

Pole. If I do guess, my Lord, I cannot speak positively.

L. C. J. Prithee don't say so, I know thee canst if thou wilt: come, recollect thy Memory.

Pole. My Lord, I would remember it, and fix the Person, if I could, but I cannot.

L. C. J. But as near as thee canst guess, I know thee hast a good Guess with thee.

Pole. Indeed, my Lord, I cannot.

Mr. *Powis*. Did you observe that he did any ways concern himself about the Election, Mr. *Sacheverell* I mean?

L. C. J. What did he do there Mr. *Powis*: he was present there.

Mr. *Recorder*. Was not he the Head of the Old Charter Party?

Pole. The Old Charter People took it that the Surrender had been surreptitiously obtain'd, and I think he might say they had a good Right to insist upon the Old Charter.

L. C. J. Who said so? Mr. *Sacheverell*?

Pole. I believe I did hear him say something to that purpose, but I cannot positively say what; I dare not undertake to say what particular Person spoke that Day.

Mr. *Recorder*. Was not he for reading of the New Charter, upon your Oath?

Pole. I cannot tell whether he was or no?

Mr. *Recorder*. Did he not bid the People be quiet?

Pole. I can't say I heard any such thing.

Mr. *Ward*. Did not you hear him say any thing to the Mayor when he came into the Council-House?

Pole. No, I did not.

Mr.

Mr. Ward. Did not you here the Serjeant make Proclamation for all People to depart that had no Business there?

Pole. I did not.

L. C. J. What say you, Reynolds, did you make Proclamation in the Council-House by the Mayor's Direction?

Reynolds. Yes, I did.

L. C. J. And yet you said you staid there all the Time.

Mr. Blencow. When the Shout was in the Hall, pray, where was Mr. Sacheverell?

Pole. He was in the Council-Chamber: The Occasion of the Shout to be in the Hall was this, when the Poll was taken, and the Majority appeared to be for Greaves, Mr. Hutchinson was sent to acquaint the Mayor with it, and to desire him to come, and be present at the swearing of him.

L. C. J. Who sent him?

Pole. Mr. Hutchinson and they can tell themselves.

L. C. J. But who do you say sent him?

Pole. I can't tell particularly, they can best tell.

L. C. J. But who told you so? or did any body tell you so?

Pole. I was told so by several Persons that they was sent.

L. C. J. Prithee, who told thee?

Pole. I believe I may have heard it from himself, that he was sent.

L. C. J. Who did he tell you sent him?

Pole. He did not tell me who particularly.

Mr. Farewell. My Lord, I desire to ask Reynolds this Question; Who was there besides, that heard you make the Proclamation?

Reynolds. The Mayor was there.

Mr. Just. Holloway. They made such a Noise, that perhaps every body could not hear it.

Mr. Pollexfen. Pray swear Mr. Slater. (Which was done.)

Mr. Holt. Were you in the Council-Chamber on Michaelmas-Day was Twelve-month in Nottingham?

Slater. Yes, I was.

Mr. Holt. Pray, give me an Account of what passed there, and what you observed.

Slater. I was at St. Mary's Church with them, and came down from the Church with them to the Council-House; and when they came, they went into the Council-House to the Mayor that was then Alderman Wild, and there they went and staid some small time; and then the Mayor and Aldermen came out, and came to the Common-Hall, and staid a pretty considerable time; and then came Mr. Hutchinson and Mr. Gregory to his Worship, and told him, And it please your Worship, the Council desires you to come and hear Mr. Greaves sworn Mayor; and at that Word, the Mayor replied to them, that he would come to them presently, if they should have done there: So presently after, some cry'd out, a Greaves Mayor, a Greaves Mayor, and Alderman Rippon and others bid them hold their Tongues, or it should be worse for them; but still they cry'd, A Greaves, a Greaves.

L. C. J. Where was that?

Slater. In the Common-Hall.

Mr. Pollexfen. What, the Burgesses cry'd out so, did they?

Slater. The People in the Hall.

Mr. Recorder. Was not you one of the Shouters?

Slater. No, I did not shout.

L. C. J. Were you one of the Cloathing, one of the Council of the Town?

Slater. No, my Lord, I was not.

L. C. J. What Business had you there?

Slater. I went to see, as others did.

Mr. Just. Withens. What Trade are you?

Slater. I am a Taylor.

Mr. Just. Withens. Do you use to go to Church?

Slater. Yes, Sir.

L. C. J. You say the People did shout, A Greaves Mayor; did you hear them among that Shout, cry, No New Charter, No New Charter?

Slater. I can't say any thing of that.

L. C. J. Canst thee say thou didst not hear any such Shout?

Slater. For my Part, I can safely say I heard nothing of it. Then I see Alderman Wild take a Book in his Hand, as to take an Oath, and then there was a Shout, A Greaves Mayor; and Alderman Parker went off from the Bench, and said, A Riot, a Riot.

Mr. Pollexfen. Swear Roger Ryley. (Which was done.)

Mr. Holt. Pray, were you at the Election of a New Mayor at Michaelmas-Day was Twelve-month?

Ryley. I was at the first Nomination, which was the 14th of August.

Mr. Holt. Who was named then?

Ryley. Mr. Greaves.

Mr. Holt. Is that the Custom of the Town, to nominate him before?

Ryley. Yes, it is.

Mr. Holt. Were you there on Michaelmas-Day?

Ryley. Upon Michaelmas-Day I was summoned in upon the Cloathing, and there the New Mayor went to the Old Mayor, and waited there a long time to go with him to Church; at last the Old Mayor would not go, but staid waiting for a New Charter; so we went to Church, and heard the Prayers, and from the Church we went to the Hall according to Custom; and there was the New Mayor there, Mr. Greaves, and he was sworn Mayor there.

L. C. J. Who swore him?

Ryley. Alderman Edge.

L. C. J. Did you ever know him swear a Mayor before?

Mr. Just. Holloway. Did you ever know a Mayor sworn before in the absence of the Old Mayor?

Ryley. I have known many, I have been of the Council these Eighteen Years.

L. C. J. You say you have been of the Council these Eighteen Years.

Ryley. Yes, I have so, Sir.

L. C. J. And have you been present when the New Mayor has been sworn?

Ryley. Yes, I have.

L. C. J. And do you know that the New Mayor was sworn when the Old Mayor was not there?

Ryley. I have known many sworn, I say, but I cannot tell whether I ever knew but that the New Mayor was sworn before the Old Mayor.

L. C. J. Then when Edge gave Greaves the Oath, was the Old Mayor there?

Ryley.

Riley. He was in the Room when he was chosen.

L. C. J. Was he there when he was sworn, or when he was going to be sworn?

Riley. They would not abide the Place, but went away.

L. C. J. But, prithee Friend, don't dally, thou art upon thy Oath; was *Wild*, the old Mayor there, when they gave *Greaves* the Oath?

Riley. I don't know exactly the Moment when he went away, but he was there when they voted him.

L. C. J. Thou art a prevaricating shuffling Fellow.

Riley. If it please you, my Lord, I won't forswear myself for all the Town and Country.

L. C. J. Speak the Truth, Man, and answer my Question.

Riley. He was there all the while they were voting, and how he went away I don't know.

L. C. J. Was he there when *Greaves* was sworn?

Riley. I can't tell that, if it please your Honour.

Mr. Farewell. My Lord, I desire to ask him one Question.

L. C. J. But the Man won't answer a Question fairly.

Mr. Just. Holloway. I swear, I think both Sides are very careful of answering Questions.

Mr. Farewell. My Lord, I desire to ask him what was the Behaviour of the Company all the time they were there in the Council-House; was there any Disturbance there?

Riley. None, that I saw.

L. C. J. I ask you again, was there no Proclamation made?

Riley. I heard none.

Mr. Farewell. Did you take Notice of *Reynolds* to be there.

Riley. He might be there, for ought I know.

Mr. Farewell. Do you believe he could make a Proclamation, and you not hear it?

Riley. No, I don't know how he should.

Mr. Pollexfen. Call *Thomas Muxlow* and *John Peak*.

Mr. Just. Withens. Have you any more Witnesses, *Mr. Pollexfen*?

Mr. Pollexfen. We have more, my Lord, if we can get them but in. Swear *Thomas Muxlow*.

(Which was done.)

Mr. Lovell. Were you at the Election of a Mayor of the Town of *Nottingham*, *Michaelmas-Day* was Twelve-month.

Muxlow. I went to the Church, as the Custom was; after Prayer we expected to go to the Election.

L. C. J. Ay, prithee speak out as if thou wast at an Election; you would have shouted then, I warrant you.

Muxlow. When we were at the Church, we waited there, expecting to have *Mr. Wild* and the rest of the Company, to nominate the Mayor, according to the antient Custom.

Mr. Holt. You say you were at the Election on *Michaelmas-Day* was Twelve-month; pray speak how Things were carried there.

Muxlow. Yes, I was there, and it came to an Election, and it came to a Poll.

Mr. Just. Holloway. Who proposed the Election?

Mr. Recorder. Were you an Elector?

Mr. Holt. Answer the Gentleman's Question, were you one of the Cloathing?

Muxlow. I was one that had a Vote there.

Mr. Holt. Do you know any thing of this Matter?

Muxlow. I know there was a fair Election according to Custom.

Mr. Stanhope. Was it peaceable and quiet?

Muxlow. Yes, there was no Disturbance at all.

Mr. Stanhope. Was there no Shouting?

Muxlow. No Shouting that I heard.

Mr. Holt. You were in the Inner Room, were not you?

Muxlow. I was in the Council-House.

Mr. Holt. Were you not in the Hall?

Muxlow. I was in the Hall, as we went out.

L. C. J. Did you hear nothing of crying out, *A Greaves, a Greaves*?

Muxlow. No, I can't remember that.

L. C. J. Were you there when *Greaves* was sworn?

Muxlow. Yes, I was, when Alderman *Greaves* was sworn.

L. C. J. Was you there when the Mace was taken away?

Muxlow. No, my Lord, I was not.

L. C. J. Who swore the Mayor?

Muxlow. One of the Coroners.

L. C. J. Was the Old Mayor there when the New Mayor was sworn?

Muxlow. I can't tell that.

Mr. Just. Withens. None of them can tell that, or will tell it.

Mr. Pollexfen. Swear *Burroughs* and *Parker*.

(Which was done.)

Mr. Lovell. What is your Name?

Burroughs. My Name is *Burroughs*.

Mr. Lovell. Were you present on *Michaelmas-Day* at the Election of a Mayor of *Nottingham*?

Burroughs. I was one of them that were at the Hall; when I was in the Hall, there came a Gentleman, one of the Council-House, and acquainted *Mr. Wild*, the present Mayor, that the Burgesses had elected *Mr. Greaves* Mayor, and the Coroners were proceeding to swear him, and asked him to come and hear him sworn; and he said he could not come presently, they must wait a while; he was asked how long, he told them by and by; with that, some body cried out, *A Greaves, A Greaves*, and there was a great Shout.

L. C. J. Where was that Shout?

Burroughs. In the Hall; but then the Gentlemen were in the Council-House.

Mr. Blencow. Where was *Mr. Sacheverell* then?

Burroughs. He was in the Council-House.

L. C. J. Well said: now you have made this Fellow swear thro' a Wall, that your other Witnesses could not hear thro'. Prithee, Friend, wer't thou one of the Cloathing?

Burroughs. No, my Lord, but I was a Burgess.

L. C. J. What did you do there?

Burroughs. There were other Burgesses not of the Cloathing besides me.

Mr. Holt. Come then, our next Witness is *John Parker*.

L. C. J. *Reynolds*, did you see this Fellow there, was he one of the Shouters?

Reynolds. Yes, and he flung up his Hat thus.

L. C. J. Were you one of the Shouters?

Burroughs. I cannot say I did not shout.

L. C. J.

L. C. J. Did you fling up your Hat?

Burroughs. No, I did not.

L. C. J. Did you do it over your Head?

Burroughs. It may be I might.

Mr. Just. *Holloway.* Were you by when *Greaves* was sworn Mayor?

Burroughs. No, I was not.

Mr. Holt. Well, what say you to this Matter, *Parker*?

Parker. Going by the Street, I met the New Charter coming down, *Reynolds* brought it; so I turned back again to the Mayor, and after he had received it, pray, says he, go up and tell Mr. *Sacheverell*, and some of them, that they will come up to the Church; and if they will but stay there a while, we will come to them: So I, and another, and two or three more, went up to the Church, and told them the Mayor would come and wait upon them, and bring the New Charter; upon that Mr. *Sacheverell* looked upon his Watch, and staid a considerable while, and look'd again upon his Watch, and I heard him say he had staid above an Hour: and presently a Message came from the Mayor, desiring them to come down to the Town-Hall to wait upon the Mayor.

Mr. *Stanhope.* Who did the Messenger direct his Speech to?

Parker. I suppose it might be to Alderman *Edge* and Serjeant *Bigland*. Says Mr. *Sacheverell*, we'll go down, and see what they say to us: So they went down, and we went with them; they got many of them into the Council-House, but I could not, so I stood in the Hall, and waited all the while the Gentlemen were in the Council-House; then there came out Alderman *Rippon*, the Mayor, and Mr. *Malin*, and by and by after them, Alderman *Parker*, out of the Council-House, and sat down upon the Bench; Mr. *Malin* had not his Mace, and he was asked where it was, and they said they had it in the Council-House: so, said they, you had best have a care of your Staff; no, said he, before they take my Staff, I'll break it over their Pates; and by and by they proceeded to swear *Wild* Mayor, and they were about to give him some of the Oaths, I suppose of Allegiance and Supremacy; but before he said any thing, there came two of the Council-House, and told him, they had elected Mr. *Greaves* Mayor, and desired the Mayor, and the rest, that they would please to come and hear them swear the Mayor, he, said, he could not come; but come, come, says he, we'll go on, and upon this they proceeded to give Mr. Alderman *Wild* the Oath: and when they had gone half way in the Oath, some body came and cried out, they were swearing Mr. *Greaves* Mayor, and upon that both Parties gave a Shout, and one cry'd, A *Greaves*, A *Greaves*, and another cry'd, A *Wild*, A *Wild*. And upon this, Alderman *Rippon* had the New Charter by him, and he took it out; look you, said he, we do nothing but by Authority, We have his Majesty's Order, and the Broad-Seal, and thereupon sat down again; but somebody told him it was commonly reported they were depriv'd of their Privileges: he said, it was not so, if 'twas, he would forfeit his Head and his Estate: Upon that, they proceeding to swear Mr. *Wild*, the Burgesses gave another Shout, but not so big as the other; with that Alderman *Parker* went out, and, I think, cry'd, a

Riot, a Riot. They sat a little longer, and it was desired to send for Alderman *Parker* again: no, said they, he won't come; and so they whisper'd a little upon the Bench, and went all down the Street, and I went down the Hall with them, and in Street-Gate they met with Alderman *Parker*, and he was coming to the Hall again, and he turned back to the Mayor's, and I went to the Council-House; but I could hear nothing, only that afterwards at the Mayor's they called the Gentlemen, and swore them according to the New Charter.

L. C. J. Were you one of the Electors?

Parker. No, not I; I was not concerned on any side.

Mr. *Pollexfen.* Were any of the Defendants Mr. *Sacheverell* or Mr. *Gregory*, at the Shouting in the Hall?

Parker. Not that I know of.

Mr. *Farewell.* He says, my Lord, that the Mayor sent to Mr. *Sacheverell* and them to come from Church.

L. C. J. How do you know the Mayor sent to Mr. *Sacheverell*?

Parker. My Lord, they directed their Speech to the Persons that were there, I can't justly say to whom in particular.

L. C. J. It has been sworn they directed their Speech to Alderman *Edge*, and Serjeant *Bigland*.

Parker. They told it when Mr. *Sacheverell* was present, and so he went down with them.

Mr. *Pollexfen.* But this appears by the Evidence, that the Old Corporation is by the Name of the Mayor and Burgesses, but we know there were Aldermen since, and so it is according to Truth, as it is laid in the Information; but let them put in their New Charter. (Which was done, and read.)

Mr. *Pollexfen.* Is there not a Proviso in it, that the Mayor should not act till he be sworn?

L. C. J. Admit it be so, what then?

Mr. *Pollexfen.* Then it follows that we must be not guilty.

L. C. J. How so?

Mr. *Pollexfen.* It is plain, my Lord, that this Man should not take upon him the Office of Mayor till he has taken the Oaths? then suppose they take it that the Old Charter is gone, by this there is no new Mayor till he be actually sworn; then all these things being done before he was sworn, it cannot be that this was such an Assembly as was laid in the Information.

L. C. J. You mistake yourselves sadly, the Proclamation was after the swearing.

Mr. *Pollexfen.* No, no, my Lord, I am not mistaken in that.

L. C. J. *Reynolds*, Was not the Proclamation made after he was sworn?

Reynolds. I can't tell, my Lord.

L. C. J. Where is the Mayor, *Wild*? Upon your Oath, were you sworn before you gave direction to make Proclamation to depart or no?

Wild. I can't certainly tell, but I think the first Proclamation was made in the Council-House, that was before I was sworn; the Proclamation afterwards was after I was sworn.

Mr. *Holt.* Where was the Proclamation after you was sworn?

Wild. In the Hall.

L. C. J. Did Mr *Sacheverell* continue there after you was sworn?

Mr. Pollexfen. Good, my Lord, this I think is the Fact upon the Evidence: in the Council-House Mr. *Sacheverell*, and the greatest part of these Defendants were, and then they went on to the Election of *Greaves*; and they sent out to tell *Wild*, the former Mayor, when he was in the Hall, that *Greaves* was elected, and did desire him to come in to swear him, but he refused; but when this was done, he was not sworn; but upon this, there was the Shout of the People, A *Greaves*, A *Greaves*: All this was, as I think, before he was sworn.

L. C. J. The Mayor himself says he was sworn.

Wild. My Lord, I was just come into the Hall before the Messenger came in; but I told them they could make no New Election without me, nor at all, because of the New Charter.

Mr. Pollexfen. Then as to the Business of the Mace, I hope the Information will not hold to charge us, because then he was not Mayor.

L. C. J. That does not affect the Mayor but the Sheriffs, the Mace does not.

Mr. Pollexfen. But, my Lord, as this Information is laid, he says he was Mayor, and called an Assembly, and it was held before him, and these things were done; but this cannot be true, for by this very New Charter he must be sworn before he can act, and this tumultuous Proceeding, as they call it, and seizing upon the Mace was before he was sworn, and this Information supposes all the Fact was done while he was Mayor.

Mr. Holt. I think it does appear by *Wild's* own Oath, that he was not sworn when Proclamation was made in the Council-Chamber; and I think there was but one Proclamation made there, the next was made after, and that was in the Hall: Now, with Submission, that does not affect those that were in the Council-Chamber, because they did not hear the Proclamation; now the Information is laid, that they continued after the Proclamation; therefore we must leave it to your Lordship and the Jury.

L. C. J. Well then, Gentlemen of the Jury, this Case has held long, but the Question is very short: Here is an Information exhibited by Mr. Attorney-General against the Defendants, which by particular Names are by some of the Witnesses sworn to be present when the Occasion of this Fact did arise.

Mr. Coombs. Pray, my Lord, give me your favour, here is one of the Defendants says he has a Witness to prove he was not there; it's Mr. *Turpin*.

L. C. J. *Reynolds*, upon your Oath, did you see *Turpin* there.

Reynolds. Yes, I did.

Mr. Just. Withens. Mr. Mayor, did you see him there?

Wild. Yes, I saw him in the Hall

Mr. Just. Withens. Was he busy in the Hall?

Reynolds. Yes, he was shaking his Hat and shouting.

L. C. J. Well now where is your Witness?

Mr. Pollexfen. Swear Mr *Flaits*. (*Which was done.*) What say you, was Mr. *Turpin* there?

Flaits. He was in the Hall that Day, but not above a Quarter of an Hour.

L. C. J. You were there, it seems, pray had you a Vote there?

Flaits. I went to speak with Mr. *Turpin*.

Mr. Pollexfen. Was he in the Hall when the Mayor came into the Hall?

Flaits. I never saw him there while the Mayor was there.

Mr. Pollexfen. I pray swear Mr. *Holt*. (*Which was done.*) Pray was Mr. *Barker* either in the Hall, or in the Council-Chamber that Day?

Holt. No, I was at work with him that Day from six of the Clock in the Morning till eight at Night.

L. C. J. And he was not out all the time?

Holt. No, he was not.

L. C. J. Well, have you done, Gentlemen?

Mr. Sacheverell. My Lord, here is Mr. Serjeant *Bigland*, I desire he may be examined.

L. C. J. Ay, with all my Heart. Swear him. (*Which was done.*)

Mr. Pollexfen. Mr. Serj. *Bigland*, I think you were down at the Election of this Mayor upon *Michaelmas* was Twelve-month; will you be pleased to tell the Court and the Jury what was done then.

Serj. Bigland. I will give you as short an account as I can. I was in my House when the Mayor and Aldermen sent to me to desire me to give my Attendance: They sent the Two Sheriffs to me, and I did attend, and staid an Hour or two, and went to Church, according to the usual Course; and when we had been there a while, Alderman *Rippon* came to me, and desired me that I would go down with them to the Hall: accordingly I did go down, and there was Mr. *Wild* and several Aldermen sat there; so then they proceeded to that that was done towards an Election.

Mr. Lovell. Pray, Sir, how was their Carriage during the time you was there?

Serj. Bigland. I sat then in the Council-Chamber, I think I sat next the Mayor, and Mr. *Edge*, I think, was next to me, and I saw nothing of Disorder at that time that I took notice of.

Mr. Lovell. Was there any Proclamation made for People to depart?

Serj. Bigland. Upon the Oath that I have taken, I don't remember it.

L. C. J. Pray did the Mayor ask your Advice about any thing?

Serj. Bigland. Yes, my Lord, he did; and I said to him, In what capacity, Sir, do you desire my Counsel, as Recorder, or how? and so he said no more to that: But he said there was a new Charter, but whether he desired me to read it or no, I can't tell.

L. C. J. Was it opened?

Serj. Bigland. Some part of it was opened.

L. C. J. Upon your Oath, did you hear Mr. *Sacheverell* speak to the Mayor?

Serj. Bigland. No, my Lord, I do not remember any such thing.

L. C. J. Pray let me ask you, you have been, before this, at Elections of Mayors of this Town?

Serj. Bigland. I was Deputy-Recorder in my Lord Marquess of *Dorchester's* time; as soon as he was dead, I was chosen Recorder; and then I was at one Election at another Day, when they do nominate, which is before *Michaelmas*.

Mr. Holt. Pray, Sir, was there any Disturbance?

Serj. Bigland. None that I saw.

L. C. J. Was there any Shouting that you heard?

Serj. Bigland. I was not in the Hall, my Lord; in the Council-Chamber there was none.

Mr. Just. Holloway. Did you hear any body cry, A Greaves, a Greaves?

Serj. Bigland. I heard a Noise in the Hall, but what it was particularly, I can't say.

Mr. Holt. How long did you stay in the Council-Chamber?

Serj. Bigland. I believe I staid as long as most of the Company was there.

L. C. J. Did you stay while Greaves was sworn?

Serj. Bigland. My Lord, I believe I was there then.

L. C. J. Pray what Authority had you to swear Greaves?

Serj. Bigland. All that I know of it was, he was nominated at August according to Custom.

L. C. J. But what occasion had you to be present then, and what Authority had you to swear him? You are a Gentleman of the Long-Robe, and should have known better.

Serj. Bigland. Truly, my Lord, he was chosen by those that had a Right to chuse in August before.

L. C. J. But what Authority had you to swear him? Why did not you send for somebody out of the Street to swear him? I reckon it to be worse in those People that understand the Law, than in others, that they should be present at such things, and not advise People better. Here is Serjeant Bigland and Mr. Edge have mighty squeamish Stomachs as to the reading of the Charter, and nice Questions; Do you ask me as Recorder, or as Counsel? But they would have done well to advise People to meddle with their own Business; let my Brother take that along with him.

Mr. Pollexfen. Pray, swear Mr. Edge. (Which was done.)

Mr. Edge. My Lord, I did not swear him.

Mr. Just. Holloway. Pray who took the Poll?

Mr. Edge. I took the Poll.

Mr. Just. Withens. Pray did you ever know a Mayor sworn when the Old Mayor was not by?

Mr. Edge. I did tell them so. Mr. Sacheverell and the other Gentlemen would have gotten me to poll in the Vestry in the Absence of the Mayor, but I told them I would not have any such thing done: and when the Old Mayor went out of the Council-Chamber, they would have had me read the Oath. Said I, Gentlemen, I will not swear him but in the Mayor's Presence.

Mr. Ward. Did not Mr. Sacheverell head them all the Day?

Mr. Edge. He was among us all the Day.

Mr. Ward. Did he peruse the Charter?

Mr. Edge. I can't tell that.

L. C. J. They that once begin first to trouble the Water, seldom catch the Fish.

Mr. Hutchinson. My Lord, I desire I may ask Mr. Edge one Question, Whether I was not sent to the Mayor, and did not go my self?

Mr. Edge. Upon the best of my knowledge I did not send you to the Mayor.

L. C. J. I thought, Mr. Hutchinson, you had been a Man of greater Quality than to go of his Errands. Have you done, Gentlemen?

Mr. Holt. Yes, my Lord.

L. C. J. Then, Gentlemen, as I said, this is an Information against several Persons, you shall have the Names of them deliver'd to you, and it is for a Riot, an unlawful Assembly in Nottingham; and tho there are two times that have been spoken of, and two Places in the Evidence, yet I must tell you, That that Part that does affect these Persons is only that which does relate to Michaelmas-Day, and for the other part, about the Cross, is not compriz'd in this Information; and Persons that were put at the Cross, but that were not put at the Hall, are not concerned in this Information. But all, it appears, were concerned, except one, which is Humphry Barker; now tho he was hopping and jumping upon the Cross, yet not being present upon Michaelmas-Day, he is not within this Information.

And now, Gentlemen, because the Cause has held something long, I shall be the shorter: Only, for Example sake, there are some things that ought to be taken notice of. The Right of the Charters, whether it be the New, or the Old Charter that is to prevail in point of Law, is not a Question; that is not to be determined in this Cause one way or another, for they have a methodical Way to have that Point determined, and should not have proceeded in the Way they went; and 'tis pretty well known they have proceeded in that way too, for we know there are Scire Facias's and Quo Warranto's depending between them. They would have done well to have pursued the legal Course only; for I hope we shall never live to see that Law prevail in England which is called Club-Law: Let the Right be never so much on their Side, they ought to take a rightful Way to observe it, and not by any unlawful Means.

Another thing, Gentlemen, is this; they insist upon it, that they could not be guilty upon this Information, because the Mayor was not sworn. It is plain they are guilty of a very great Crime, because till another was chosen, he was Mayor. They say their Mayor was sworn regularly according to the Old Charter; but according as the Evidence has been given, they could not swear him by any Pretence whatsoever, and whosoever administer'd the Oath to him, were guilty of a very great fault, as well as he that took it.

Now, Gentlemen, the Law is so direct in Point, that they needed not to have gather'd themselves into an Assembly about this Matter; for if he that they pretend to be Mayor had been rightfully chosen Mayor, they had a regular Course to have brought him into this Office; for they might have come, and of right have demanded a Mandamus to admit and swear him into the Office, and so he must have been sworn Mayor, unless they had shew'd good Cause to the contrary.

Gentlemen, there is no Right but has a lawful Remedy, therefore it had been much better for these Gentlemen, if they have a Right, to have gone in a rightful way to obtain that Right.

Now this being premised, I must tell you, it is very unfortunate, concern it whom it will, and very strange to me, that Men in Matters of Government, where they have nothing to do, that are Country Gentlemen, that never came to interpose in any Election before, that they should come to busy themselves, and head Peo-

ple where they have nothing to do; nay, they have no pretence of Precedent, for it was never practised before.

If in case it was only to satisfy their Curiosity to see the manner of the Election, they had been only there, and patient and quiet, it had been something; but to be there, and to demand People to be Sworn, and calling People to look to the Books, and heading the Mob, that does not become any Man, let him be as great as he pleases: The greater the Man, the greater his Name; and the greater his Influence, the greater is his Offence, and the greater ought to be his Punishment.

Then, Gentlemen, to have those other Persons to come there, Mr. *Hutchinson* and Mr. *Gregory*, and they must be demanding of the Mayor to come and swear; pray what have these People to do there?

Then, Gentlemen, you see the Consequences of it, it was come to that height in the midst of this great and populous Town of *Nottingham*, that nothing but flinging up Hats, and hollering, and shouting, and making all the Disturbance and Interruption in the World; nay, insomuch, that you may observe by one of the Witnesses for the King, the very Seal was broken off from the New Charter. Nay, to that Height they were grown, that whereas there was a Mace, that is an Ensign that doth belong to the Sheriff, they came and ravished it away, and force it from him, and take it away; whether he would or no, and bid him go about his Business, he had nothing to do there: So that here are People without any Authority chuse a Mayor, that Mayor must call and assemble together a Meeting of all sorts of People, and all sorts of Disorders must be committed under pretence of this Authority; which is setting up a kind of a Commonwealth, I can call it no better; and had it been such a general Assembly not with an Intent for doing such one particular purpose, it had been High-Treason. For if People once think to obtain the Rights they pretend to in a mutinous manner, that in the general is High-Treason, or at least so near, I'll assure you it is pretty hard to distinguish between them.

Now, Gentlemen, as to the Evidence, I must tell you the Witnesses do swear, that all these Persons were present, Abettors, and Assistants in this Matter; the Man that headed the Party had no manner of Concern among them: And surely, after you have heard all this Matter, if ever there was a Riot prov'd in this World, this Riot is plainly prov'd upon every one of these Men except *Barker*.

But whereas they pretend on the other side, and they would have you to believe that the Sheriff was not Sheriff till he was sworn, surely he was Sheriff till another was sworn, and if you allow him to be Sheriff, then they ought not to take his Mace from him: if he was the Sheriff *de facto*, in possession of the Ensign of this Office, that is enough; for the Right is not to be determin'd in such a way as this.

The next thing they pretend to is this, alack-a-day there was no Proclamation made till after he was sworn Mayor by the New Charter, when before he came first into the Common-Council, the Hubbub was there begun, and the Mayor told them, Gentlemen, you have nothing here to do, pray go about your Business;

and when Mr. *Sacheverell* press'd him, he ordered Proclamation for all Persons that had nothing to do, to be gone. Then afterwards he comes into the Hall, there is sworn in the Hall, and takes his Oath according to the New Charter, and still after Proclamation made; then the same Persons continue still in the same Place, so that there is no Obedience given either to the Old Authority or the New: and instead of going away upon the Proclamation, that made them the more violent; for you find by Mr. *Edge*, the last Witness, that even to the time of the swearing, Mr. *Sacheverell* continued very earnest to have him sworn, tho Mr. *Sacheverell* was shewn the New Charter, and they could not even by the Old One proceed to swear him in the Absence of the Old Mayor, and the Old Mayor was absent.

There are indeed several Gentlemen that are Witnesses for the Defendants, that happen'd to be there at that time; there is Sir *Thomas Parkyns*, and he being ask'd whether he heard any Noise at all, why truly he forgot that there was ever a Word spoken; and tho other Persons, even some of their own Witnesses, did hear a Noise, yet he heard none, but all was a wonderful regular Thing: so that the Witnesses that they themselves call'd, interfere among themselves, some of them say they did hear a Noise and Shouting, yet such is the Unhappiness of some People, that they can't hear if they have no mind to it. Then here is Mr. *Thinn*, a Gentleman that came by accident, and he can give no good Account of the Matter: Some Noise he did hear, but he came but as a Stranger, and was not concern'd one way or other, as he says.

You have heard several other Witnesses, that give an account there was a Noise, but they cannot tell whether the Charter was produc'd, or not produc'd; and they cannot tell one word that was said of a *Greaves*, or no New Charter: And one particular Man, I have forgot his Name, he could not by any means remember any thing of the Matter; tho he was there all the while, he could not tell what Mr. *Sacheverell* said, he did hear him, but not what he said.

This, Gentlemen, is the Substance of the Evidence: I can only say this to you, you must believe all the Witnesses for the King actually perjur'd unless you believe their Evidence; and for what others say, that they did not hear such and such Things, yet all these other People did hear; and tho the Witnesses for the Defendants did not see, the others did see; and you must find these Men without any Evidence that does appear, to be guilty of wilful Perjury, or else every Person that you have had in charge, except *Humphry Barker*, is guilty of the Riot whereof they have been informed against.

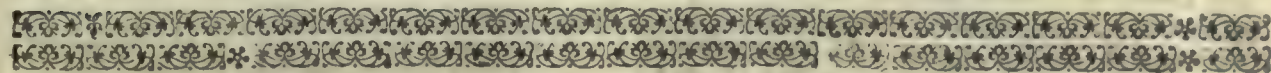
Then the Jury withdrew, and the Court brake up, and a private Verdict being deliver'd in the Night, the next Morning it was given in open Court, where they found Twenty of the Twenty One Defendants that were in the Issue, Guilty of the Offence and Misdemeanour in the Information; and the other Defendant, Humphry Barker, Not Guilty.

In *Trinity-Term* following, the Defendants, who had been found Guilty, were Sentenc'd as follows.

William Sacheverell, fined ——— 500 Marks.
George Gregory, ——— 300
Charles Hutchinson, ——— 200
John Greaves, ——— 20 Nobles.
William Greaves, ——— 20 Marks.
Samuel Richards, ——— 20
Robert Green, ——— 20
Francis Salmon, ——— 5 Nobles.
Arthur Riccards, ——— 20 Marks.
Ralph Bennet, ——— 20 Nobles.
John Sherwin, ——— 100 Marks.
William Wilson, ——— 100

Samuel Smith, ——— 20 Nobles.
Thomas Trigg, ——— 20 Marks.
Richard Smith, ———
John Hoe, ——— 20 Nobles.
William Smith, ——— 20
Joseph Turpin, ——— 100 Marks.
Nathaniel Charnel, ——— 100
Joseph Astlin, ——— 5

And that the several Defendants do give Security for their Good Behaviour for a Twelve-month.



The CASE of the CORPORATION of Nottingham, as it was stated by the late William Sacheverell of Barton, Esq;

THE Town of *Nottingham* hath always claimed to have been a Borough by Prescription: And it cannot well be doubted that it hath been so; for that it appears by *Doomsday-Book*, in the time of King *William* the First, that the Burgesses of *Nottingham* then had divers Houses and Parcels of Land in *Nottingham*; and the Burgesses of that Town were One Hundred and Seventy Three in Number in the Time of *Edward* the Confessor.

That Town hath also always claimed to have been a Corporation by Prescription: And it is hard to believe it otherwise; because no Charter of its first incorporating could yet be found; and the Charters granted to the Burgesses of that Town by King *Henry* the Second and King *John*, do imply them as a Body Corporate before those Times.

Yet it appears by the Charter of King *Edward* the First, that there was no Mayor of that Town before his Reign; for that he then was pleas'd to grant the Burgesses of that Town a Privilege, that they then after should chuse a Mayor out of themselves annually; and some of their former Charters, as well as that, shew that for some time before they had only Bailiffs of that Town. From *Edward* the First's Time, under Mayor and Bailiffs the Town continued till *Henry* the sixth's Time, who was pleas'd to make it a County, and grant them Sheriffs instead of Bailiffs, and the Privilege of chusing out of themselves Seven Aldermen, and one of them annually to be Mayor; and that the Aldermen (as long as they so continued) should be Justices of the Peace within that Town; and moreover, that the Burgesses of the Town of *Nottingham* should for ever be a Body Corporate by the Name of Mayor and Burgesses. Nor hath any Charter since, nor any By-Law that can be heard of, given the Aldermen any more Power than they had by that Charter, which was then nothing more than every Burgess of that Town had, except being Justices of the Peace, and wearing Gowns and Hoods. So that the Aldermen, tho of late they have taken upon

them to sit as Members of the Council of that Town, can neither prescribe to that Power, because there were no Aldermen in that Town before King *Henry* the sixth's Days; nor can they claim to be of the Council of that Town by force of any Charter, for no Charter either in *Henry* the sixth's Time, or since, hath granted them any such Authority, nor did they pretend to sit in that Council by virtue of any By-Law of that Town, or ever shewed any such By-Law, tho their Right of sitting and voting there hath been denied in the Council by Members thereof.

The Aldermen indeed in King *James*'s Time began, tho they had no Right so to do, to take upon them to be part of the Council, and to intermeddle in the Town's Concerns, and to encroach so far upon the Burgesses, without their Consent, as to pretend to have a Right in the setting and disposing of the Corporation-Lands, and of the Bridge-Lands, and School-Lands: But the Burgesses were so far from consenting to their having of any such Power or Authority, that they in the Year 1605, by their Petition to the Lords of the Council-Table, complained of the Encroachments of the Aldermen, and prayed Redress. Upon which the Lords of the Council referred the Examination of the Matters in Controversy to the Judges of Assize that went that Circuit; to the end they might be certified and better inform'd by the said Justices of such Course, as upon good Advice and Deliberation they should find in their Judgments agreeable to Law, and meet to be set down and ordered in that behalf. Who accordingly enter'd into Consideration of the Complaints on both sides, and advised with the rest of the Judges touching the Charter granted to that Corporation; and all other Matters meet to be considered of concerning the Matters in Controversy; and return'd Certificates of their Opinions of such Order of Agreement as they thought fit and convenient to be observed and established, according to Law and Justice, for the publick Good and Government of the said Town. Wherefore the Mayor and the Parties indifferently sent up to solicit a peaceful end of those Controversies, having taken knowledge,

did consent thereto; and thereupon, by Consent of the said Parties, it was, against other things, order'd, That there should be a Council in that Town of Twenty-Four Persons only, out of which the Aldermen for the Time being should always be excepted; and that the said Council, with the Mayor, or the greater part of them being at such Assembly, without any other of the said Corporation, should set and let the Town-Lands, Bridge-Lands, and School-Lands, taking upon them the Chamberlains, Bridge-Masters, and School-Wardens respectively, as their Places for the Lands within their several Offices should require, as by the said Order and Agreement, which the Burgeses have ready to produce when occasion shall require, will plainly appear. So that now all Pretence of the Aldermen being of the Council, or having any thing to do with the Corporation-Lands, the School-Lands, or the Bridge-Lands, was adjudged against both by the Judges and the Lords of the Privy-Council; and accordingly was wholly laid aside, till of late.

The Case standing thus, and the Mayor, Aldermen, and Burgeses of that Corporation being by their Burgeses-Oath particularly obliged that the Franchises of the said Town they will maintain, sustain with their Bodies, their Goods, and their Chattels to their Power, and them not let neither for Love nor Dread, without Regard of any Man, but maintain the Laws, good Customs, and Franchises of that Town: and divers Burgeses of that Town being informed, about the beginning of *Easter-Term* last, that the Mayor and some of the Aldermen of that Town had a Design to surrender the Charters of that Corporation, it was scarce credited by any of the Burgeses, that the Mayor or almost any of the Aldermen would consent to do a thing so directly contrary to their Burgeses-Oath. Yet divers Burgeses of the said Town considering they had taken the said Oath for preserving the Rights of the Town, thought it but convenient, for the Prevention of the ill Consequences which they well knew must befall that Town, if their Charters should be delivered up, and a New Charter taken without the Privy, Consent, or Hearing of the Burgeses of that Town, to order Four Caveats to be enter'd: And accordingly in *Easter-Term* ordered Two to be enter'd at the Lord-Chancellor's, and Two at the Attorney-General's. One of which Caveats in each Place was against passing any New Charter to the Town of *Nottingham* without the Privy, Consent, or Hearing of the Burgeses of that Town; the other against the accepting of any Surrender of any Charter of that Town without the like Privy, Consent, and Hearing. Which said Caveats were enter'd accordingly.

And so the Matter rested till the 25th of *July* last: But upon that Day the Mayor called a Council without giving Notice what the Business would be, unless it was to those of his own Party and Confederacy. But that he had Thoughts of surrendring when he came to the Hall, will be pretty manifest from what he did after the Question was put to the Vote, and the Poll taken: There appeared at the Hall the Mayor and Five Aldermen, and Two and Twenty of the Council, and Mr. *William Toplady*, (who the last Year, by Order of Mr. *Gervas*

Rippon, the then Mayor, was sworn in as an Alderman, tho Mr. *Sherwin*, who stood in competition with Mr. *Toplady*, had near twice as many Votes; upon which Mr. *Sherwin* brought his *Mandamus*, and the Cause is yet undecided in the Court of *King's-Bench*.) After some Business in the Hall was dispatch'd, the Mayor caused a Question to be put for surrendring of the Charters of that Town; and tho it was declared by some of the Council, That the Aldermen had no Right to vote therein, yet the Mayor caused a Poll to be taken, and admitted them and Mr. *Toplady* as Voters, save only that Mr. Alderman *Edge* suspended his Vote, and gave it neither way. The rest voted as followeth, *viz.*

For Surrendring the Charter.

Gervas Wild, Mayor,
Christopher Hall, Alderman,
John Parker, Alderman,
Gervas Rippon, Alderman,
William Toplady, Alderman, *de facto*,
William Mabbot,
Edward Mabbot,
William Petty,
Robert Wortley,
Hugh Walker,
William Woolhouse,
John Whitby,
Thomas Lee,
John Urwin.

Against Surrendring the Charter.

William Greaves, Alderman,
John Greaves,
Samuel Richards, } Coroners:
Robert Green, Sheriff,
Huntingdon Eyre,
Roger Ryley,
Thomas Walker,
Richard Smith,
Francis Salmon,
Ralph Bennet,
John Sherwin,
Samuel Smith,
Thomas Trigg,
William Smith.

So that if the Aldermen should be admitted to have a Right to vote in the Council, yet here was no Majority for the Surrender. But on the contrary, the Aldermen having no Colour of Right, either by Prescription, or Charter, or otherwise, for the Reasons aforesaid, to be of the Council; it is plain, there was only the Mayor and Nine of the Council for the Surrender, and Thirteen of the Council against it; and consequently that the greater Part of the Council voted against the Surrender. Nor can it be imagined that the Council of that Corporation (being neither settled by Prescription, nor vested in by Charter, but only brought in by consent and choice of all the Burgeses, only for the better Managery of the Revenues of the Corporation, and Dispatch of some other ordinary Affairs, and not intrusted with many Rights of that Town,) can pretend to any Power of surrendring the Charters and Liberties of that Town, more than any small Number of Burgeses. So that how this Surrender

of Fourteen Men against the Vote of the greater Number of the Council, and Will of almost all the Burgesſes, ſhould be good in Law, is not yet well underſtood. And if the putting of the Town-Seal to an Inſtrument without the Conſent of the Body Corporate, ſhould be ſaid to be ſufficient in Law to give away the Lands and Rights of any Body Corporate, then any Thief that can but ſteal the Corporation-Seal, will have it in his Power, tho he be no Member of the Corporation, to give up the Lands and Liberties thereof; which indeed would be a ſtrange Piece of Law and Juſtice to be owned in any Nation that pretends to Senſe and Honesty. Yet Mr. Mayor, all this notwithstanding, did, as ſoon as the ſaid Vote was over, pull out of his Pocket an Inſtrument in Writing, purporting a Surrender of their Charters, and cauſed the Town-Seal to be affixed thereto without any further Vote. The Draught of the Inſtrument, as it is commonly ſaid, was firſt made at *London*, and thence tranſmitted to an Honourable Perſon in *Nottinghamſhire*, and by his Order convey'd to Mr. Mayor. But this Report, if it were not for one thing, which it's believed will be proved if there be occaſion, might ſeem not well grounded, becauſe, as it afterwards will appear, this Surrender was not thought ſufficient, and ſo another was ſealed; which yet one of the Aldermen would have to be the very ſame, Word for Word, with that which was firſt ſent up ſealed to *London*; as if twice ſealing would make that effectual, which was not ſo by being once ſealed. But it is likely he had not heard what is commonly reported, and perhaps will be proved when time ſerves, that the firſt Inſtrument for ſurrendering that was ſealed, was drawn ſo as to make a Surrender, by the Right Honourable the Earl of *Hallifax* and Sir *Leoline Jenkins*.

After the ſaid Vote touching the intended Surrender was over, many of the Burgeſſes of *Nottingham*, conſidering their Oath, and that there were many Cuſtoms and Privileges in reference, to trade, which the Burgeſſes of the Corporation held only by Cuſtom and Preſcription; and that as ſome of the Lands which that Corporation held was by Grant from ſome of his Maſteſty's Royal Predeceſſors, ſo moſt of their Town-lands (which are of great annual Value) were given by private Perſons; thought fit to aſk Advice of Counſel in ſeveral Points.

The firſt Queſtion propoſed to Counſel was, Whether if the Charters were ſurrender'd, and a New one taken, that New Grant would not preſerve the Lands to the Corporation? To which Counſel reply'd, that if the Charters of any Body Corporate were lawfully ſurrender'd, then the Corporation that held by ſuch Charters was diſſolved; and that if they had any Lands which had been given to that Corporation, the Heirs of thoſe that gave thoſe Lands would, as ſoon as ſuch Surrender was completed, be entitled to the Lands, and recover the ſame. And they ſaid, Thoſe Lands which had been given to ſuch Corporation by any of his Maſteſty's Predeceſſors, his Maſteſty might, if he ſo pleaſed, grant them again to the Corporation; but no New Charter of his could, as they conceived, give the Corporation any Title to thoſe Lands which had been given by private Perſons, or enable the Corporation to keep them from the Heirs of thoſe that

gave them, in caſe ſuch Surrender ſhould be. And ſo, they ſay, it was reſolved by the Judges when the Monasteries were ſurrender'd, or diſſolv'd; and that therefore a ſpecial Act of Parliament was adviſed to be made, and accordingly was made, to veſt thoſe Lands in the King, there being no other way to hinder them from going to the Heirs of thoſe that gave them, when by Surrender they had diſſolved thoſe Corporations.

The Second Queſtion propoſed was, Whether if the Mayor and Burgeſſes of a Corporation claim any Right of Common by Cuſtom or Preſcription upon other Mens Lands, as is in the Caſe of *Stafford*, *Derby*, *Coventry*, and many other Corporations, they can ſurrender their Charters, and yet by any New Charter to be obtained from his Maſteſty, or by any Means, preſerve their Right of Common? To which it was answered, That if the Mayors and Burgeſſes of any Corporation claim ſuch Common, and afterwards make ſuch Surrender, and ſo diſſolve the Body Corporate, their Preſcription for Common is deſtroy'd; and tho his Maſteſty ſhould pleaſe to incorporate them anew, yet their Title to the Common will, as they conceive, be totally loſt.

The Third Queſtion was, Whether the Town of *Nottingham*, being one of the antienteſt Corporations of *England*, and free of Tolls in moſt Places, ſhould have the ſame Privilege if they ſurrender'd their Charters? To which it was answer'd, That if the Town of *Nottingham* ſurrender'd their Charters, and ſo diſſolved their Corporation, then in all other Places that had formerly Tolls granted them, and kept their Old Charters, they ſhould have Toll of *Nottingham* Men, and all ſuch Corporations as ſhall ſo ſurrender, notwithstanding any New Charter that can be granted them.

The laſt Queſtion propounded was, Whether if the Mayor, or any other Members of a Corporation do, without the Conſent of the major part of the Body Corporate, occaſion the Surrender of the Charters of that Corporation, the particular Perſons that received Damage by that Surrender, may not have an Action at Law for Recovery of their Damages? To which it was answered, That it was no queſtion but that every particular Perſon that ſhould be any ways damaged by ſuch Surrender, might by Action at Common Law recover all his Damages of thoſe Perſons that occaſioned the Surrender. Yet it was thought adviſeable, as the moſt proper Way for preventing the Surrendering of the Charters, and of thoſe Inconveniencies and Suits which might be occaſioned thereby, or by taking of a New Charter, if obtained by the Mayor and a few of the Burgeſſes without the Privy, Conſent, or Hearing of the reſt, that the major part of the Burgeſſes ſhould preſent Mr. Mayor with their Senſe of his Proceedings, and declare their Diſſent from any Surrender. And accordingly a Writing was drawn, and ſigned by betwixt Three and Four Hundred of the Burgeſſes; and then a fair Copy made and examined with the Original, and ſo with all the Burgeſſes Names to it that had ſubſcribed, was by ſeveral of the Burgeſſes, and in Preſence of ſeveral Gentlemen of Quality that were no Burgeſſes, preſented to the Mayor upon the Fourth Day of *Auguſt*, as the Senſe of moſt of the

the Burgesses of that Town. The Writing so presented was as followeth, viz.

To Mr. Gervas Wild, Mayor of Nottingham.

SIR,
WE whose Names are hereunto subscribed, being Burgesses of the Town of Nottingham, and knowing or understanding that you and Thirteen more of the Corporation have, without the Consent of the Burgesses of this Town, and against their Will, taken upon you to agree to the Surrender of the Charters, Liberties, and Franchises of this Corporation, and to cause the Corporation-Seal to be affixed to an Instrument for making of such Surrender; and being by our Burgesses-Oath obliged to preserve, as far as in us lies, all the Rights and Privileges of this Corporation; and considering what great Damage it must necessarily be to the Corporation in general, and to us and every other particular Burgess of the Corporation, if the Charters, Liberties, and Franchises should be so surrendered, have thought ourselves obliged, in order to prevent so great an Evil, to signify these our Thoughts of what you have done, and are about to do; and that many of your Liberties and Franchises, which are only held by Custom, and not by Charter, will certainly be lost, if you make such Surrender as you have agreed to. We do therefore hereby declare our Dissent from those your Proceedings; and that we neither do nor shall consent, or have consented, that any Surrender of any Charter, Liberty, Franchise, or Privilege of the Corporation of Nottingham should be made either by you or any Members of this Corporation, or other Person or Persons whatsoever; and that we will by all lawful Ways and Means oppose and hinder the Surrendering or Vacating of any of the Charters, Rights, Liberties, or Privileges of this Corporation; and that in case you occasion the Surrender of any of the Charters, Rights, Liberties, or Privileges of this Corporation, we shall expect from you such Satisfaction as the Law will allow us.

The Burgesses were also advised to order, and accordingly did order Caveats in the Names of some particular Burgesses, on behalf of themselves and most of the Burgesses of the Town, to be enter'd at the Lord Chancellor's, the Lord Privy-Seal's, and in the Signet-Office, against Surrendering of any of the Charters of that Town without the Privy, Consent, and Hearing of the said Burgesses, and against passing of any New Charter to that Town without like Privy, Consent, and Hearing. And the Burgesses have had an Account from their Agent at London, that he had enter'd such Caveats at the Lord Chancellor's, and in the Offices of the Lord Conway and Sir Leoline Jenkins, it being commonly reported that the Lord Privy-Seal had delivered up the Privy-Seal to the said Sir Leoline.

The Burgesses were further advised to petition the Lord Chancellor to be heard before any Surrender of their Charters should be accepted, or any New Charter to that Town should pass the Broad-Seal; and accordingly a Petition was drawn and signed by above Three Hundred and Sixty Burgesses, and a Copy therefore fairly engrossed, with the Names of the Burgesses that had subscribed, was sent and presented to the Lord Chancellor at Bath on

Thursday the Tenth of this Instant August. Which Petition was in these Words following, viz.

To the Right Honourable the Lord High Chancellor of England, the Humble Petition of the Burgesses of the Town of Nottingham, whose Names are hereunto subscribed, on behalf of themselves and most of the Burgesses of that Town.

Most Humbly sheweth,

THAT the Town of Nottingham being a Borough by Prescription, and an antient Corporation; and the Burgesses of that Town, (who are a Body Corporate by the Name of Mayor and Burgesses) having many Liberties, Privileges, Rights, and Franchises, which they hold by Grant and Confirmation from his Majesty and his Royal Predecessors; and many other Rights, Liberties, and Privileges which they hold by Custom or Prescription; and divers Persons having given Lands to that Corporation of a very great annual Value: The present Mayor, with three or four of the Aldermen, and nine other Burgesses of that Corporation, have declared they design to take a New Charter, and have taken upon them, without the Consent of your Petitioners, and most of the Burgesses of that Town, to agree to the Surrender of the Charters of that Corporation; and have taken the Town-Seal, and affixed it to an Instrument, designing thereby to make an actual and absolute Surrender of all the said Charters; which if they have power to effect, it will (as your Petitioners are advised) not only dissolve the Corporation, deprive your Petitioners and other Burgesses of that Town of many Rights, Liberties, and Privileges which they held by Custom and Prescription, cause all the Lands given to that Corporation to revert to the Heirs of the Donors, and disinherit your Petitioners and other Burgesses of that Town of all the said Lands, Liberties, and Privileges, which both they and their Predecessors, as Burgesses of that Town, have inherited, and ought to enjoy, but also subject your Petitioners and their Freeholds against their Will to such Services, Damages, and great Inconveniences, as may be brought upon them by the Contrivances of the said Mayor and Aldermen, in case they can obtain a New Charter to pass the Broad-Seal without the Privy, Consent, or Hearing of your Petitioners.

Your Petitioners therefore humbly pray your Lordship to take into Consideration the aforesaid Mischiefs, Damages, and Inconveniences that are like to befall your Petitioners and other Burgesses of that Town, in case such Surrender should be made and accepted, and a New Charter taken by the said Mayor and Aldermen: And that your Lordship would please, before such Surrender be accepted, or any New Charter for that Town be passed the Broad-Seal, to grant your Petitioners a Day of Hearing, and to order thereupon as shall be agreeable to Equity and Justice.

And your Petitioners shall ever pray, &c.

The Petition being delivered as aforesaid, and Mr. Mayor having been acquainted in manner aforesaid, by the Generality of the Burgesses, that they neither had consented, nor should consent to a Surrender of any of the Charters, Rights, or Liberties of the Town, and the Burgesses having been advised by Counsel that no Instrument for making a Surrender of

of the Charters to the Earl of *Hallifax* and Sir *Leoline Jenkyns* could be effectual in Law; it was hoped that there would not have been any further Progress in the Business, at least before the Burgesses were heard upon their Caveats or Petitions. And it was taken for granted, that no new Instrument in order to any Surrender could be made and sealed without calling together the Council of that Town; because, by Custom of that Town, the Town-Seal hath always used to be kept under the Custody of three Locks and Keys, and not taken out but in Council; and those three Keys kept by three several Persons, for better preventing of any indirect Use of the Seal. But contrary to the Burgesses Expectation, and against all antient Usage, Mr. Mayor (having, as he said, received Advice from *London* that the Instrument he had sent up for surrendering the Charters was not sufficient) did on *Saturday* the Twelfth of *August* require of the Senior Coroner to deliver him his Key; which the Coroner refusing to do, (unless, according to the Custom of the Town, a Council was call'd, and should order such Delivery) it seems Mr. Mayor found another way to come by the Seal, if that be true which was signified in the Publick Prints that came down to *Nottingham* on the Nineteenth of *August*, viz. *That upon the Fourteenth*

of *August* a Surrender of *Nottingham Charters* was made to his Majesty. And there is one thing which hath happened since, which gives a shrewd Light what Mr. Mayor did on that Twelfth of *August*, without so much as summoning a Council; for the Party who by Mr. Mayor's Command, as he saith, did that Day force open the Lock to which the Coroner's Key belonged, hath since confessed the Fact. So that now if it should hereafter appear to be true, as those Prints seem to intimate, That any Instrument for surrendering of *Nottingham Charters* to his Majesty, was presented to his Majesty on the Fourteenth of *August*, it will scarce be a Question, by what means, or how lawfully Mr. Mayor came by the Seal, or how valid such Surrender is like to be.

This is the true Case of the Burgesses of *Nottingham*, who are ready to make good every Matter of Fact, as herein stated, whenever there shall be occasion; and doubt not but to prove it, if they may either be heard upon their Petition or Caveats; and however, question not but by the Assistance of the Courts of Justice they shall still preserve their Rights, notwithstanding all these Endeavours that have been used to give up their Charters and Liberties.



*The Trial of JOSEPH HAYES * at the King's Bench for High-Treason, in corresponding with Sir Thomas Armstrong, an Outlaw for High-Treason. Nov. 21. 1684. Mich. 36. Car. II.*



R. Hayes was brought by *Habeas Corpus*, upon the 3d of *November*, 1684. from the Gate-house, and was arraigned upon an Indictment to this Effect, viz.

That he being a false Traitor against the King, &c. the 31st of August, in the 35th Year of the King, knowing Sir Thomas Armstrong to have conspired the Death of the King, and to have fled for the same, did traitorously relieve, comfort, and maintain him; and for his Relief and Maintenance, did pay the Sum of 150 l. against the Duty of his Allegiance, &c. To this he pleaded Not Guilty.

Upon the 21st of *November*, 1684. He was brought to Trial, before the Lord Chief Justice *Jefferys*, Judge *Holloway* Judge *Withens*, and Judge *Walcor*; and the Jury being called, he challenged the following Persons,

Sir Thomas Griffith,
Richard Ellis,
Thomas Langham,
Henry Whistler,
Nicholas Smith,

Thomas Soper,
Thomas Passenger,
Henry Minchard,
Peter Jones,
William Crowch,

Peter Devet,
Henry Lodes,
William Fownes,
Charles Gregory,
William Peele,
Richard Weedon,
Thomas Pory,
Thomas Piercehouse,
Richard Burden,
John George,
John Steventon,
Robert Watkins,
George Twine,

Thomas Short,
Robert Townshend,
James Bush,
Walter Masters,
Thomas Larkham,
Edward Cooke,
William Fashion,
John Flowerdew,
John Greene,
John Grice,
Charles Fowler, and
James Smith.

In all 35.

The Jury sworn, were

Samuel Sheppard,
Daniel Allen,
Rowland Platt,
Adam Bellamy,
Daniel Templeman,
William Dewart,

Edward Piggot,
Thomas Brailesford,
Edward Cheeke,
Edward Underwood,
Robert Masters, and
William Warren.

* Burn. Hist. of his own times, Vol. I. p. 599.
VOL. V.

Then the Indictment being read, Mr. Dolben, as Counsel for the King, opened it to the Jury.

Mr. Attorney General *. After
* Sir Robert Sawyer. Sir Thomas Armstrong had fled, the Prisoner relieved, and aided him with Money, and that, after he was indicted, and sued to the Exigent; besides, a Proclamation followed upon his flight, which was a sufficient notice to all the King's Subjects. Sir Thomas went by the Name of Henry Laurence, beyond Sea; by that Name the Prisoner held a Correspondence with him, and sent him a Letter, dated the 21st of August, and tells him, he had sent him a Bill of Exchange, for 165 l. drawn upon his Brother, Israel Hayes, who was acquainted with Sir Thomas.

If it were not for these receiving and nourishing of Traitors, they would not lurk at Amsterdam, as they do. The Letter was taken about Sir Thomas, and we shall prove it is the Prisoner's Hand-writing, and that Sir Thomas received the Money.

I hope you will take care, by convicting this Gentleman, to stop the Fountain, which issues so much Supply to these Traitors, who lurk abroad.

Mr. Hayes then affirmed, that he never knew Sir Thomas in his life.

Then the Indictment against Sir Thomas was read, which was found the 12th of July, and Mr. Glover proved a Copy of the King's Proclamation against Sir Thomas, dated the 28th of June, 1683.

Then Ezekiel Everis was sworn, and testified, that in August, 1683. he was at Cleve in Germany, with the Lord Grey, who went by the name of Thomas Holt, and Sir T. A. came thither, by the Name of Mr. Henry Laurence, and shewed him a Bill of Exchange, from England, upon Mr. Israel Hayes in Amsterdam, for 160 l. odd Money; and that it was for 150 Guineas paid in England; and he told him, it was drawn by Joseph Hayes, and it was signed Joseph Hayes; and the Bill was accepted, and he saw Israel Hayes his Letter to Sir Thomas, by the Name of Laurence, which mentioned the sending the said Sum to Cleve.

The Common Serjeant (Crispe) then delivered a parcel of Letters into the Court, and swore that he received them of the Lord Godolphin, and they had been ever since in his hands.

The Lord Godolphin then testified, that he received three Letters produced in Court, from Mr. Constable, Mr. Chudley's Secretary, who told him they were taken about Sir Thomas, that one of them, without any Name, mentioned 150 Guineas returned to Henry Laurence.

Constable testified, that he was present, when the Scout of Leyden apprehended Sir T. A. and that the Letters were taken out of his Pocket, and he himself delivered them to Mr. Chudley, who sealed them up, and sent them by him, to the Lord Godolphin.

Charles Davis testified, that taking Boat from Amsterdam to Rotterdam, he met Israel Hayes and Sir Tho. A. coming to take Boat, and Sir Thomas went with him in the Boat, and he told him his Name was Henry Laurence.

Davis added, that he lodged a Month in one Briscowe's House at Amsterdam, where there was

a Club every Thursday: There were Mr. Israel Hayes, Mr. Henry Iveton, one Wilmore, Emerton, Dave, and some other English Merchants; and he heard them several times abuse the King at Table.

The Attorney General then shewed Mr. Hayes a Letter, saying, It may be he will save us the labour of proving it; but Mr. Hayes disowning it,

Mr. Walpoole was called, and Mr. Hayes said, He was my Servant, and went away after a rate that possibly would not be allowed.

Walpoole testified, that he served Mr. Hayes almost four Years and three Quarters, and did believe the Letter to be Mr. Hayes's Hand.

Mr. Hayes. My Lord, in Matters of Treason, I hope you will not admit of comparison of hands and belief, for Evidence.

Chief Justice. Yes, no doubt of it.

Mr. Hayes. It has not been so in other Cases, that have not been capital; as particularly in the Lady Carr's Case.

Chief Justice. That is a Mistake, you take it from Algernon Sidney, but without all doubt, it is good Evidence.

Judge Withens. Comparison of Hands was allowed for good Evidence in Coleman's Case.

Mr. Hayes. That, with Submission, vastly differs: Those Letters were found in his own Custody; this was not found in my possession, but in another Man's, and in another Nation.

Sir John Trevor, Counsel for the King. This Gentleman was a Trader with the East-India Company, and made Contracts with them, which are entred in their Books: We will compare them with the Writing in this Letter.

The Common Serjeant then called Harman and Brittle, and demanded of them, where the Books were; and they produced them.

Harman testified, that he knew Mr. Hayes, and that he made several Contracts in 1683. and that he saw him in September, 1683, subscribe his Hand to a Book of the Company's, shewn to him.

Brittle testified, that he is Porter in the Street to the East-India Company, and that he saw Mr. Hayes write his Hand to a Book shewn to him.

Capt. Piercehouse produced a Note, which he said, was Mr. Hayes's, and that he supposed it to be his hand, and compared it with the hand in the Book, and said, that he delivered the Goods upon it; and Walpoole then said, he believed it to be Mr. Hayes's hand.

Then Mr. Sturdivant was called, and they shewed him the Letter, and he said, Here is Joseph Hayes writ, but I do not know it to be his Hand.

The Common Serjeant said, that Mr. Sturdivant swore he did know Mr. Hayes's hand, before the Grand Jury; but Mr. Sturdivant affirmed, the Common Serjeant was under a mistake.

Then Sir John Trevor called for Mr. Hardresse, but the Common Serjeant answered, That he was out of Town, before he could be served with a Subpena.

Then the Letter was read, it was subscribed Joseph Hayes, and dated the 31st of August, 1683. directed to Mr. Henry Laurence senior, at Amsterdam and began thus, Sir, at your desire I have sent you a Bill, &c.

The

The Letter and the *East-India* Brooks were then shewn to the Jury, and to the Prisoner.

Mr. *Hayes* denied the Letter to be his Writing, and said, 'Tis very strange I should not know my own hand; may not Counsel be admitted to plead, Whether comparison of hands and belief are any Evidence in criminal Causes? I have been informed, it hath been denied to be Evidence.

Chief Justice. you are under a Mistake; some body has put it into your Head, and puffed you up with a vain story; there is no such thing, 'tis a Fiction, a mere Whim, only said by Mr. *Sidney*, and no ground in the World for it.

Mr. *Hayes*. Was it not so in the Case of my Lady *Carr*? There is a Record of that I suppose.

Chief Justice. It was not so. Don't talk of it*, there was no such thing at all — Comparison of Hands was allowed for good Proof in *Sidney's* Case. We must not alter the Law for any body.

Mr. *Att. Gen.* Besides this Comparison of Hands, we shall give an Account of the Correspondence of the Prisoner's Brother, and that he received the Money of him. Mr. Common Serjeant, Where had you this Paper?

Common Serjeant. I had them from my Lord *Godolphin*. This is an Account of the Receipt and Disbursement of the Money, shew it Mr. Constable.

Constable. This is one of the Papers, which was taken out of Sir *T. A's* Pocket.

It being shewn to the Jury, one of them demanded, whether any one proved the hand that was in that Note?

Mr. *Attorney*. No; but *Everis* swears, that Sir *T. A.* shewed him a Bill, subscribed *Joseph Hayes*, for so many hundred *Guilders*.

Common Serjeant. He says, it was 160 odd Pounds; now, the Sum of this Note is 161 l. 5 s. which is the change of 150 *Guineas*.

Mr. *Hayes*. Here is no body proves this Letter to be my hand, positively: They only prove it by similitude, and comparison, and belief.

I conceive there is but one Witness, that that Letter was found in Sir *T. A's* hands. *Everis* says, he saw a Bill had my Name to it. Sir, you did not know me, nor ever saw my hand?

Everis. No, never in my Life.

Mr. *Hayes*. 'Tis only an evidence of Reputation, he heard it was my Bill; you saw no Money paid upon it, did you?

Everis. No; but I saw a Letter from Mr. *Israel Hayes*, that gave some Account of it.

Mr. *Hayes*. All this is but Similitude and Circumstance; and I thought in case of Treason there ought to be two Witnesses, and hope you will let it be so here: — here is no Evidence but the Letter, and that is not two Witnesses; there is no body has proved the knowingly in the Indictment, that runs, that I knew Sir *T. A.* and his Treason, that ought to be proved, but I am sure 'tis not. Your Lordship says, that the Indictment and the Proclamation are sufficient Notice, that he was a Traitor; that may admit of Counsel to debate it: there ought to be Witnesses, that could shew me to be concerned with him; which no body in the World can prove, or that I ever saw him; and that Witness, who says, he saw the Bill, or this Let-

ter, does not know that I wrote it; there are them that say, they heard of Money paid upon this Bill, but there is not one of them says, he saw any Money paid; and these are several Witnesses, every one to a several thing.

Here is no Proof, but by the *East-India* Porters, and those who say, they believe this Letter to be my hand; no body says, he saw me write this Letter, or had any Correspondence with Sir *T. A.*

If they pretend there was Money paid beyond Sea; Is this Indictment well laid, for it is laid to be paid in *London*? The Payment of Money beyond Sea can be no Evidence of the Fact upon this Indictment; for the Jury of *London* are to enquire of Matters arising in *London* only. If I am to be tried for Payment of Money beyond Sea, the fact should have been laid there, and the Trial ought to proceed upon the Statute of 35 H. 8. cap. 2. The Indictment should be taken by Special Commission from the King, and the Trial be in the County that the King should choose. I desire Counsel upon this point.

L. C. J. No, 'tis an idle Whim, and I would fain know the Counsel, that put that foolish Notion into your head.

Mr. *Hayes*. If you will allow me Counsel, you shall hear who they are; I have been informed the Law is so.

L. C. J. We are of another opinion: if any whimsical Notions are put into you, by some Enthusiastick Counsel, the Court is not to take notice of their Crotchets.

Mr. *Hayes*. The Witnesses are Strangers to me; there is one that has been sworn, to whom I have paid several thousands of Pounds, who says, he does not believe it to be my hand.

Then he called Mr. *Sturdivant*, who looking upon the Letter, said, I do not believe it to be his hand, I have had Dealings with him, and he hath given me many Receipts.

Mr. *Hayes*. There have been a great many Forgeries; and this Letter is forged; there have been Forgeries so like, that the Persons themselves have not known their own hands.

L. C. J. Every body knows, that a hand may be counterfeited very like: in Mr. *Sidney's* Case, Mr. *Wharton*, a young Gentleman, not above one or two and twenty, said, He could undertake to counterfeit any Man's hand whatsoever.

Mr. *Hayes*. I am not a man of that Quality, to give Sir *T. A.* 150 *Guineas*.

L. C. J. We all know you have been a very active Man, a busy Fellow about the City; as forward a Spark as any I know, of a great while. I don't know what you talk of your Quality, but we know your Qualifications, you have always been factious and turbulent against the King and the Government.

Mr. *Hayes* then affirmed, that he neither gave, nor lent, nor returned any Sum of Money to this Person; and then called Mr. *Langley*, who testified, that a Letter was counterfeited, and a Bill of Exchange for 450 l. and so exactly like, that if he had not known of it before he saw it, he must have owned it for his hand; and the Party that paid the Money, paid it in his own wrong; for he never drew any such Bill. Mr. Common Serjeant had my Books several days in his hands, where there is an Account of 20,000 l. between my Brother and me; and if I would set my hand to such a Letter and Bill, and write my Name

at

at length, is it not as reasonable that I should put the Name of *Laurence* in my Books? and if it were there, it would appear.

Indeed here is an Account produced, of divers Parcels of Money disbursed, in little Sums; but, I appeal to the Merchants, whether any Bill of *Exchange* was ever paid in such Parcels? No foreign Bill was ever paid by 3 *l.* or 5 *l.* or 20 *l.* at a time: it must be paid at the day, or it will be protested—Here is a Computation of a Sum like to the Sum in the Bill; but these are Suppositions, and not Proof.

Then Mr. *Hayes* called Alderman *Jeffries*, to speak to his Reputation and Conversation; who said, That he had known him many Years, and never knew any hurt by him.

L. C. J. Have you been at any of the Elections at *Guild-hall* for Mayors or Sheriffs, when Mr. *Betbel*, and Mr. *Cornish*, and them People were chosen; and have you seen Mr. *Hayes* there, and how he behaved himself? A very forward active Man, I will warrant you.

Alderman *Jeffries*. I suppose, I may have seen him there, but I cannot say any thing to his Behaviour.

Then Mr. *Hayes* called Mr. *Pellet*, Mr. *Lloyd*, Mr. *Withers* senior, Mr. *Withers* junior, and Mr. *Hugh White*, who gave a fair Account of his Dealing and Conversation. He then said that he would trouble the Court with no more Witnesses.

Mr. Attorney General then said, that he would call one Witness more against him; and ordered *Atterbury* the Messenger to be sworn, and the Letter was shewed to him.

Atterbury. I apprehended Mr. *Hayes*, and brought him before the King, and was present when the Letter was shewed to him: and the King, and Lord Keeper *North* pressed him to own, whether it was his hand, or no; and he said, he should say nothing to it, if they could prove it upon him, well and good.

Mr. *Hayes*. His Majesty was not there.

Atterbury. As I remember, the King was there; I imagine the King was there.

Chief Justice. I was there, what he says is true; you said, I am not bound to accuse myself; 'tis true, you did deny that you knew *Laurence* or *Armstrong*; and 'tis as true, you would not absolutely deny the Letter, but said, you were not bound to accuse yourself.

Mr. *Hayes*. My Lord, I did hope, that in point of Law, my Counsel should have been heard to those things I mentioned, and I wish you would favour me in it; but that being denied him he addressed himself to the Jury: Nothing has more troubled me, since my Confinement, than the Imputation of High-Treason, a Thing I always detested; I never knew any, the least thing of the Conspiracy, but by the Trials, or other printed Papers; not one of the Conspirators, who have come in, or been taken, have charged me in the least; nor did he himself accuse me, with whom I am charged to have this Correspondence. Gentlemen, I desire you to consider, that 'tis my Life is concerned, and I beg you would consider what these Witnesses have testified; they are not positive in any respect, nay, there are not two to any one thing that is charged: *Constable* says, the Letter was found among Sir *T. A's* Papers; he

says no more; and here are not two Witnesses to that: *Everis* tells you, he saw this Bill, but did not know my Hand; there is no body tells you I wrote this Letter, but it is found in another Man's custody, in another Nation.

Gentlemen, 'tis very hard, that by comparison of hands a Man's Life should be in danger; when, in lesser Crimes, it has been denied to be good Evidence; and none of you can escape the same danger, if this be allowed to be Evidence; for your hands may be counterfeited, as well as mine.

If there had been any Probability of my knowing him, it had been something; but there is not one that testifies that ever I knew him, nor indeed did I: There is a great deal of Circumstance made use of, upon the account of his Acquaintance with my Brother in *Holland*; but, 'tis strange, there should not be some Evidence of a further Correspondence between him and me, if there were that Intimacy, that such a Letter as this doth import.

I must, with Reverence to the Divine Majesty, say, and I call God, Angels, and Men, to witness the truth of it, as I shall answer it to him, before whom, for ought I know, I am quickly to appear, that I never in my Life spoke with Sir *T. Armstrong*, nor was ever in his Company, nor ever wrote to him, by the Name of *Laurence*, or any other Name; and I do solemnly say in the presence of God, that I never gave, sent, lent, paid, or ordered to be paid, any Money, directly or indirectly, to Sir *T. A.* or *H. Laurence*, or to him by any other Name, or to his Use; I speak it without any counterfeiting or equivocation.

Gentlemen, there have been Overtures, if I would say some things, that my Life might be saved; and 'tis not to be believed, that I would run the Risque of my Life, if by speaking the Truth I could save it — — —

The Chief Justice did hear appear enraged, and interrupted him, saying, What do you mean by this?

Mr. *Hayes*. I say — — —

Chief Justice. Ay, but you must say those things that are decent and fit for us to hear; you must not insinuate, as if the Government would make any such Compacts as you talk of.

Mr. *Hayes*. I say, that Mr. *Foster*, told me —

Chief Justice. If you offer that, I can tell you a Story, that perhaps you will be very unwilling to hear; on my word, 'twill be very unpleasant to hear it; you had better let those things alone, for you will but draw a load upon you.

Mr. *Hayes*. I beseech your Lordship to hear me — — —

Chief Justice. Yes, I will hear you, provided you keep within due bounds; but we must not suffer these things.

Mr. *Hayes*. I say nothing but this, it has been told me, the way to save my Life is to confess.

Chief Justice. As you represent it, 'tis a reflection upon the Government—you talk of Overtures having been made you; don't make me say what I have no mind to say.

Mr. *Hayes*. I say, Mr. *Foster* by Name told me, there was no way for me to escape but by Confession.

Chief Justice. You had best call Mr. *Foster*, to know how he came to tell you so; if you do, I will

will tell you of another thing, of * 4 or 5000 l. that was offered for your escape: you had better forbear, or else I shall put you in mind of a Brother of some Body, that is at the Bar.

Mr. Hayes. My Lord, I was told, that was the way: Gentlemen of the Jury, I have declared to you the whole truth, with all the Solemnity that becomes an innocent Man, and not an ill Man—Besides, what you have heard, in all this Evidence, is nothing but Circumstance and Hear-say; and shall a Man's Life be taken away for *I believe*, and *I think*, or *I have heard*?

Gentlemen, I know you are my Fellow-Citizens and Fellow Christians, and of the same Reformed Religion that I am; and I hope you are sworn into this Service without any Prejudice against me, but with an impartial Resolution to do Justice; and therefore I cheerfully leave the matter with you; I am sure, that if God help me, and deliver me in this Exigency, that it is he, and you under him, that preserve my Life—

Gentlemen, the great Incertainties, Improbabilities, and Consequences in this Case, I hope will be weighed by you, and make you the better to consider the Proof, which is made by none but such as are Strangers to me; since then they know me not, I hope you will weigh it, before you give it against me: We must all die, and I am sure it will be no grief to you, to acquit a Man that is innocent; I leave it with you: The Lord direct you.

Sir Thomas Jenner the Recorder. The Treason charged on the Prisoner is of that sort, that if he be guilty, he will be a just example, to terrify others from doing the like; for if Traitors had not Persons to supply them with Money abroad, it may be, they would not have so much Courage to run away. We have satisfied you that Sir Thomas Armstrong was indicted, that an Exigent was gone against him, upon that Account; here was a Proclamation, and Sir Thomas Armstrong named in it; and so the Recorder repeated the Evidence of the Witnesses, and concluded: Gentlemen, We think that his Defence has been so little, and our Proof so strong, that you have good ground to find him guilty.

The Chief Justice then summed up the matter to the Jury.

Gentlemen of the Jury, This is an Indictment of High-Treason against the Prisoner at the Bar; and you are to try it according to your Evidence; the Prisoner's Affirmation of his Innocence is not to weigh with you. Nay, I must tell you, I cannot but, upon this Occasion, make a little Reflection upon several of the horrid Conspirators, that did not only, with as much Solemnity, imprecate Vengeance upon themselves, if they were guilty of any Treason; but thought they did God Almighty good Service in that hellish Conspiracy. It is not unknown, one of the Per-

sons proscribed in this Proclamation, did declare, they should be so far from being esteemed Traitors, that they should have Trophies set up for them; and all this under the pretence and enamel of Religion: Nay, I can cite to you an Instance of another of the Conspirators, that after a full and evident Proof, and plain Conviction, of having an hand in it, when he comes upon the Brink of Death, and was to answer for that horrid Fact, before the great God, he blessed Almighty God, that he died by the hand of the Executioner, with the Ax, and did not die by the Fiery Trial: He blessed God, at the place of Execution, that he died a Traitor against the King and Government, rather than died a Martyr for his Religion. I think it necessary to make some Reflection upon it, when Men, under the Pretence of Religion, are wound up to that height, to foment Differences, to disturb and distract the Government, to destroy the Foundations of it, to murder his sacred Majesty, and his Royal Brother, and to subvert our Religion, and Liberty, and Property; and all this carried on upon Pretence of doing God good Service. You are to go according to Evidence; as the Blood of a Man is precious, so the Government also is a precious thing; the Life of the King is a precious thing, the Preservation of our Religion is a precious thing, and therefore due Regard must be had to all of them. I must tell you, in this horrid Conspiracy there were several Persons, that bore several parts; some, that were to head, and to consult; there was a Council to consider; others were designed to have a hand in the perpetrating of that horrid Villany, that was intended upon the Persons of his Sacred Majesty and his Royal Brother, and with them, upon the Persons of all his Majesty's Loyal Subjects, that acted with duty as they ought to do; there were others, that were to be aiding and assisting (as in the Case of the Prisoner, if you find him guilty) aiding, abetting, assisting by Money, or otherwise, or harbouring any of those Persons, that were concerned therein. Then he recounted the Evidence given against the Prisoner, and made such Remarks upon the same, as he thought fit.

The Jury withdrew, and spent two hours in consideration of the Matter; and then returning, gave their Verdict, that the Prisoner was not guilty.

Mr. Attorney General. My Lord, tho they have acquitted him, yet the Evidence is so strong, that I hope your Lordship and the Court will think fit to bind him to his good behaviour during his Life.

Chief Justice. Mr. Attorney, that is not a proper Motion at this time.

So the Prisoner was discharged, after he had been Imprisoned five Months.

* The Story of the 4 or 5000 l. was this, An eminent Papist, very acceptable to King Charles the second, undertook to some of the Friends of Mr. Hayes, that a Pardon should be had for 4000 Guineas to the King, and 1000 to himself; but he afterwards declared, that the King had refused him therein, and told him, that he was advised, that he had better give that Popish Friend 4000 l. out of the Exchequer, than pardon Hayes; but that he gave his Royal Word, that the Overture should not hurt Mr. Hayes.

The Proceedings upon the Bill of Divorce between His Grace the Duke of NORFOLK and the Lady MARY MORDANT, February and March, 1699, 12 Will. III.

V I Z.

- I. *The Journal of the House of LORDS, together with the BILL.*
- II. *The Depositions before their LORDSHIPS.*
- III. *The Examination and Evidence of the DUKE's Witnesses.*
- IV. *The State of the Case on both Sides.*
- V. *Bishop Couzens's Argument, proving that Adultery causes a Dissolution of Marriage.*
- VI. *The Pleadings of the Learned Counsel, before the Honourable House of Commons and the Committee, with other Matters thereto relating.*

Die Jovis 15 Februarij, 1699.



PON Reading the Petition of Henry Duke of Norfolk, praying Leave to bring in a Bill to dissolve his Marriage with the Lady Mary Mordant, and to enable him to marry again; he having certain Proof of his Wife's living in Adultery with Sir John Germaine: It is Order'd by the Lords Spiritual and Temporal in Parliament assembled, That the said Petition shall be taken into Consideration to-morrow, at Eleven of the Clock, and all the Lords summon'd to attend.

Die Veneris 16 Februarij, 1699.

After reading the Order for resuming the Consideration of the Duke of Norfolk's Petition, and Debate thereupon;

Hodie prima vice lecta est billa, entitled, An Act to dissolve the Duke of Norfolk's Marriage with the Lady Mary Mordant, and to enable him to marry again. In the Words following,

Humbly sheweth, and complaineth to Your most Excellent Majesty, your true and faithful Subject Henry Duke of Norfolk, and Earl-Marshal of England, That he did, some Years since, marry the Lady Mary Mordant, his now Wife; and, that she hath, for divers Years, lived in Separation from the said Subject, and hath had unlawful Familiarity and Adulterous Conversation with Sir John Germaine Bar. and is guilty of Adultery on her part, and hath broken the Bond of Matrimony. Forasmuch therefore as your said Subject hath no Issue, nor can hope for any other than spurious Issue to succeed him in his Honours, Dignities and Estate, unless the said Marriage be declar'd void, and annull'd by Parliament, and your said Subject be enabled to marry any other Woman. May it please Your most Excellent Majesty, out of your Princely Goodness and Compassion to your said Subject's Misfortune

and Calamity, and for the future Support and Comfort of himself and Family, that it may be enacted: And it be enacted by the King's most excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and of the Commons in this present Parliament assembled, and by the Authority of the same, That the said Bond of Matrimony being violated and broken by the manifest open Adultery of the said Lady Mary Mordant, be, and is hereby enacted, declared, and adjudged to be from henceforth wholly dissolved, annulled, vacated, and made void to all Intents, Constructions, and purposes whatsoever: And, that it shall and may be lawful to and for the said Henry Duke of Norfolk, at any time or times hereafter, to contract Matrimony, and to marry (as well in the Life-time of the said Lady Mary, as if she were naturally dead) with any other Woman or Women with whom he might lawfully marry in case the said Lady Mary was not living: And, that such Matrimony, when had and celebrated, shall be a good, just, and lawful Marriage, and so shall be adjudged, deemed, and taken to all Intents, Constructions, and Purposes; and, that all and every Child and Children, born in such Matrimony, shall be deemed, adjudged, and taken to be born in lawful Wedlock, and to be legitimate and inheritable, and shall inherit the said Dukedom of Norfolk, Office of Earl-Marshal of England, and all other Earldoms, Dignities, Baronies, Honours, and Titles of Honour, Lands, Tenements, and other Hereditaments from and by their Fathers, Mothers, and other Ancestors in like manner and form as any other Child or Children born in lawful Matrimony shall or may inherit or be inheritable, according to the Course of Inheritances used in this Realm; and to have and enjoy all Privileges, Pre-eminencies, Benefits, Advantages, Claims, and Demands, as any other Child or Children born in lawful Wedlock may have or claim by the Laws and Customs of this Kingdom. And be it further enacted, That the said Henry Duke of Norfolk shall be entitled to be Tenant by Courtesie of the Lands and Inheritance of such Wife whom he shall here-

he, after marry; and ſuch Wife as he ſhall ſo marry ſhall be entitled to Dower of the Lands and Tenements whereof the ſaid Henry Duke of Norfolk ſhall be ſeiſed of ſuch Eſtate whereof ſhe ſhall be dowable, as any other Husband or Wife may or might claim, have or enjoy. And the Child or Children born in ſuch Marriage ſhall and may derive and make Title by Deſcent or otherwiſe to and from any of their Anceſtors, as any other Child or Children may do, any Law, Statute, Reſtraint, Prohibition, Ordinance, Canon, Conſtitution, Preſcription, or Cuſtom had, made, exerciſed, or uſed to the contrary of the Premiſes, or any of them, in any wiſe notwithstanding. And be it further enacted by the Authority aforeſaid, That the ſaid Lady Mary ſhall, and is hereby barred and excluded of and from all Dower and Thirds, and of and from all Right and Title of Dower and Thirds unto or out of any the Honours, Mannors, Lands, or Hereditaments of the ſaid Duke; and, That all Conveyances, Joyntures, Settlements, Limitations, and Creations of Uſes and Truſts of, into, or out of any Honours, Mannors, Lands, or Hereditaments, at any time heretofore made by the ſaid Duke, or any of his Anceſtors or Truſtees, unto, or upon, or for the Uſe or Benefit of the ſaid Lady Mary, or any the Iſſue of her Body, or for eaſing, diſcharging, or counter-ſecuring any the Mannors, Lands, or Hereditaments of the ſaid Lady Mary, or any of her Anceſtors, ſhall be from henceforth, ſo far as concerns the ſaid Lady Mary, or any Iſſue of her Body, or any Intereſt for her or them, utterly void and of none effect; and all and every the ſaid Honours, Mannors, Lands, or Hereditaments of the ſaid Duke, or any of his Anceſtors or Truſtees, ſhall from henceforth remain and be to and for the Uſe and Benefit of the ſaid Duke, and ſuch other Perſon or Perſons, and for ſuch Eſtates and Intereſts, and in ſuch manner and from as if the ſaid Lady Mary was now naturally dead without any Iſſue of her Body. And alſo, That all Limitations and Creations of any Uſe, Eſtate, Power, or Truſt, made by any of the Anceſtors of the ſaid Lady Mary, unto or for the Uſe or Benefit of the ſaid Duke, his Heirs or Aſſigns, out of any the Mannors, Lands, or Hereditaments of any the Anceſtors of the ſaid Lady Mary, ſhall be from henceforth void, and of none effect. * And be it further enacted by the Authority aforeſaid, That the ſaid Duke of Norfolk, his Heirs, Executors, Adminiſtrators, or Aſſigns, ſhall, on or before the Five and twentieth Day of March, One thouſand ſeven hundred and one, pay, or cauſe to be paid, unto the ſaid Lady Mary, or her Aſſigns, the Sum of Ten thouſand Pounds of lawful Money of England, which was the Portion in Money paid on her Marriage with the ſaid Duke; and on default of Payment of the ſaid Sum of Ten thouſand Pounds, on or before the ſaid Five and twentieth Day of March, then, and in ſuch caſe, ſhe the ſaid Lady Mary, and her Aſſigns, during her Natural Life from the Deceafe of the ſaid Duke, if ſhe ſhall ſurvive him, ſhall be entitled to, and ſhall and may have and enjoy ſuch Joynture and other Advantages as ſhe might or may have or claim by virtue of a certain Indenture, Quinquartite, made upon and in conſideration of the ſaid Marriage, bearing Date the Thirteenth Day of June, Anno Domini One thouſand ſix hundred ſeventy ſeven, and made, or mention'd to have been made, between Henry late Duke of Norfolk, then Earl of Norwich, Father of the ſaid Duke, and the preſent Duke, by the Name of Henry Lord Howard of the firſt part, Henry Earl of Peterborow and the ſaid Dutcheſs by the Name of the Lady Mary Mordant, ſole Daughter and Heir

apparent of the ſaid Earl of Peterborow, of the ſecond part; Henry Marquis of Worceſter, William Earl of Powis, and Henry Lord O-Brian, of the third part; Arthur Onflow Eſq; and Thomas Dalmatroy Eſq; of the fourth part; Simon Fox Eſq; and Thomas Weſt Gent. of the fifth part: And by virtue of the Agreements contain'd in certain Articles bearing Date the Eight and twentieth Day of April, in the Year of our Lord One thouſand ſix hundred ninety four, made, or mention'd to have been made, between the ſaid Duke of the one part, and the ſaid Henry Earl of Peterborow on behalf of the ſaid Dutcheſs, and the ſaid Dutcheſs of the other part, according to the true Intent and Meaning of the ſaid Quinquartite Indenture and Articles; and alſo, during the joynt Lives of the ſaid Duke and Dutcheſs, ſhall and may enjoy Five hundred Pounds per Annum, by virtue of an Indenture Quadrartite, dated the Fifteenth Day of June, One thouſand ſix hundred ninety four, made, or mention'd to have been made, between the ſaid Duke of Norfolk of the firſt part, the ſaid Earl of Peterborow and the ſaid Dutcheſs of the ſecond part, William Lord Lemſter of the third part, and Sir John Mordant Knight and Baronet, and William Longeville Eſq; of the fourth part. And then, and in ſuch Caſe, the ſaid Duke of Norfolk, his Heirs, Executors, and Adminiſtrators, is and are diſcharg'd of and from the payment of the ſaid Sum of Ten thouſand Pounds, any thing herein contain'd to the contrary thereof in any wiſe notwithstanding. But on Payment of the ſaid Ten Thouſand Pounds in manner aforeſaid, ſhe the ſaid Lady Mary ſhall be wholly barred and excluded from her ſaid Joynture, and of and from all other Advantages out of the Real and Perſonal Eſtate of the ſaid Duke, as aforeſaid.

Upon the firſt Reading of the Bill, entitled, *An Act to diſſolve the Duke of Norfolk's Marriage with the Lady Mary Mordant, and to enable him to Marry again*; It is order'd by the Lords Spiritual and Temporal in Parliament aſſembled, That the Dutcheſs of Norfolk may have a Copy of the ſaid Bill; and, That his Grace the Duke of Norfolk ſhall be heard by his Counſel, to make good the Allegations of his Bill, on *Tueſday* next, at Eleven of the Clock in the Forenoon; and, That the Dutcheſs of Norfolk may have Counſel to attend at the ſame time, if ſhe pleaſe.

Die Sabbati 17 Februarij, 1699.

Upon reading the Petition of Mary Dutcheſs of Norfolk, praying to be heard by her Counſel before any further Proceedings be made on the Bill entitled, *An Act to diſſolve the Duke of Norfolk's Marriage with the Lady Mary Mordant, and to enable him to Marry again*; It is order'd by the Lords Spiritual and Temporal in Parliament aſſembled, That the Dutcheſs of Norfolk ſhall be heard by her Counſel as deſir'd, on *Tueſday* next, at Eleven of the Clock in the Forenoon.

It is order'd by the Lords Spiritual and Temporal in Parliament aſſembled, That *William Lane* and *John le Fountain*, Gent. do attend this Houſe on *Tueſday* the Twentieth Day of this Inſtant February, at Ten of the Clock in the Forenoon, as Witneſſes to be examin'd on the behalf of the Duke of Norfolk.

* This Clause was added after the Bill was brought into the Houſe of Lords.

Die Luna 19 Februarij, 1699.

It is order'd by the Lords Spiritual and Temporal in Parliament assembled, That Mr *Daniel Germaine*, Mr. *Simon Briane* alias *de Brienne*, Mrs. *Anna Maria Briane* alias *de Brienne*, and Mrs. *Judith Possette* alias *Perfode*, do, and they are hereby requir'd to attend this House, as Witnesses on the behalf of his Grace the Duke of *Norfolk*, to morrow at Eleven of the Clock in the Forenoon.

Die Martis 20 Februarij, 1699.

After hearing Counsel, upon the Petition of the Dutcheſs of *Norfolk*, pursuant to the Order of the Seventeenth instant: as also Counsel for the Duke of *Norfolk*, the following Order was made, *viz.*

It is Order'd by the Lords Spiritual and Temporal in Parliament assembled, That this House will hear Witnesses for the Duke of *Norfolk*, only to Matter of Fact, since the rejecting of the first Bill, except only Mr. *Daniel Germaine*, Mr. *Simon Briane* alias *de Brienne*, Mrs. *Anna Maria Briane* or *de Brienne*, Mrs. *Judith Possette* or *Perfode*, Mrs. *Elianor Vanes*, who are at liberty to give Evidence to Matters of Fact before that Time, which were not then before the House; and are hereby requir'd to attend this House, as Witnesses on the behalf of his Grace the Duke of *Norfolk*, to morrow Morning, at Eleven of the Clock,

It is Order'd by the Lords Spiritual and Temporal in Parliament assembled, That to morrow, at Twelve of the Clock, this House will proceed to hear Counsel and Witnesses for the Duke of *Norfolk*, to make good the Allegations in his Bill, at which Time the Dutcheſs of *Norfolk*'s Counsel shall be present.

It is Order'd by the Lords Spiritual and Temporal in Parliament assembled, That *William Bayly* and *Edmund Davies* do, and they are hereby requir'd, to attend this House to morrow, at Eleven of the Clock in the Forenoon, as Witnesses to be examin'd on the behalf of the Duke of *Norfolk*.

Die Martis 21 Februarij, 1699.

The House being inform'd, that Endeavours had been made to serve Orders upon the Duke of *Norfolk*'s Witnesses, and several of them were sick, and others could not be found,

Joseph Whilley being call'd in and sworn, said as follows.

Daniel Germaine — I went to his House, and was told by a Neighbour no body was within, but they bid me go to the Alehouse at the next Door and I might hear of him; and enquiring there, I found one of his Journeymen, *Peter Hercules*, who told me, He had not been at home these Six Months, nor could not tell when he would return; but I shew'd him the Original Order, and serv'd him with a Copy, and told him, his Master was to appear at the Duke of *Norfolk*'s Lodgings, at the House of Lords, to morrow at Eleven a Clock, as a Witness for him.

Mr. *Simon Briane* — I went to his House in *St. James's Street*, and Mr. *Possette*'s Man, *Fer. Hoffman*, came to the Door, who told me Mr. *Briane* went to *Kensington* that Afternoon; and no sooner had he said so, but Mr. *Possette* came in, who told

me the same; and I ask'd him to speak with Mr. *Briane*'s Wife, and he told me, She was so weak that I could not serve her with the Order. Then I ask'd to see Mrs. *Possette*, his own Lady; he likewise told me She was sick, and could not be spoke to; so I shew'd him the Original Order, and left the Copy with himself for his Lady and Mr. *Briane*'s Lady, and forthwith went to *Kensington*, to serve the Order upon Mr. *Briane*; but not meeting with him, after a great deal of Enquiry, I left it with his Maid-Servant at his Lodgings, and serv'd her with it, who told me, She would give it her Master that Night, who waited for the King's coming from *Hampton Court*. This Morning I went again to his House at *St. James's*, and sent for his Servant, who told me, His Master did not come to Town last Night; so, I believe, his Maid had given him the Order.

Mrs. *Elianor Vanes* — I enquir'd at every House in *Kensington*, where I was inform'd there were Dutch People, and could not know of any of them of any such Woman; but the Earl of *Albemarle*'s Steward, and the Porter of the Lodge going into *Hide-Park (Kensington)* promis'd me they would enquire after her, and send me word if they heard of such a Person.

Then *George Starkey* being call'd in and sworn, said as followeth. I serv'd *William Bayly* with the Order of this House, to attend as a Witness this Day; he told me, He was under a Course of Physick, and could not stir out without danger of his Life, but any other Day he would attend.

Then a Certificate under the Hands of *John Hutton* and *Theodore Colladon*, Doctors of Physick, was produced and read as follows.

We whose Names are under-written, Doctors of Physick, do certify, That *Mary* Wife of *Simon de Brienne*, and *Judith* Wife of *Peter Perfode*, have been for some Time, and are at this present, so extraordinary ill in Bed, that neither of them can remove from thence without danger of their Lives. Witness our Hands, at their Dwelling-House in *St. James's Street*, betwixt Ten and Eleven of the Clock in the Morning, the 21st Day of February, 1699.

John Hutton.

Theodore Colladon.

After which, the following Order was made, *viz.*

It is Order'd by the Lords Spiritual and Temporal in Parliament assembled, That Doctor *John Hutton* and Doctor *Theodore Colladon* (who sign'd a Certificate deliver'd and read this Day, of the Illness of Mrs. *Mary* Wife to *Simon de Brienne*, and *Judith* her Sister, Wife to Mr. *Peter Perfode*) do attend this House to morrow, at Eleven of the Clock, to attest upon Oath what they have certified.

Then the Form of the Oath formerly given to Witnesses being read out of the Journal 23 Jan. 1691, the same was agreed to with some Alteration, and is as followeth.

You shall true Answer make to all such Questions as shall be ask'd you by this Honourable House, in relation to the Charge of Adultery in the Bill brought in by the Duke of *Norfolk*, against the Dutcheſs of *Norfolk*, with Sir *John Germaine*. You shall declare your whole Knowledge of this Matter, and shall speak the Truth, and nothing

nothing but the Truth, as well upon the Matter as you ſhall be examined on behalf of his Grace the Duke of *Norfolk*, as upon ſuch Interrogatories as ſhall be exhibited on behalf of the Dutcheſs of *Norfolk*, without Favour or Affection to either Party. So help you God, and by the Contents of this Book.

Then the Counſel being called in, they for the Duke having opened the Nature of their Evidence, Mrs. *Elianoꝝ Vanefs* was Sworn, and being asked ſome Queſtions by the Duke's Counſel, ſhe appeared to be a *Dutch* Woman, and could not well underſtand *Engliſh*, and an Interpreter being offered by the Duke's Counſel; Counſel withdrew, and the Houſe agreed that the Dutcheſs's Counſel ſhould have an Interpreter alſo; and the Counſel being called in again, were told ſo by Order of the Houſe, and that they might proceed to any other Witneſs. The Duke's Counſel deſired that they might begin with Mrs. *Vanefs*, and withdrew.

Then the following Orders were made.

It is Ordered by the Lords Spiritual and Temporal in Parliament Aſſembled, That the Agents for the Duke of *Norfolk*, do forthwith deliver a Liſt of the Witneſſes they intend to examine on the behalf of the Duke of *Norfolk*, to the Dutcheſs of *Norfolk*, or her Agents.

It is Ordered by the Lords Spiritual and Temporal in Parliament Aſſembled, That to-morrow at Twelve of the Clock, this Houſe will proceed to hear Counſel and Witneſſes for the Duke of *Norfolk*, to make out the Allegations in his Bill, at which Time the Dutcheſs of *Norfolk*'s Counſel ſhall be preſent.

It is Ordered by the Lords Spiritual and Temporal in Parliament Aſſembled, That *Daniel Germaine*, *Simon Briane* alias *de Brienne*, *Anna Maria Briane* alias *de Brienne*, *Judith Poſſette*, alias *Perſode*, — *Goutaken*, — *Pontack*, *Suſanna Barrington*, — *Hicgonee*, Mrs. *Keemer*, *Joſeph Berger*, *William Lane*, *John Le Fountaine*, *Jonathan Browne*, — *Hater*, and — *Welburne*, do, and are hereby required to attend this Houſe to-morrow at Eleven of the Clock, in the Forenoon, as Witneſſes to be examined on the behalf of the Duke of *Norfolk*.

It is Ordered by the Lords Spiritual and Temporal in Parliament Aſſembled, That *William Allen* and *John Maitland* do, and they are hereby required to attend this Houſe, on Service of this Order, as Witneſſes to be examined on behalf of the Duke of *Norfolk*.

Die Jovis 22 Februarii, 1699.

This Houſe being informed that Sir *Theodore Colladon*, and Doctor *Hutton* attended, as Ordered yeſterday.

Sir *Theodore Colladon* being called in and Sworn, ſays he ſaw Mrs. *De Briane* yeſterday, ſhe was very ill fainting in Bed, and ſcarce able to live. Mrs. *Perſode* he alſo viſited, who having miſcarried by a Fright, could not ſtir out of her Bed without Hazard of her Life.

Doctor *Hutton* being called in and Sworn, ſays he viſited Mrs. *Mary de Briane* this Morning, ſhe hath been ſick three Months, is in an ill Condition of Health, and will endanger her Life if ſhe comes abroad. Mrs. *Perſode* is very ill, ſhe cannot come out of her Bed without endangering her Life.

VOL. V.

Then the Counſel were called for Duke and Dutcheſs of *Norfolk*.

The Dutcheſs's Counſel moved to have the Witneſſes Chriſtian Names, and Place of their Abode, and ſaid they had not the Names till this Morning.

Then the two Interpreters took the following Oath.

You ſhall well, truly, and faithfully interpret between the Houſe and Elianoꝝ Vanefs, the Witneſſes, touching the Matters ſhe ſhall give in Evidence.

Counſel being withdrawn, the Houſe agreed to tell the Duke's Counſel, that they might proceed to examine Witneſſes that were named the Day before. And that if the Dutcheſs's Counſel had any exception, they might now make it againſt them or their Teſtimony, and that the Duke's Agents ſhould give the Chriſtian Names of their Witneſſes, and as much as they can of the Places of their Abode to the Agents of the Dutcheſs.

The Counſel being called in again, were told what was agreed on by the Houſe touching the Witneſſes: Then the Duke's Counſel proceeded and called in *Elianoꝝ Vanefs*, who being ask'd ſeveral Queſtions by the Duke's Counſel, the Interpreter ask'd them of her in *Dutch*, and ſhe answered again to the Interpreter, and he declared her Answers to the Houſe in *Engliſh*.

Nicholas Hauſier, being Sworn in like manner, gave his Teſtimony in *French* by an Interpreter.

Then Counſel being withdrawn, the following Orders were made, viz.

It is Ordered by the Lords Spiritual and Temporal in Parliament Aſſembled, That the Short-hand Writers, who took the Witneſſes Evidence, do dictate to a Clerk in order to be tranſcribed what the Witneſſes have ſaid, that the Examinations with the Short-hand Writers Book and Papers are to be ſealed up, and kept by the Clerk until the next Day the Houſe ſhall proceed on this Matter, and then what is tranſcribed ſhall be read at the Bar in the Preſence of the Witneſs.

It is Ordered by the Lords Spiritual and Temporal in Parliament Aſſembled, That on *Saturday* next at Twelve of the Clock, this Houſe will proceed to hear Counſel and Witneſſes for the Duke of *Norfolk* to make out the Allegations of his Bill, at which Time the Dutcheſs of *Norfolk*'s Counſel ſhall be preſent.

It is Ordered by the Lords Spiritual and Temporal in Parliament Aſſembled, That *Simon Briane* alias *de Brienne*, ſhall be and is hereby required to attend this Houſe, on *Saturday* next at Eleven of the Clock in the Forenoon, to be examined as a Witneſs on behalf of the Duke of *Norfolk*.

Die Veneris 23 Februarij, 1699.

It is Ordered by the Lords Spiritual and Temporal in Parliament Aſſembled, That *James Berger*, *Suſannah Barrington*, *Francis Knight*, and *James Macdonnell*, ſhall, and they are hereby required to attend this Houſe to-morrow at Eleven of the Clock in the Forenoon, as Witneſſes to be examined on the behalf of the Duke of *Norfolk*.

Die Sabbati 24 Februarii, 1699.

The Houſe being moved, that Mr. *Simon Briane* or *De Brienne* may be ſent for in Cuſtody, for not having

having attended according to the Order of this House, as a Witness for the Duke of Norfolk.

Hereupon *Thomas Kellet* was called in, and being Sworn, said to this Effect, *viz.*

I went to the House of the Dutcheſs of Norfolk, and inquired for Mrs. *Susannah Barrington*, and if she lived there, a Man said no: I asked if he could tell me where she was, he said no.

Then I went to serve Mr. *Simon Briane* or *de Brienne*, and being at his House enquired for him, his Man said, his Master was gone to *Kensington*; he took the Order and said he would give it his Master.

I went to the Lord *Cutts's* House, and ask'd for one Mr. *Berger*, but could not hear of him; I went to my Lord's Stables, and asked his Coachman for Mr. *Berger*, he said he lived in *Hedge-Lane*; there I went and found his Wife, and delivered the Order to her, she said she would have nothing to do with it, and that Mr. *Germaine* gave him Bread. I saw him yesterday, and he told me he had been with the Duke of Norfolk, and would attend him again.

I went again to the Dutcheſs of Norfolk's House to serve Mrs. *Barrington*, and one told me she was seen look out of a Window, and another told me she was at Home, so I could not serve the Order on her.

The House being informed upon Oath, That a Copy of the Order for Mr. *Simon Briane* or *de Brienne* to attend this House, as a Witness for the Duke of Norfolk, was left with his Servant at his Dwelling-place, and he not attending this House, It is Ordered by the Lords Spiritual and Temporal in Parliament Assembled, That the Serjeant at Arms attending this House, do forthwith attach the Body of the said *Simon Briane* or *de Brienne*, and bring him to the Bar of this House, to answer for his Offence: And this shall be a sufficient Warrant on that behalf.

To the Serjeant at Arms attending this House, his Deputy or Deputies, and every of them.

The House was informed that one *Hugonee*, Servant to the Lord *Haversham*, being summoned was since gone away. Of which the Lord *Haversham* gave the House an account to this Effect, That he received a Letter from the Duke of Norfolk, wherein he desired his Servant might attend the House this Day. And his Lordship writ an answer that he should. But when his Lordship arose in the Morning, his Servant was gone away, and told the Laundry-woman or Servants, he had a Quarrel, and was going for *Holland*.

The Counsel and Witnesses being called in for the Duke of Norfolk, the Dutcheſs's Counsel present, and Mrs. *Vanefs* at the Bar, the transcribed Depositions from the Short-hand Writer were read to her, and she signed them.

In like manner *Nicholas Hosier's* Deposition was read, and he signed it.

Then the Counsel proceeded, and examined *William Bayly*, and his Depositions were taken in Short-hand, and left with the Clerk to be transcribed, in Order to be read to him on Monday next.

Counsel withdrew, and it was ordered that *William Bayly* do attend this House on Monday next.

Then the following Orders were made. It is Order'd by the Lords Spiritual and Temporal in Parliament Assembled, That on Monday

next at Twelve of the Clock this House will proceed to hear Counsel and Witnesses for the Duke of Norfolk, at which Time the Dutcheſs of Norfolk's Counsel shall be present.

It is Ordered by the Lords Spiritual and Temporal in Parliament Assembled, That Mr. Secretary *Vernon* be desired to send to this House on Monday next at Eleven of the Clock, the Books wherein the Entries of Passes are in the Months of *January*, *February*, and *March*, One Thousand six Hundred ninety one.

Die Luna 26 Februarii, 1699.

The Counsel for the Duke and Dutcheſs of Norfolk were called in, and the Examination of *William Bayly* was read to him, and he being cross-examined by the Dutcheſs's Counsel, and that Examination read to him, he signed them.

Then *John Curry* was called in and Sworn, said, I went to serve Mr. *La Fountaine*, and Mr. *Lane* with the Order for their Attendance.

Mr. *La Fountaine's* Wife lay in, he said he could not be forced to come, he was not a Subject of England, and is the Lady Dutcheſs's Servant.

Mr. *Lane* gave me a Letter to the Clerk of the Parliament, which was read, and in it he desired further time, not having Horses, nor could ride fast.

The Dutcheſs's Counsel moved for Copies of the Depositions taken, and Time for the Dutcheſs to be heard, and withdrew. Then the following Orders were made, (*viz.*)

An Order for both Parties to have Copies of the Depositions, and so much as relates to that Matter in the Journal.

The other for hearing the Dutcheſs by her Counsel, on Monday next, and the Duke's Counsel then to be present.

Depositions of *Elleanor Vanefs*.

Die Jovis 22 Februarii, 1699.

ELIA NOR *Vanefs* Sworn, Depoſeth as followeth, (*viz.*)

Quest. D'ye know Sir *John Germaine* and the Dutcheſs of Norfolk?

Answ. Yes.

Q. How long have you known them?

A. Two Years.

Q. When did you first come acquainted with them?

A. Sir *John Germaine's* Sister hired me for a Cookmaid the Summer after the King came for England.

Q. In what Month of that Year?

A. In May.

Q. Did you live with either of them as a Servant maid?

A. I lived two Months with my Lady Dutcheſs, in Sir *John Germaine's* House.

Q. How long did you live in the House with them?

A. Till they went to *Fox-Hall*.

Q. How long was the Dutcheſs in the House before they went to *Fox-Hall*?

A. Two Months.

Q. Where was that House?

A. Just over Spring-Garden.

Q. At

Q. At the Time when the Lady Dutcheſs lived with Sir John Germaine, what Company and Converſation did they keep with one another? And in what manner?

A. Like Man and Wife.

Q. Where was it the Lady Dutcheſs lived when you came firſt into England?

A. In Sir John Germaine's Houſe.

Q. Where did ſhe live then?

A. The Dutcheſs lived there then.

Q. How long continued ſhe there?

A. About two Months.

Q. How did they live together during that Time?

A. Like Man and Wife.

Q. Saw you them in Bed together, at any Time, at that Place in the Cockpit?

A. Yes.

Q. How often?

A. Many times, as often as Man and Wife ſhe ſaw them in Bed, but did not put them in Bed in thoſe two Months.

Q. Did you think any otherwiſe, but that they had been Man and Wife?

A. She did not at firſt, but afterwards ſhe did; and then they kept her within Doors, for fear ſhe ſhould tell it.

Q. Whither did the Dutcheſs go after that two Months?

A. To Fox-Hall.

Q. How long did ſhe live there?

A. About two Years.

Q. Did Sir John Germaine uſe to come and keep Company with the Dutcheſs there?

A. Yes; he uſed to come and Dine with her ſometimes; and he lay there ſometimes.

Q. What Converſation had Sir John Germaine with the Dutcheſs at Fox-Hall?

A. They converſ'd together as Man and Wife.

Q. How long?

A. Sometimes one Night, ſometimes two.

Q. How often did he uſe to come thither?

A. Sometimes twice, ſometimes three times a Week, and ſometimes but once.

Q. Had they one Bed, or two?

A. But one.

Q. What Name did the Dutcheſs go by at Fox-Hall?

A. By the Name of the Lady Beckman.

Q. What kin was Sir John Germaine pretended to be to the Lady Dutcheſs?

A. Her Brother; my Lady Dutcheſs ſaid ſo.

Q. Did you go with them to Fox-Hall, or not?

A. She went with the Lady Dutcheſs.

Q. Whoſe Servant was you there?

A. Lady Dutcheſs's.

Q. How long did you ſerve the Lady Dutcheſs?

A. She ſtaid with her till ſhe went to Mill-bank.

Q. How came you to leave their Service?

A. They ſent her away upon the account of the late Trial.

Q. Who went with you?

A. Mrs. Suſannah, Chambermaid to the Lady Dutcheſs; and Mr. Nicholas, that was Gentleman to Sir John Germaine.

Q. What's his Name?

A. Nicholas Hoſier.

Q. Who took care of your Paſſage?

A. Nicholas Hoſier.

Q. Whither was you order'd to go?

A. To Holland, to the Hague: they paid her in full, and promiſed Fifty Livres beſides.

VOL. V.

Q. Was any part of it paid? And by whom?

A. She receiv'd it in four Quarters, from his Brother Philip, at the Hague.

Q. Whoſe Brother?

A. Sir John Germaine's Brother.

Q. Who hired you when you came to England?

A. Mr. Briane's Wife.

Q. What kin is ſhe to Sir John Germaine?

A. His Siſter; and they promiſed, if Matters did not go for the Dutcheſs, ſhe would come to Holland herſelf, and take her into her Service again.

Q. Have you ſeen Sir John Germaine and the Dutcheſs in Bed together at Mill-bank?

A. Once or twice.

Q. How long had the Lady Dutcheſs lived at Mill-bank ere you left her Service?

A. Nine or Ten Weeks.

Q. How came you to ſee them in Bed together?

A. By reaſon none was ſuffer'd to come into the Room, the Bedchamber, but ſhe and another Maid, to bring Neceſſaries, as, Water to waſh their Hands, and to clean the Room.

Q. Did you ſee them at their undreſſing, when they went to Bed?

A. She undreſs'd them herſelf, and ſaw them in Bed.

Q. Give an Account how you two came to be admitted into the Chamber, and what you ſaw there.

A. She help'd them to Bed, and ſaw them go to Bed together.

Q. Saw you them next Morning?

A. Yes.

Q. On what Occaſion came you into the Chamber in the Morning?

A. She came with Chocolate, and Water to waſh their Hands.

Q. Did you ever ſee Mr. Nicholas Hoſier there?

A. Yes; he did the Buſineſs that ſhe did when ſhe could not be preſent; he was Valet de Chambre.

Q. Was he Valet de Chambre to Sir John Germaine, or to the Dutcheſs?

A. He belong'd to the Dutcheſs at Fox-Hall and afterwards to Sir John Germaine.

Q. Came he to Sir John Germaine before the Lady Dutcheſs went to Fox-Hall, or not?

A. The Dutcheſs was at Fox-Hall when he came to Sir John Germaine.

Q. Who lived with the Dutcheſs at Fox-Hall?

A. Sir John Germaine's Siſter.

Q. Who hired you?

A. Mrs. Briane, Mr. Briane's Wife.

Q. Was there no other Relation of Sir John Germaine's that lived there beſides?

A. Mrs. Judith.

Q. What Mrs. Judith? What's her Name?

A. She does not know.

Q. What kin was Mrs. Judith to Sir John Germaine?

A. His Siſter.

Q. Did the Dutcheſs uſe to go to no other Place?

A. None, but to the neighbouring Gardens, to gather Flowers.

Q. When you were at Mill-bank, did you ever ſee the Dutcheſs's Father?

A. She hath been ſeveral times at the Dutcheſs's Father's, and the Lady Dutcheſs told her Father and

and Mother, that she brought her from *Holland*; she dress'd three Dishes of Meat, by order of the Dutcheſs.

Q. Who was the Lady Dutcheſs's Father? Where did he live?

A. He lived at *Mill-bank*, but could not tell his Name; the Lord *Peterborow*, ſhe ſays, but could not think on't before now.

Q. When ſhe lived with *Germaine* at the *Cockpit*, was there no other that lived with them at that Time?

A. No body.

Q. Did Sir *John Germaine*'s Brother-in-Law or Siſter lie in the Houſe at any time?

A. Yes; when they came firſt to *England* they uſed to lie there.

Q. Name them.

A. Mr. *Briane*, and his Wife.

Q. Did you ſee any of Sir *John Germaine*'s Relations, at any time, in the Room during the Time that the Dutcheſs was in Bed with him?

A. Yes, Mr. *Briane* and his Wife.

Q. Was Sir *John Germaine* in Bed at that time with the Dutcheſs?

A. Yes.

Elianor Vanefs cross-examin'd.

Q. Was it at *Fox-Hall* that the Lady Dutcheſs ſaid, That *Germaine* was her Brother?

A. Yes.

Q. Did the Dutcheſs tell you, that Sir *John Germaine* was her Brother?

A. She gave it out among the Neighbours, but never told her ſo.

Q. Was you Cookmaid?

A. She was hired for Cookmaid.

Q. Did you continue to act as Cookmaid?

A. Yes, at *Fox-Hall*.

Q. Was you at the *Cockpit*?

A. She uſed to clean the Rooms, and no body was ſuffer'd to come into the Room but ſhe, Mrs. *Suſannah*, and *Nicholas*.

Q. Was there no other Woman in the Houſe but you?

A. Yes, Mrs. *Suſannah*.

Q. Where did you ſee Sir *John Germaine* and the Dutcheſs in Bed?

A. At *Fox-Hall*.

Q. When came you from *Holland*?

A. About five or ſix Weeks ago.

Q. Where have you been ſince?

A. She does not know no Place nor Street in *London*.

Q. How came you over?

A. About a Year and a half ago ſhe met *Nicholas* at *Amſterdam*; ſhe ask'd him how he did, and if he had got a Place; he answer'd, No, but he believ'd he ſhould very ſoon have one in *England*.

Q. Who ſent for you, or brought you over, from *Holland* this laſt Time?

A. She met Mr. *Nicholas* about a Year ago, and ſaid, She had a great Mind to go and live in *England* again; and he ſaid, He would get a Place for her.

Q. Who ſent for her?

A. Does not know.

Q. When you came over, who paid your Paſſage, and firſt took Care of you?

A. *Nicholas* hath given her what ſhe ſpent ſince.

Q. Who brought you to Town? And who furniſh'd you with Money? And where did you land? What Houſe did you firſt come to?

A. She landed at *Graveſend*.

Q. Who receiv'd her there, or, when ſhe came to Town, brought her to any place to lodge at?

A. *Nicholas* brought her to a place where ſhe was ſecure.

Q. What place is it?

A. She does not know, ſhe never was in *London*.

Q. Did you not live at *Fox-Hall*, and at Sir *John Germaine*'s Houſe in the *Cockpit*?

A. She was no further than thoſe Houſes; ſhe means, ſhe was never in the City of *London*.

Q. Where is the Houſe ſhe has been at theſe ſix Weeks?

A. She can't tell whereabouts it is.

Q. Was you not ſent for back from *Holland* to be a Witneſs?

A. No, knew nothing of it till about ——— Now about eight or nine Weeks ago.

Q. In what Street is the Houſe you have been at?

A. I can't tell.

Q. How long is it ſince you went into *Holland*, ſince you left the Dutcheſs's Service?

A. About eight Years ago.

Q. Did you never tell any body the Occaſion of your going over?

A. Yes, in *Holland*, but not here.

Q. To whom did you tell it?

A. To a great many.

Q. Know you any of thoſe to be in *England*, that you did tell it to?

A. Does not know any.

Q. Did you ever diſcover this Matter of your own accord? or, Was you ask'd to do it?

A. I ſaid, I would tell the Truth if I were ask-ed.

Q. Can you name the Perſon that ask'd you?

A. Mr. *Nicholas*.

Q. Had you any Diſcourſe about this Matter about eight Weeks ago?

A. When I asked Mr. *Nicholas* if he could get me a Place in *England*, I told him, I would ſay the Truth.

Q. What Diſcourſe had you with Mr. *Nicholas* about it?

A. I ask'd Mr. *Nicholas*, whether there was any danger of any ſuch Thing; he ſaid, He knew nothing of it.

Q. Did you ever diſcover that you were ſent out of the Way, into *Holland*?

A. No.

Q. Whether you and this Gent. that interprets have not talk'd moſt of this Matter before you came hither?

Q. Who have you talk'd to about this Matter, ſince you came into *England*, beſides *Nicholas*?

A. No body.

Q. Are you a Single Woman, or a Married Woman?

A. A Single Woman.

The Duke's Counsel.

Q. Was it your Buſineſs to look after the Chamber, to keep the Door conſtantly, or on what Occaſion?

A. I uſed to waſh the Dutcheſs's Clothes, and bring to Sir *John Germaine*'s Houſe, and keep the upper Rooms clean, where Sir *John Germaine* lay.

Q. Did *Susan* go over with you into *Holland*, and come back with you?

A. Mr.

A. Mr. Nicholas brought me into a Room where ſhe was kept, and I ſtayed a while with her.

Q. Did *Suſan* go with you, and come with you again?

A. Nicholas, and *Suſan*, and I, were in a Room together, and Mr *Germaine* came every Night when the Houſe was broke up, and told us what paſſed.

Q. Did *Suſan* go to *Holland* with you? whether did you go before *Nicholas* or with him?

A. Sir *John Germaine* ordered *Nicholas* and ſhe to go into *Holland*, and *Nicholas* went with her.

Signum,

Elianor Vanefs.

Depositions of *Nicholas Hoſier*.

Die Jovis 22 Februarii, 1699.

Nicholas Hoſier Sworn.

Q. **W**Hether he knows Sir *John Germaine* and the Dutcheſs of *Norfolk*?

A. Yes Sir, I underſtand, I know both.

Q. How long have you been acquainted with Sir *John Germaine*, and upon what Occaſion?

A. The firſt he came to know him was in *Suffolk-Street*.

Q. Whether ever he was a Servant to him?

A. Yes, I was a Servant to him there.

Q. When was it you firſt came into Sir *John Germaine's* Service?

A. It was above half a Year before King *James* went away.

Q. Did you live with Sir *John* or the Dutcheſs?

A. With Sir *John Germaine*.

Q. Where did he dwell at that Time?

A. He had Lodgings at the *Golden Ball*.

Q. Was you with him afterwards when he was at the Cockpit?

A. Yes, and I lived with him at the Cockpit too.

Q. At that Time did you know the Dutcheſs of *Norfolk*?

A. I knew her becauſe they told me ſhe was ſo.

Q. Was there any Lady that lived with Sir *John Germaine* at the Cockpit?

A. At that time there was Mrs. *Brienne*, Sir *John Germaine's* Siſter.

Q. Was there any body elſe uſ'd to lodge there?

A. There was none there but her at firſt.

Q. Was there any other afterwards?

A. Yes, about two or three Months after he was there, but I don't juſtly know how long afterwards.

Q. Who was there then?

A. There was his Siſter, by Name Mrs. *Judith Germaine*.

Q. Do you know any thing about the Dutcheſs of *Norfolk* at that Time?

A. Yes.

Q. What Converſation had Sir *John Germaine* and the Dutcheſs of *Norfolk*?

A. She was in the Houſe, and they eat and drank together, and lay together.

Q. Where was that?

A. At Sir *John Germaine's* Houſe next the Cockpit.

Q. How came you to know they lay together?

A. Becauſe I was his *Valet de Chambre*, and help'd to undreſs and put him to Bed.

Q. Where was the Dutcheſs at that Time?

A. The Dutcheſs was ſometimes a-Bed, and ſometimes not, according as he came home, early or late.

Q. How long was the Dutcheſs with Sir *John Germaine* at the Cockpit?

A. She was at the Cockpit before I came there.

Q. Whether he went from Sir *John Germaine's* Service, after he came to live there?

A. He left his Service ſeveral Times.

Q. When was the firſt Time he went from Sir *John Germaine's* Service?

A. The firſt Time he left his Service was in *Suffolk-Street*.

Q. How long was it before he came to live with him again?

A. He came into his Service again, the Summer after this preſent King came into *England*.

Q. What time of the Summer was it?

A. He can't juſtly tell that.

Q. Whether the Dutcheſs was there before he came to the Cockpit or not?

A. She was there before.

Q. How long continued ſhe there?

A. About fifteen Days after he came to Sir *John Germaine*.

Q. In what manner did Sir *John Germaine* and the Dutcheſs live there during thoſe fifteen Days?

A. He ſays he hath already explained that before, he uſed to undreſs him and put him a-bed together with the Dutcheſs.

Q. Where did the Dutcheſs live after ſhe went from Sir *John Germaine's* Houſe?

A. She went and dwelt at *Fox-Hall*.

Q. By what Name did ſhe go when ſhe was at *Fox-Hall*?

A. She went by the Name of my Lady *Beckman*.

Q. Whether he went with her, or continued in Sir *John Germaine's* Service?

A. He went with my Lady Dutcheſs for ſome time, by Sir *John Germaine's* Order, he was ſometimes with the one, and ſometimes with the other, ſometimes one paid him, and ſometimes the other.

Q. Whether Sir *John Germaine* went to *Fox-Hall*?

A. He came there ſometimes, he has ſeen him there ſeveral Nights.

Q. Whether he ſtayed all Night there?

A. Sometimes.

Q. Whether he was alone, or any body was with him?

A. There was ſome body lay with him.

Q. Who upon his Oath?

A. Madam the Dutcheſs, Madam *Beckman*.

Q. How know you that?

A. Becauſe he undreſs'd him when they lay together.

Q. How often was that?

A. He can't juſtly ſay how often, but it was ſeveral Times.

Q. What Service was he in when he went out of *England*, and upon what Occaſion?

A. He

A. He left Sir John Germaine's Service at that Time when the Trial was depending between the Duke and Dutcheſs of Norfolk.

Q. By whose Order did you leave that Service?

A. He desired leave.

Q. How came you to leave that Service at that Time?

A. Because he was afraid he should be obliged to speak the Truth of what he had seen.

Q. Whether any went with him, and who went from their Service when he went?

A. There were two Servants of the Dutcheſs's.

Q. What was their Names?

A. One is called *Susannah Barrington*, and the other *Elianoſ Vanefs*.

Q. Whither did they go?

A. He was ordered by Sir John Germaine to hire Lodgings for them where they should be unknown and private.

Q. What was the Reason why they should be in private.

A. He knows no other Reason, but the Difference before the Parliament between the Duke and Dutcheſs of Norfolk; he was obliged to take the Lodgings because the Wind was contrary for them to go for *Holland*, and took private Lodgings for them by the Order of Sir John Germaine.

Q. What became of *Susannah Barrington* after that?

A. She stay'd about three Weeks with him, and then Sir John Germaine came and fetch'd her back again, and where he carried her he does not know.

Q. What became of *Vanefs*, and yourself afterwards?

A. When the Wind favour'd we pass'd the Seas.

Q. What Time of the Year was it?

A. It was about *Easter* that he came into *Holland*.

Q. What time he went from his Service and was order'd to be private?

A. It was about the Time of the Trial.

Q. Whether he hath any Paper under Sir John Germaine's Hand for his Discharge? We do not ask it, but only to refresh his Memory.

The Paper was dated, Eighth of February One thousand six hundred ninety two; reckoning the Year to begin the first of January.

Whether that was the Time he left the Dutcheſs's Service?

A. Yes, about six or eight Weeks after he went to Sea.

Q. Where did you stay in the mean time?

A. In the *Minories* near the Tower.

Q. How came you to stay there so long after you were out of Service, before you went beyond Sea?

A. Because the Wind was contrary.

Q. Who went over with him, what became of *Elianoſ Vanefs*?

A. She went with him to *Holland*.

Q. Who bare her Charges thither?

A. Sir John Germaine gave him seven Guineas to pay for the Expences that he was at here, and to cross the Sea.

Q. How long after that he continued in *Holland*, before he came into *England*?

A. He did not stay long in *Holland*, but went into his own Country.

Q. How long was it before he return'd to *England*?

A. The Summer following.

Q. Was he sent for over into *England* and by whom?

A. Yes, Sir John Germaine sent to him often, by himself and by his Brother in *Holland*.

Q. When he came over in the Summer following (in Ninety two) whose Service did he come to?

A. He returned to Sir John Germaine.

Q. Where did he live at that Time?

A. Where he lives at present, at the *Cockpit*.

Q. Whether after he came back in the Year One thousand six hundred ninety two, he observed any Conversation between Sir John Germaine and the Dutcheſs?

A. Yes, he says he saw them come together at their House.

Q. What more?

A. He again then saw them a-bed together.

Q. Where?

A. In the House of Sir John Germaine.

Q. How often may that be?

A. He can't justly tell how often.

Q. Whether it was often or not?

A. No, he can't say very often.

Q. When was the last Time he ever saw them a-bed together?

A. The last Time he saw them a-bed was not at the *Cockpit*.

Q. Where then?

A. It was at the Dutcheſs's own House, where, as he believes, she lives still.

Q. Whereabout in the Town?

A. It was upon a Corner of the Park, near my Lord of *Oxford*'s.

Q. How long since he saw them last a-bed together?

A. He can't justly tell the Time, it was about two or three Months before he went away.

Q. Did he mean the first, second, or third Time?

A. It was two or three Months before he went away the last Time.

Q. In what Year did he go away the last Time?

Let him look upon any Note he hath to refresh his Memory.

Accordingly he look'd upon a Paper.

A. 'Tis the Twenty seventh of April, One thousand six hundred ninety six.

Q. Did you go away then the last Time?

A. Yes, he says, that 'twas the last Time he left his Service.

Q. How long before that did you see them a-bed together?

A. He says it was about two Months and a half before he left the Service.

Q. When my Lady Dutcheſs lived at *Fox-Hall*, whether he can name any body else that was a Servant in the House at that Time?

A. Yes, there was one *Elianoſ Vanefs*.

Q. What Servant was she?

A. She look'd to the Kitchen.

Q. Whe-

Q. Whether he has ſeen her in the Chamber when the Dutcheſs was a-bed there?

A. Yes very often.

Q. How came ſhe that was Cook-maid to be in the Chamber?

A. He ſays, he can't tell the Reaſon, or what Buſineſs ſhe had there, but there ſhe was for one Thing or other, beſt known to herſelf, he does not know.

Q. Whether when the Dutcheſs was at Fox-Hall, any Relations of Sir John Germaine came to her there?

A. Yes, they would come and ſee her.

Q. Who were they?

A. Mrs. Brienne and Mrs. Judith; he ſays he does not remember that Mrs. Brienne has lain there, but Mrs. Judith has.

Q. Where it was and upon what Occaſion he met with *Elianoſ Vanefs* after he carried her over into *Holland*?

A. I met her in *Amſterdam*.

Q. Whether he came over into *England* with her, and upon what Occaſion?

A. I met her at *Amſterdam*; and ſhe ask'd me what Buſineſs I had there, whether I had a Maſter, and I ſaid no.

Q. When was that?

A. About a Year and a half, to his remembrance.

Q. Whether he came over with her the laſt time?

A. Yes, he came over into *England* with her in Company, about ſix or ſeven Weeks ſince.

Q. Where has ſhe been ſince he came into *England*?

A. She was in Lodgings.

Q. Where?

A. He put her into private Lodgings, that ſhe ſhould be ſecure.

Q. Why did you put her into private Lodgings?

A. Becauſe he was afraid, in the Circumſtances that he is now, that ſomebody might give them ſome Affront, or do them an Injury, and therefore he thought it beſt to be in ſome Place of Security.

Q. What particular Reaſon had he why he ſhould take private Lodgings, or have that Fear upon him?

A. He ſays, that when he was laſt here, Sir John Germaine came up one Night in a great Paſſion, and ſwore, and ſaid, ſome body would betray him.

Q. I deſire he might repeat that again?

A. Sir John Germaine came one Night up ſtairs, and ſaid, that *Nicholas* this Rogue would betray him.

Q. Who was that?

A. He ſays 'twas one *Nicholas Ruſbett*, that ſerved him or both he can't tell, but he was in his Service, that he heard theſe Words, and that he thought in theſe Circumſtances, the ſecureſt Way would be to take private Lodgings.

Q. What brought him into *England* the laſt Time? Whether he was ſpoke to, to come, and for what purpoſe?

A. He ſays, that about two or three Years ago he happened to meet with a Friend, and he deſired him if he heard of a good Place for him in *England* to let him know of it, for he would go and ſerve there again.

Q. Whether he was ſpoke to, to come over, or was *Elianoſ Vanefs* ſpoke to, and what was the Occaſion?

A. My Lord ask'd him if he would ſpeak the Truth and do him any Service, and whether he would bring this Girl along with him.

Q. Who was it that ſpoke to him?

A. My Lord Duke and my Lord Howard.

Q. When was that?

A. It was about a Year ago;

Q. Where was he at that Time?

A. He was in *London*.

Q. Did he go over of his own accord, or was he ſent into *Holland*, who it was that ſent him over, and for what?

A. It was a Friend of his Acquaintance, that he deſired in caſe he heard of a Place to ſend for him.

Q. Who ſent for *Elianoſ Vanefs* over?

A. He ſays, that after he had promiſed my Lord Duke and Lord Howard, to ſpeak the Truth of what he knew, they deſired him that if he met with *Elianoſ Vanefs*, to deſire her to come over and ſpeak the Truth of what ſhe knew.

Q. How long after did you meet with *Elianoſ Vanefs*?

A. 'Tis about Twelve Months ſince I met with her.

Q. When was the firſt Time that he ſpoke to *Elianoſ Vanefs* about her coming over to ſpeak the Truth?

A. 'Tis about a Year ſince.

Q. How long is it ſince they reſolved to come over?

A. About twelve Months.

Q. Whether he was acquainted with *Elianoſ Vanefs*, before he met with her in Sir John Germaine's Service?

A. He ſays never.

Q. You ſay you went from Sir John Germaine's Service in *Suffolk-Street*, and you ſay when you came to him again, he lived in the Cockpit, Did you find *Elianoſ Vanefs* there then?

A. He ſays he found her at the Cockpit.

Q. When he waited on Sir John Germaine in his Chamber, who waited on the Dutcheſs in her Chamber?

A. There was one *Suſannah Barrington*, and *Elianoſ Vanefs*.

Q. But who waited upon her in her Chamber?

A. *Suſannah Barrington* did, to dreſs her.

Q. Whether he had ſeen any of Sir John Germaine's Relations in the Chamber, when this Lady and Sir John Germaine were a-bed together?

A. Yes.

Q. Name them?

A. He ſays, he ſaw Mrs. Brienne, and Mr. Daniel Germaine there.

Q. Did you ſee Mrs. Judith there?

A. He does not remember that he ſaw Mrs. Judith in the Room while they were a-bed together, but the other he hath ſeen when they were a-bed together, but at different Times.

Q. Whether ever he hath ſeen the Dutcheſs at any other Place?

A. He has been at the Chapple with her, and elſewhere?

Q. Where?

A. At my Lord Peterborow's, and in her own Houſe?

Cross Examined.

Q. I desire he may reduce this to a Certainty what Time he went out of England, and look upon his Note again?

He look'd upon his Note, and 'twas dated Eighth February, One thousand six hundred ninety two.

Q. How long after this he went out of England?

A. He went away as soon as the Wind was favourable.

Q. Can he recollect the Time?

A. He says 'twas sometime before Easter, for he came into Holland about Easter.

Q. When he told his Grace the Duke of Norfolk and Lord Howard he would be true to them, whether he was in any Service at that Time?

A. No, he was in no Service at that Time.

Q. How long had he been out of Employ?

A. He has none yet.

Q. But how long had he been out of Employ, or Service, before he made this Proposal to the Duke, or my Lord Howard?

A. He says, he went away about the Twenty-seventh of June.

Q. Is it the same Year his Paper speaks of, that he spake to my Lord Duke?

A. No, 'twas not; he spake to my Lord Duke about twelve Months ago.

Q. But how long had he been out of Service when he spake to my Lord Duke? when did he leave Sir John Germaine the last Time?

A. 'Tis about Three Years and half ago; 'twill be Four Years in June next.

Q. Has he been in any Service since that Time?

A. No, he hath not.

Q. How has he lived since then?

A. He says, He has something of his own in his own Country, upon which he may subsist some Time.

Q. I think he said, he saw Sir John Germaine and the Dutchess in Bed together, in the House where she now lives?

A. Yes.

Q. Then I desire he will tell, if he knows any of the Dutchess's Servants that were about her at that Time?

A. Yes, he does.

Q. Then, that he will name them?

A. Henry Keemer.

Q. What's become of him?

A. They told he was dead; and there was Susan Barrington.

Q. I desire he will tell of some of the Servants that lived with the Dutchess at that Time, besides that Person that is dead, and the other which is gone beyond Sea, as they say?

Mr. Northey answer'd, We don't say she is gone beyond Sea.

A. He does not know any other.

Q. Then, that he will tell what Month he saw them in Bed together?

A. He can't remember the Month, or the Day; but if they will ask him the Reason why he remembers it, he will tell it them.

Q. If you can come to any Certainty about the Time of the Year, or the Month?

A. He can't say the Month, or any particular Time.

Q. What Servant he saw in the House, or who let him in?

A. He had himself the Key of the lower Room, and could come in when he pleas'd.

Q. Whose Servant was he at this Time he speaks of? Whether he was a Servant to the Dutchess or to Sir John Germaine?

A. He was Servant to Sir John Germaine.

Q. He was saying, he could tell a Reason to the Times, let him recollect himself of the Time?

A. He can't remember the Time, but he came into the Room to bring a Clyster, and he was desired to stay a little, till my Lady Dutchess got up.

Q. That he may be positive whether he had a Key to the lower Room of the Dutchess's House?

A. He says, he had a Key of the Door that goes into the Park, and he could come into the House by it, for it was the Key of the House.

Q. What Servant was it that brought him up, for that Key only let him into the lower Room?

A. Sometimes Susan Barrington, and sometimes Henry Keemer.

Q. What Room the Lady Dutchess lay in?

A. 'Tis a Room that looks into the Park.

Q. 'Tis not a Ground Room, I suppose?

A. No, 'tis up Stairs.

Q. How many Stories?

A. He can't tell what degree it was.

Q. Being ask'd that Question again upon the reading his Depositions, he says, He can't tell how many Stories, but, if you please, he will describe the coming into the Room as well as he can.

Q. Describe the coming into the Room?

A. That as you come upon the left Hand, there is a Way to go into the Dutchess's Room? when you have passed the little Chamber door, you go into a Place full of China; and, after that, you come to the Dutchess's Bed-Chamber: On the other side, going, up Stairs, there is a little Room, where Susan told him she lay; and afterwards you come into the Room where the Chimney is as he thinks, on the right Hand, and he thinks there are Two Windows that look into the Street, he is not very certain; and in the Room upon the left Hand there is a Door into a great Room, and from that great Room you can go into the Lady Dutchess's Room. It was so at that Time, to the best of his Remembrance.

Q. How many Rooms are there upon a Floor?

A. There are a matter of four Rooms upon a Floor.

Q. Whether he has spoke with any body that he knows is acquainted with this House since he was examin'd here before?

A. He says, he has spoke to no body since, that has given him any Account of the House.

Q. Which Side of the Park does the Window of my Lady Dutchess's Room look into?

A. Towards the Pond where the Brass Statue is.

Q. Does the Bed-Chamber look towards the Brass Statue?

A. He durst not go to look out at the Window for fear of being discover'd, but he could see the Water.

Q. Whether he knows the Horse-Guards?

A. Yes.

Q. Whether he knows Arlington House?

A. Yes.

Q. Whether the Window does look towards Arlington House, or the Horse Guards?

A. He

A. He hath been there ſeveral Times, but it was not his Buſineſs to go to the Window ; but when he was in the Room he could ſee the Water.

Q. Whether he could tell which way the Window look'd ?

A. He did not live in the Houſe, but went there ſometimes upon Meſſages ; and when he was there, 'twas not his Buſineſs to go to the Window, but he could ſee the Water when he was in the Room.

Q. Whether the Window was on that ſide of the little Door that he came in, or on t'other ſide ?

A. Upon the left Hand coming in. He ſays, He has explain'd himſelf as to the entering in, and he can ſay no more to it.

Q. Was it one or two pair of Stairs that the Dutcheſs lay ?

A. He can't be poſitive whether one or two pair of Stairs.

Q. Who brought him up that Time he brought the Clyſter ?

A. *Suſan Barrington.*

Q. Who told him, at the Cockpit, 'twas the Dutcheſs of Norfolk ?

A. Sir John Germaine, her ſelf, and the whole Houſe told him ſo.

Q. Did he before that Time know the Dutcheſs ?

A. No.

Q. Did you never ſee other Women there beſides this Lady ?

A. Yes.

Q. Did you know all the reſt that you ſaw there ?

A. No, he did not know them all.

Q. Whether he was not told the reſt of the Women were of great Quality too ?

A. He never was told ſo, nor did he inform himſelf whether they were or no.

Q. At Fox-Hall, and at the Cockpit, I think, he ſpoke as if he undreſs'd Sir John Germaine and the Dutcheſs : Whether he undreſs'd them both ?

A. Not the Dutcheſs.

Q. What Year was it they were at Fox-Hall ?

A. It was before he went to Ireland, and after he came from Ireland, but he can't precisely tell the Time.

Q. Whether he has been in any Service ſince One thouſand fix hundred ninety ſix, when he left Sir John Germaine's ?

A. No.

Q. Whether when he came, about a Year ago, into England, there was Application made to him in order to make a Diſcovery ; or, whether he offer'd of himſelf to make it ?

A. He never did offer himſelf.

Q. Who was it that firſt ask'd him the Queſtion ?

A. 'Twas my Lord Howard.

Q. Where did you meet my Lord Howard ? and upon what Occaſion ?

A. He ſays, That 'twas that Perſon that he had addreſs'd himſelf to, to get him into Service here, that was the Occaſion of their meeting together.

Q. Did you know the Lord Howard before ?

A. No.

Q. Where was the Place they met ?

A. He call'd him to his Houſe.

Q. My Lord, or that Perſon ?

A. He ſays that Perſon to which he addreſs'd himſelf to get a Place, told him he had found one.

Q. Name that Perſon.

A. *Richardſon.*

Q. Where does he live ?

Vol. V.

A. I don't know.

Q. Were you acquainted with him before ?

A. Yes.

Q. Where had you been acquainted with him ?

A. At London ; 'tis a Woman.

Q. Whether he can deſcribe the Room, or the Furniture of the Room, where this Noble Lady and Sir John Germaine were a-bed together, where ſhe lives now ?

A. He can't remember any thing of the Furniture.

Q. Was it hung or wainscoted ?

A. He ſays, he can't tell, and yet was there often.

Q. Pray who was the Clyſter for ?

A. For Mr. Germaine.

Q. Where was it to be adminiſtered ?

A. A-bed.

Q. Who was a-bed ?

A. My Lady Dutcheſs was a-bed too.

Q. Was it to be adminiſtered at the ſame Time as he and the Dutcheſs were a-bed together ?

A. No.

Q. Was the Dutcheſs there ?

A. He laid the Syringe to the Fire-ſide till ſuch time as the Dutcheſs roſe.

Q. Apothecaries are exact in point of Time in making their Bills.

A. He ſays, I compos'd the Clyſter myſelf, but he did not compoſe it at the Dutcheſs's Houſe, but at Mr. Germaine's.

Q. Did you ſtay with Sir John Germaine till all was over ?

A. No ; as ſoon as he had given it him, he went home to Mr. Germaine's Houſe.

Q. Whether he pretends to ſpeak of any other Time he ſaw the Dutcheſs in Bed with him at her Houſe in Duke-Street, but when he carried him the Clyſter ?

A. Yes, my Lord, he ſays, he has.

Q. Let him tell the Times and Circumſtances.

A. He ſays, he can't very well remember the Times, but he had ſometimes Buſineſs there, to bring and carry Letters.

Q. When was that Time of the Clyſter ?

A. It was about two Months before he left them.

Q. Was that the laſt time he ſaw them together ?

A. That was the laſt Time.

Q. How long before that did he ſee 'em together ?

A. Long before that Time, in the ſame Houſe.

Q. He ſays, he has ſeen Sir John Germaine and the Dutcheſs in Bed together elſewhere ; Did he never ſee them in Bed together at the Mill-Bank ?

A. He has ſeen them there two or three Times a-bed together.

Q. When did your Maſter order you to prepare a Clyſter ?

A. He had Order to come and wait for Mr. Germaine at the Dutcheſs's ; and, that Mr. Germaine coming to the Dutcheſs's late, he order'd him to bring the Clyſter next Morning.

Q. At what Time he came the next Morning ?

A. He had Order to bring it at nine a-Clock, and he brought it at the appointed Hour, and waited in the little Room where Suſan was till he was call'd in.

Q. He ſays, he waited for Sir John Germaine, by his Orders, at the Dutcheſs's, till 'twas late ; which of the Dutcheſs's Servants did he keep company with ?

4 D

A. He

A. He says, he remembers very well it was Mr. Keemer.

Q. Whether that Time that he saw Mr. Germaine and the Dutcheſs in Bed together at Mill-bank, if it was after the first time he was sent out of England, when the Bill was depending before the Lords?

A. 'Twas after.

Q. What Year did you see them a-bed together at Mill-bank?

A. 'Twas a Day or Two before Mrs. Davenant died. A Day or two before she died Mr. Germaine came to Mill-bank, and staid there about eight Days.

Nicola Hausfear.

Depositions of William Bayly,

Die Sabbati 25 Februarij, 1699.

William Bayly Sworn.

Q. D^OY E know Sir John Germaine and the Dutcheſs of Norfolk?

A. Yes.

Q. Was you Servant to Sir John Germaine?

A. Yes.

Q. In what Capacity?

A. Three Years I wore his Livery, and three Years I was his Steward.

Q. When did you first come to live with him?

A. Three Weeks before the King was crown'd.

Q. Was there any Conversation between Sir John Germaine and the Dutcheſs of Norfolk? D^Oye know that they liv'd together, or kept company one with another?

A. No; I never knew them live together, but seen them keep company together, but never saw any Incivility between them.

Q. Where saw you them in company together?

A. I saw them in company in my Master's House.

Q. How long ago?

A. About Five Years ago.

Q. Where did your Master then live?

A. He liv'd then where he does now.

Q. Did the Dutcheſs of Norfolk ever lie there?

A. Never, to my Knowledge.

Q. What was the Time she usually came there?

A. Commonly in an Afternoon.

Q. How often have you seen her there?

A. Two or three times.

Q. At what Time did she use to come? and, At what Time did she use to go away?

A. She used to come there about Four or Five a Clock in the Afternoon, and might stay there about Two or Three Hours.

Q. You are upon your Oath, and pray tell whether you ever saw them in Bed together?

A. By all that's good, I never saw them in Bed together.

Q. Did the Lady Dutcheſs use to come thither Mask'd or Unmask'd?

A. She used to come Mask'd, but put it off when she came into the House.

Q. Who used to come with her?

A. There used to come Mr. Keemer with her.

Q. What Company? Did no other use to come with her to Sir John Germaine's House?

A. Yes; another Servant, Mr. Carter.

Q. Who was in the Room with them in Sir John Germaine's House?

A. Mr. Keemer stay'd commonly with them all the Time they dined; and after Dinner the other Servants and I were in the next Room to them, and commonly, when they had Occasion, they would call Mr. Keemer.

Q. Was there no other Servant but Mr. Keemer that they used to call upon?

A. Yes; a Gentlewoman, Mrs. Susan Barrington.

Q. Have you seen her lately?

A. No, not these Six Months.

Q. D^Oye know if your Master used to go to the Dutcheſs's House?

A. Yes, I have heard so, but I can't say so positively.

Q. Did you ever go with them to the Dutcheſs's House?

A. No; but I have gone with them as far as the Horse-Ferry.

Q. When was the last Time you saw them together?

A. I can't tell; I have been out of my Master's Service these Four Years.

Q. How long before you left your Master's Service, d^Oye think it was, that you saw them together?

A. I can't tell, but I think it might be about half a Year.

Q. He has gone with his Master as far as the Horse-Ferry, pray then let him be ask'd where he left his Master?

A. I left him at the Horse-Ferry.

Q. What Orders did your Master give you when you left him?

A. He order'd me to go home, and keep the House.

Q. D^Oye know whither your Master was gone then?

A. I may judge he went to the Dutcheſs, but I can't swear he went there.

Q. Did Sir John Germaine come home to Bed that Night?

A. Some Nights he came, and some he did not.

Q. Did you carry Clothes to him at any Time?

A. I have carried Clothes for him to Mr. Keemer, the Dutcheſs's Servant.

Q. Where did Keemer live when you carried Clothes to him?

A. In a little Street going to the Bowling-Ally.

Q. Who did he live withal?

A. He told me he lived with the Dutcheſs, but he was a House-keeper, and had a House there.

Q. Did you always carry Clothes to Mr. Keemer for your Master?

A. Sometimes I carried his Clothes to Mr. Keemer, and sometimes Mr. Keemer came to me for them.

Q. Did you apprehend that your Master was then at the Dutcheſs's, or at Mr. Keemer's?

A. I can't tell where he was; How can I tell? I answer as punctually as I can.

Q. When Keemer came to you for Clothes, what Account did he give you where your Master was?

A. He gave me no Account.

Q. Whether did you ever see the Dutcheſs and your Master together at any other Place but his own House?

A. Never.

A. Never.

Q. When you carried the Clothes to *Keemer's* did your Maſter lie at home that Night, or not?

A. Sometimes he lay at home, and ſometimes he did not: Many times my Maſter has been at the Dutcheſs of *Mazarine's* from Four a-Clock this Day till Twelve the next.

Q. Repeat it again, for that's material.

A. My Maſter has taken his Chair at his own Back door, at Four a-Clock on a *Saturday*, and not come home till *Sunday* at Twelve a-Clock.

Q. Where has your Maſter been at that Time, when he ſtay'd out all Night?

A. At the Dutcheſs of *Mazarine's*; and when he loſt his Gold, he has ſent to me for more Gold.

Q. Did he ever ſend to you for any Clothes when he was there?

A. Never.

Q. D'ye know where he was when he ſent to you for Clothes?

A. No indeed.

Q. D'ye know *Nicholas Hoſier*?

A. Yes, I know him very well: I ſaw him here juſt now.

Q. Did you know him when he waited on Sir *John Germaine*?

A. Yes, he ſucceeded me, and I ſucceeded him again.

Q. You was Footman when you went to Sir *John Germaine*: When was that? and, what Year did you leave off your Livery, and ſerve him as his Steward?

A. I can't tell.

Q. He ſucceeded *Hoſier*, and *Hoſier* ſucceeded him; pray let it be ask'd him, at what Time he came into his Maſter's Service, when he ſucceeded *Hoſier*?

A. 'Twas about the ſame Time that the Trial was here before.

Q. How long was it ere *Hoſier* return'd again to ſerve Sir *John Germaine*?

A. To the beſt of my Knowledge, it was three Years; for I receiv'd and pay'd Money for my Maſter, and *Hoſier* was away all that Time: *Hoſier* won't deny it, if he were call'd in.

Q. You ſay that you ſucceeded *Hoſier* at the Time when the Trial was here; How long before that Time did you return to your Maſter's Service?

A. About Three Weeks before the King was crown'd I came to my Maſter, and ſerv'd him Three Years, and wore his Livery, and he was pleaſed, after Mr. *Hoſier* went away, to make me lay out his Money, to be Caterer for him, and to keep his Gold, and to the beſt of my Knowledge 'twas Three Years before *Nicholas* ſucceeded me again.

Q. How long was it before he came back again to ſerve Sir *John Germaine*?

A. Before I ſaw him in my Maſter's Houſe, and that he took my Place from me, 'twas Three Years.

Q. Did you not ſee Mr. *Hoſier* in England before that Time that you went out of your Maſter's Service?

A. No. I beg your Lordſhips Pardon, I will recollect my Memory, for that, as I have a Soul to be ſav'd, now 'tis come into my Mind, my Maſter ſent for *Nicholas* into *Holland* about a Year before *Nicholas* did come over: My Maſter told

VOL. V.

me before he came, that he would ſend for *Nicholas* again, and, that I and *Nicholas* ſhould have the Charge of his Houſe. *Nicholas* came over, and we had the Play at our own Houſe: *Nicholas* ſtaid there ſome Time, but he did not like his Buſineſs, and ſo he went away again becauſe he could not have all the Money.

Q. About what Time did *Nicholas* come into England, after the Trial was before this Houſe?

A. I can't reſolve you.

Q. Had you no Certificate of Leave, or Diſcharge, when you left your Maſter's Service?

H. No; my Maſter was ſo kind, that he brought me immediately into the Excife, as ſoon as I was out of his Service.

William Bayly croſs-examin'd, Lunæ 26 Februarij, 1699.

Q. When you carried the Clothes to Sir *John Germaine's*, was it the Time when you wore his Livery?

A. I carried no Clothes to him when I wore his Livery.

Q. Had you any Diſcourſe with the Dutcheſs's Agents ſince *Saturday* Night?

A. No, I have not ſeen them, nor don't know them.

Q. He ſays, he ſaw the Dutcheſs of *Norfolk* at the Cockpit, at Sir *John Germaine's* Houſe where he now dwells; pray recollect yourſelf, that you may be poſitive as to the Time.

A. I can't reſolve you as to the Year, 'tis ſo long ago; I believe 'tis about Five Years ago.

Q. Can you be poſitive that it is not more?

A. To the beſt of my Knowledge, 'twas about Five Years.

Q. Can you be ſo far certain, that you can ſay 'twas not more?

A. I can't ſwear 'twas more, but I believe it may be Five Years, more or leſs.

Q. You ſay, you ſaw her two or three Times there; Was it all in one Year, near the ſame Time or Month? Can you reduce it to any Certainty?

A. I believe it might be in Summer.

Q. All in one Summer?

A. Yes, I believe, all in one; to the beſt of my Knowledge, there was never a Winter between the Time that I ſaw her firſt and laſt.

Q. Did you know the Dutcheſs of *Norfolk* before that Time that you ſaw her in your Maſter's Houſe, and took her to be the Dutcheſs of *Norfolk*?

A. I did not know her before the Trial was here.

Q. Did you know her any Time after that Trial, before the Time you ſaw her in Sir *John Germaine's* Houſe;

A. I was not ſure that it was ſhe, only as I had it from Mr. *Keemer*.

Q. Then you don't undertake of your own Knowledge to ſay that it was ſhe?

A. I can't ſwear that 'twas ſhe, but as Mr. *Keemer* told me; I don't know whether I ſhould know her now or not, 'tis ſo long ſince I ſaw her, I believe it is five Years, if not more.

Q. Did you ſee her before or after you ſaw her at Sir *John Germaine's* Houſe?

A. The firſt Time they told me 'twas ſhe, I met her in her Coach in the *Pall-mall*, with two other Gentlewomen with her, a little before the Trial was here, I followed the Coach, and the

4 D 2

Dutcheſs

Dutchess went into some Lady's House in *Dover-Street*, and they told me the Dutchess was the first Woman that went out; this is the first Time that e'er I saw her, that I know of, till such time as *Keemer* told me 'twas she.

Q. Whether do you know *Nicholas*?

A. I know him very well.

Q. Can you tell how long it is since he came last into *England*?

A. No, he has been here two or three times in *England*, since I left my Master.

Q. How long before this Examination, saw you him, or spoke with him?

A. I did not see him above these three Years.

Q. How long before you came hither as a Witness did you see him?

A. I have not seen him these three Years till I came hither to be a Witness, and did admire to see him here, that a Man that had got his Bread under his Master should appear here against him, it is so ungrateful a thing.

Q. How came it you had so much Curiosity as to follow the Dutchess's Coach?

A. I had a mind to satisfy my own Humour.

Q. D'ye know how *Nicholas* lived since he was out of his Master's Service?

A. No, I never saw him, nor had any Account of him at all, nor have seen him these three Years till now.

Q. Did you know when *Nicholas* and *Elleanor Vaness* went out of *England*?

A. No, I never knew when they went, nor when they came.

Q. Don't you know what business he went out of *England* about, the Time you took his Place?

A. I know not the Business he went out of *England* upon.

Q. Did he at any Time tell you he was to get away to hide himself from coming hither?

A. No, I heard not one Word from him at the Time of his Parting.

Q. What reason had you to say upon the first sight of *Hosier* that he was ungrateful for coming hither?

A. I should think myself ungrateful to eat a Gentleman's Bread seven Years, and do him all the Spite and Malice I could.

Q. Repeat those Words.

A. I should think myself very ungrateful to prosecute; if I should do any harm to a Master that I had served so many Years; I should think myself very ungrateful, let him think of himself what he pleases.

Q. He added some other Words.

A. For any thing I know it is Spite and Malice.

Q. Where did you live, when you followed the Dutchess's Coach?

A. At Mr. *Germaine's*.

Q. This Man is a Witness, and so is *Hosier*, let him explain himself what he means, and wherein there is any Difference between him and *Hosier*, for both are Witnesses?

A. I say, I should think myself very ungrateful, if I would do any harm to a Man whose Bread I did eat so long, and had got so much Money under him.

Q. What Harm does *Hosier* do, being a Witness against the Dutchess of *Norfolk*, what Harm is that to Sir *John Germaine*?

A. I don't know.

Q. D'ye reckon it ungrateful to speak the Truth to the Prejudice of a Master?

A. No, I would not speak an Untruth for all the Masters in the World.

Q. Where is their any Fault more in *Hosier* than in you?

A. I know not.

Q. Whether did *Elleanor Vaness* live with Sir *John Germaine* when you liv'd there?

A. I know not who she is.

Q. This Woman that was here as a Witness?

A. Yes, she liv'd there.

Q. What Time went she away from Sir *John Germaine's* Service?

A. I know not, I cannot tell indeed.

Sign'd

William Bayly.

Die Martis 5^o Martii, 1699.

Counsel and Witnesses being called in for the Dutchess of *Norfolk* (and the Duke's Counsel being present) the Examinations of the Witnesses, taken Yesterday in Short-hand and transcribed, were read to them, and subscribed, (*viz.*)

Die Luna 4^o Martii, 1699.

Thomas Hawksworth sworn, Deposeth as followeth.

Quest. DO you know *Elleanor Vaness*? and did you live in the Dutchess of *Norfolk's* Family?

Answ. I came to live with the Dutchess about *October*, 1691. and left her in *September*, about two Years within two Months: *Elleanor Vaness* lived there when I lived there, and was Cook-maid.

Q. When did she leave the Dutchess's Service?

A. About the beginning of *January*, or the latter end of *December*, 1691.

Q. On what Occasion went she away?

A. She was turned away, to the best of my remembrance, for keeping Company with Dutchmen.

Q. Whether used she any other Office but in the Kitchen? or had she Access to the Dutchess's Chamber?

A. Never; she was not allowed to come any higher than the first Floor: She used to clean that Room next the Street, one pair of Stairs next the Door, and the Back-parlour even with that, but was not suffered to come into the Dutchess's Chamber.

Q. Who waited upon the Dutchess in her Chamber?

A. *Frances Night*; she was constantly in the Dutchess's Chamber, and used to warm her Bed.

Q. You say that *Vaness* was allowed to come no higher than the first Floor; explain that.

A. The Kitchen is under-ground backward; that Room *Vaness* cleaned was even with the Street,

Street, a Grond-room; the Laundry-maid clean'd the next Pair of Stairs.

Q. What was the Laundry-maid's Name?

A. Susan; ſhe's dead.

Q. Do you know how long?

A. No.

Q. Did you ever ſee Vanes in the Dutcheſs's Chamber.

A. Never in my Life; I never heard ſhe was allowed to come there.

Q. How long is it ſince you lived with the Dutcheſs?

A. About ſix or ſeven Years, or very near it.

Q. D'ye remember the Bill that was brought into Parliament againſt the Dutcheſs, while you lived there?

A. I came to the Dutcheſs the *October* before that Bill was brought in.

Q. Was Vanes turned away before that?

A. She was gone a Month or thereabouts before that.

Q. D'ye remember the Month?

A. To the beſt of my Remembrance, 'twas about the latter end of *December*, or the beginning of *January*.

Q. Was there any Stir about the Dutch Foot-Soldiers haunting Vanes?

A. I never ſaw any, but have heard the Servants ſay they did.

Q. Can you ſay what Time it was? Was it before or after the Bill?

A. Before I heard any Thing of the Bill ſhe was gone.

Croſs-Examin'd.

Q. Where do you live now?

A. With Sir Thomas Barnardiston.

Q. What Station were you in, when you lived with the Dutcheſs?

A. A Footman.

Q. Do you know Hoſier then?

A. No.

Q. Where did the Dutcheſs live, when you came firſt to her.

A. upon the Row between the Horſe-Ferry and Mill-Bank.

Q. How long did you live there?

A. A Fortnight or thereabouts, not much more.

Q. Do you know where ſhe liv'd before?

A. No.

Q. Do you know Sir John Germaine? And, on the Oath you have taken, did he ever come to the Dutcheſs's Houſe while you liv'd with her?

A. I never ſaw him in the Houſe; I never ſaw any unhandſom thing by the Dutcheſs; all the Time I lived with her.

Q. Did you never ſee Sir John Germaine with her?

A. No, never; and I had the Privilege of the firſt Floor and the ſecond Floor, and help'd to rub the Rooms, and ſometimes I rubb'd the Lodging-Room.

Q. Had you the Privilege of going up ſtairs in the Morning?

A. No, it was one Peacock that rubb'd the Room above ſtairs.

Q. Did you know Vanes? Was ſhe Servant to the Dutcheſs when you liv'd there?

A. Yes, ſhe was.

Q. Can you be poſitive as to the Time of her going away?

A. As near as I can tell, it was in the beginning of *January*, 1692. I came in the *October* before, and ſhe went away the *January* following.

Q. Were you by, when ſhe was diſcharg'd?

A. No.

Q. Who paid her her Wages?

A. I can't tell.

Q. Did you never ſee Vanes in the Dutcheſs's Chamber?

A. Never.

Q. Did you attend at the Dutcheſs's Chamber in the Morning?

A. Not conſtantly; we took it by turns!

Q. Did you never attend in her Chamber when ſhe was a-bed?

A. No.

Q. Who was it of her Women that attended in her Chamber?

A. Susan — Frances Knight, and Susan Barrington.

Q. When did you ſee Susan Barrington laſt?

A. About five Years ago.

Q. Did ſhe conſtantly attend in the Dutcheſs's Chamber?

A. She and Mrs. Knight carry'd Coals conſtantly to warm the Bed?

Q. How old was you when you liv'd with the Dutcheſs?

A. About eighteen Years old.

Q. How old are you now?

A. I think, about Seven and twenty.

Thomas Hawkſworth.

Die Luna 4^o Martii, 1699.

John Peacock Sworn, Depoſeth as followeth.

Queſt. DID you live with the Dutcheſs of Norfolk, in 1691?

A. 'Tis ſix Years ſince I left her Service, laſt *January* or thereabouts; I liv'd two Years and a half with her, or thereabouts; I came in *August* and ſtay'd till *January* two Years following, or thereabouts.

Q. Did you live with the Dutcheſs, when the firſt Trial, as they call it, came on in Parliament?

A. Yes, I liv'd with her before and after.

Q. Did you know Vanes?

A. I knew one, whoſe Name was call'd Lena?

Q. What was her Buſineſs?

A. Below Stairs in the Kitchen; I never ſaw her in any other Room, but the outer Room next to the Street, and I was there all the while ſhe was there, and after ſhe was gone.

Q. Did you ever ſee her in the Dutcheſs's Bed-chamber?

A. No; the Work ſhe was employ'd about was dirty Work; I never ſaw her clean, but naſty, and could not eat the Victuals of her dressing.

Q. Was you there before Vanes?

A. Yes, I was in the Houſe ſome time before her Grace came over, to help the Upholder, and to carry Looking-glaſſes and Stands.

Q. When did ſhe come over?

A. She

A. She came to *Mill-bank*, but I know not when she came over: My Lady *Peterborow* order'd me to do what I did.

Q. Was you servant there to the Dutcheſs, before ſhe came over?

A. I never ſaw my Lady Dutcheſs before ſhe came there, except ſome Years before at *Drayton*, when he liv'd with her.

Q. Who hired you?

A. I came there by the Lady *Peterborow's* Order, and had my Viſuals at my Lord *Peterborow's*.

Q. Who hired you?

A. I was not hired at all.

Q. How long did you live at *Mill-bank*?

A. I liv'd about two Years and a quarter, or ſomewhat more.

Q. What was your proper Buſineſs when you liv'd with the Dutcheſs.

A. When the Dutcheſs went abroad, I went with the Coach; and when ſhe ſupp'd or din'd at home, I laid the Cloth, Forks and Spoons.

Q. Did you ever wait above ſtairs?

A. Yes, I have waited above ſtairs.

Q. Who waited upon the Dutcheſs in her Chamber?

A. *Frances Knight*, one *Suſan*, and one *Suſannah*.

Q. Upon your Oath, did you ever ſee this Woman, *Helena*, go into the Dutcheſs's Bed-chamber?

A. I never once ſaw her there, all the Time I ſtay'd there; I rubb'd the Bed-chamber with a long Rubbing-bruſh; I never ſaw her there, nor above ſtairs.

Q. Do you know at what Time it was ſhe came to live with my Lady Dutcheſs?

A. Yes; ſhe came while I was there.

Q. Did you live with the Dutcheſs, before ſhe came to *Mill-bank*?

A. I lived at no other Place with the Dutcheſs, but at *Mill-bank*, and at *Drayton*.

Q. D'ye know how *Vaneſs* left the Dutcheſs's Service? and why?

A. Yes, upon Complaints of Diſorders, and her ill dreſſing the Viſuals.

Q. What Diſorders?

A. There were Men came to the Door to enquire for her, twice, or more.

Q. Did you ſee the Fellows?

A. Yes, I ſaw the Fellows, they came to the Door in the dusk of the Evening, and I acquainted the Dutcheſs with it, and told her Grace, I did not think it ſafe for her Houſe, becauſe I had the Charge of Silver Spoons and Forks.

Q. What ſort of Men were they?

A. One of them appear'd to be a Foot-Soldier, in a blue Coat.

Q. In what manner was ſhe put away, or left the Houſe?

A. Upon theſe Complaints, the Dutcheſs ſaid ſhe wou'd turn her away.

Q. Did you hear the Dutcheſs ſay ſo?

A. Yes.

Q. Was that before the Trial at the Lords Houſe, or after?

A. To the beſt of my Remembrance, it was before the Trial, the latter end of *December*, or the beginning of *January*, but I can't be poſitive; I think 'twas the latter end of *December*.

Q. Did ſhe go away before the Trial or not?

A. I think, before the Trial, but I am not ſure: Yes, at the Time of the Trial, I remember another Cook.

Q. Are you ſure of that?

A. Yes, I am ſure of it; 'twas the Coachman's Wife, one *Goffing*.

Q. D'ye know *Hauſeur* or *Nicola*?

A. No.

Q. You lived at *Mill-Bank* two Years? D'you know no ſuch Man?

A. I never heard his Name before; I had no Acquaintance with him, nor ever ſaw him about Houſe.

Croſs-Examined.

Q. Where do you live now?

A. Near *Huntingdon*; I board in a Houſe there.

Q. How long have you been out of Service?

A. Ever ſince I left my Lady-Dutcheſs.

Q. How do you live then?

A. I board in a Houſe; I follow no Employment, but live on my own, except to teach Children, two, three or four, out of Charity.

Q. When came you to the Dutcheſs's Service firſt?

A. I ſerved her about ten or Twelve Years ago, but I can't remember the precise Time, 'tis ſo long ſince.

Q. How long did you live with her then?

A. I lived with her about half a year at *Drayton* in *Northamptonſhire*; I went about *November*, and ſtay'd to *Lady-Day* following.

Q. How long was it before you came to live with her the laſt Time?

A. I can't tell.

Q. You ſay you came to live with her about two Years and a quarter; What Time was that?

A. I can't tell, but that may be eaſily found? I liv'd with her about ſix Years ago, or thereabouts.

Q. How long did you leave the Dutcheſs, after the Hearing came on, in this Noble Houſe?

A. I don't know; it was about a Year and three quarters, or two Years, I can't be poſitive.

Q. Was it after the Trial began?

A. Yes, I think the Trial began in *January*, and 'twas a Year after it began.

Q. Can't you be poſitive what Time you came to live with the Dutcheſs?

A. I came about *Auguſt* to *Mill-bank*, but the Dutcheſs was not come then, but the *October* following my Lady Dutcheſs came.

Q. Where did the Dutcheſs live then?

A. I don't know, I was at the Lady *Peterborow's*; I help'd her Servants to carry Things, and to get Things ready.

Q. Did you know where the Dutcheſs liv'd then?

A. No; ſome ſaid ſhe liv'd in *Flanders*, others in *Holland*, and ſome in *France*.

Q. Was you never at *Fox-Hall* while the Dutcheſs liv'd there?

A. I was never there while the Dutcheſs liv'd there, if ſhe did live there.

Q. Was you never there where ſhe did live?

A. When no body liv'd there, I have ſeen the Houſe where they ſaid ſhe did live.

Q. How

Q. How long ago is that ?

A. I know not how long ago, but 'twas in the Summer-time.

Q. How came you to take notice of that Houſe more than the reſt of the Houſes in *Fox-Hall*? Who was it told you the Dutcheſs liv'd there?

A. I think it was one that was ———

Q. You ſaid the Dutcheſs went ſometimes by Water; did you go along with her at that Time?

A. Yes, I did, with ſome other Company.

Q. Was you ever ſent to the Houſe, to fetch Goods from thence?

A. No.

Q. Who went with you, when you went with the Dutcheſs there?

A. One Mrs. *Boufflers*, and two or three other Ladies.

Q. D'ye know Sir *John Germaine*?

A. I never ſaw him, but in his Coach, as he was going along the Street; I never ſaw him in any Houſe, or any other Place, ſitting or going, but in his Coach.

Q. Was you never at his Houſe?

A. I never was at his Houſe, nor at any Place where he lived.

Q. You ſay you were at the Dutcheſs's Chamber, to rub the Room?

A. Yes, I was.

Q. Did you not ſee *Vanefs* there?

A. No.

Q. Can you take it upon your Oath, that you never ſaw her there?

A. No, I never ſaw her there, but I ſaw *Susan Barrington* there?

Q. What Service did *Susan Barrington* do there?

A. She help'd to dreſs and undreſs her Grace, and to mend Linen, as I think?

Q. When ſaw you her laſt?

A. 'Twas about the 9th, 10th, or 11th of *Auguſt* laſt, at the *George-Inn*, in *Huntingdon*.

Q. D'you know where ſhe lived then?

A. She was at *Huntingdon* then, and came with the Lady-Dutcheſs to take a Stage-Coach for *London*; ſhe was at the *George-Inn* in *Huntingdon*, I think, about *Auguſt* laſt.

Q. You ſay you liv'd at the Dutcheſs's Houſe at *Mill-bank*, before the Dutcheſs came thither; Did *Vanefs* come with her, or was ſhe hired after?

A. I think ſhe came with the Dutcheſs.

Q. D'ye know whence the Dutcheſs came, when ſhe came there?

A. As I have heard, ſhe came from *Fox-Hall*: When my Lady Dutcheſs went thither by Water the Summer after, I was told, that my Lady liv'd at ſuch a Houſe in *Fox-Hall*.

Q. Didn't you know that my Lady Dutcheſs liv'd at *Fox-Hall*?

A. I never knew my Lady Dutcheſs till ſhe liv'd at *Mill-bank*.

Q. What Account had you, at the Dutcheſs's Houſe, where ſhe was then?

A. People ſaid ſhe was in *Flanders*.

Q. D'you know when *Vanefs* came to live with the Dutcheſs?

A. I believe ſhe came to live with the Dutcheſs at *Mill bank*.

Q. D'ye know when ſhe was diſcharg'd out of her Service?

A. I think 'twas the latter end of *December*, or the beginning of *January*; I think ſo, but I don't ſpeak poſitively.

Q. Was you by, when her Wages were paid?

A. No.

Q. Have you ever ſeen her ſince?

A. No, I never ſaw her, from that Hour to this.

Q. Where have you liv'd ſince you left the Lady Dutcheſs's Service? and how? Have you any Eſtate?

A. I have a ſmall Matter to live on; I liv'd near *Huntingdon*, I was born near there, 'tis my native Place, I have liv'd there about four or five Years, or within ſeven Miles of that Place, or thereabouts.

Q. Did *Vanefs* dreſs the Dutcheſs's Dinner, when ſhe liv'd there? for it ſeems ſhe was not good enough to ſerve you.

A. Yes, ſhe did dreſs the Dutcheſs's Dinner but I did not care to eat Viſuals of her dreſſing.

Q. When did you firſt complain to the Dutcheſs, that Men follow'd *Vanefs*? or that you apprehended Danger by her being there?

A. I can't tell.

Q. Was ſhe diſcharg'd immediately after that?

A. I think ſhe was diſcharg'd immediately after that.

Q. You ſay, there were ſome other Ladies that went with the Dutcheſs to *Fox-hall*; Can you name them?

A. Mrs. *Marſhall*, and ſome others; but I can't be poſitive.

Q. Did you know Mrs. *Briane*?

A. No, I never heard her Name before.

Q. Did the Dutcheſs eat always at *Peterborough* houſe, or *Mill-bank-houſe*, as you call it?

A. Sometimes ſhe eat abroad, and ſometimes at home.

Q. Who dreſs'd her Viſuals when ſhe eat at home?

A. *Lena*.

Q. What d'ye mean by *Mill-bank-houſe*?

A. *Peterborough-houſe*.

Q. Who did you hear ſay the Dutcheſs liv'd at that Houſe at *Fox-hall*?

A. The Dutcheſs was going by Water, and told the Ladies then, that that was the Houſe ſhe had liv'd at, at *Fox-hall*; and walking in the Garden of the ſaid Houſe, told 'em ſo.

JONAS PEACOCK;

Die Luna 4^o Martii, 1699.

Frances Knight Sworn, Depoſeth as followeth.

Q. **H**OW long have you liv'd in the Dutcheſs of *Norfolk*'s Family?

A. Twenty ſeven Years, or upwards.

Q. With whom did you live all that Time?

A. With the Lady Dutcheſs's Father, the Lady *Peterborough*, and the Dutcheſs.

Q. Did you live with the Dutcheſs when ſhe liv'd at *Mill-bank*?

A. Yes, I liv'd with her at her firſt coming there.

Q. Have you been with her ever ſince?

A. Yes.

Q. Did

Q. Did you know *Vaneſs* in the Dutcheſs's Family at *Mill-bank*, and what Employ had ſhe there?

A. Yes, I know her very well: She was in the Kitchen.

Q. Did you uſe to be in the Dutcheſs's Bed-chamber, and about her Perſon?

A. Yes, I was the firſt in the Morning there, and the laſt at Night, conſtantly.

Q. Did you know *Elianoꝝ Vaneſs* there? and did ſhe uſe to come into the Dutcheſs's Chamber?

A. She never came there.

Q. Where uſed ſhe to employ herſelf?

A. In the Kitchen.

Q. Was ſhe well enough in Clothes, cleanly enough, and fit to come into the Dutcheſs's Chamber.

A. No, ſhe was not.

Q. What Time went ſhe away? And upon what Account?

A. My Lady put her away becauſe Soldiers came and aſk'd for her, and ſent for her to Ale-houſes about Ten a-Clock at Night. I went up one Morning, and complain'd of her to my Lady Dutcheſs, and told her that Soldiers haunted her, aſk'd for her, and ſent for her to Ale-houſes at Ten a-Clock at Night: And my Lady utDcheſs ſaid, She would not keep a Servant that kept ill Hours.

Q. Was this before the Trial?

A. Yes, my Lady put her away, upon my ſpeak ng this.

Q. Do you know why ſhe was put away?

A. Yes, for having Soldiers haunt her Company.

Q. Conſider well what you ſay.

A. Yes, my Lords; I ſpeak what my Conſcience tells me: Here I am before the Lords, I muſt ſpeak Truth.

Q. How far can you recollect yourſelf, if it was before the Trial, or not, that ſhe was put away?

A. It was before the Trial.

Q. How long?

A. I can't remember; I think it was about a Quarter of a Year, I can't tell exactly, but it was near upon.

Q. How near was you to the Dutcheſs? What was your Employment?

A. I help'd to get her to Bed, as her Chamber-maid.

Q. Did *Elianoꝝ Vaneſs* never undreſs her?

A. No, never in this World.

Q. Did you never know her come into the Dutcheſs's Chamber?

A. Never, never. Oh, fie! Never indeed.

Q. D'ye know *Nicholas Hauſeur*?

A. I don't know him: There were many aſk'd for Mr. Keemer, but I did not know them, for he has many Acquaintance.

Q. Did you know *Thomas Hawkſworth*, your Fellow-ſervant?

A. Yes, he came when my Lady came to *Mill-bank*, Mr. Peacock came before, they were both Servants together.

Frances Knight Croſs-Examined.

Q. You ſay you liv'd Twenty-ſeven Years and upwards with the Dutcheſs and her Mother? Do you live with the Dutcheſs ſtill?

A. Yes.

Q. How long is it ſince you liv'd with her Mother?

A. After the Dutcheſs was marry'd, I came to live with her and my Lord Duke.

Q. Have you been in her Service ever ſince?

A. Yes.

Q. After the Duke parted with my Lady Dutcheſs, Where did ſhe go to live?

A. She liv'd at *Mill-bank*, and no where elſe, that I know of.

Q. Came you to live with her ſoon after her Marriage? and have you liv'd with her ever ſince? and did ſhe ever live at *Fox-hall*?

A. I never liv'd with her at *Fox-hall*.

Q. Then you have not lived with her ever ſince?

A. I have lived with her ever ſince: I have taken my Oath, and as near as I can tell you.

Q. Where did the Dutcheſs live before ſhe came to *Mill-bank*?

A. She liv'd at *Fox-hall*.

Q. Did not you live with her there?

A. No, I broke my Leg, and was brought to her Mother's, and ſtay'd there a Twelve-month; Mr. Peters was my Surgeon, he can tell it. I came here to ſpeak the Truth.

Q. Don't be angry.

A. No.

Q. Did you continue with the Dutcheſs till you broke your Leg?

A. Yes; and when I broke my Leg, I went home to her Mother's.

Q. When left you the Dutcheſs after ſhe parted with my Lord Duke?

A. I left her at *Mill-bank*.

Q. Do you know the Queſtion that's aſk'd? When did you leave the Dutcheſs after ſhe parted with the Duke?

A. I know no ſuch Queſtion as you aſk. I ſpeak the Truth, as well as I can.

Q. Where did my Lady Dutcheſs go, when you left her?

A. I went away lame, and cou'd do her no Service.

Q. Where did you come to my Lady Dutcheſs again, when you were well.

A. *Mill-bank*.

Q. Was you ever with her at *Fox-hall*?

A. I was not there, becauſe I was lame.

Q. Was you ever at *Fox-hall*?

A. I told you, I broke my Leg.

Q. Was you ever at *Fox-hall*, or not?

A. I tell you, I was lame.

Q. Was you ever at *Fox-hall* at any Time?

A. I tell you I was lame; I give you answer to your queſtion. I tell theſe noble Lords, that every Word I ſpeak is Truth.

Q. But you are ſwore to ſpeak the Whole Truth?

A. I ſpeak the Truth. Why ſhould you do ſo?

Q. Was you ever with the Dutcheſs at *Fox-hall*?

A. I was not able to be there with her.

Q. Was you there with her, or not?

A. I was not able to go thither.

Q. Was you never there?

A. I was not able to go thither.

Q. Was you never there or not with the Dutcheſs?

A. No, I never was at *Fox-hall* in my life, but at *Mill-bank* and *Whitehall* I have. Memorandum, in this Interlineation was alter'd, upon reading over

over her Examination, *Yes, I have been there, but I did not ſtay there.*

Q. Was you ever there with the Dutcheſs, or not?

A. I was not there: I tell you I was not there, I was lame.

Q. Was you never there with the Dutcheſs at any Time?

A. No, I tell you I was lame: I was never there with the Dutcheſs.

Q. Where was the Dutcheſs before ſhe came to *Mill-bank*?

A. That I can't tell.

Q. Where was ſhe when you broke your Leg?

A. I left her at *Mill-bank*, with her Mother.

Q. Where did you find her, when you came again?

A. I found her at her Mother's.

Q. Can't you tell where ſhe was in the mean time?

A. No.

Q. Was you never told by any of the Family where ſhe was at that Time?

A. No.

Q. Did *Vanefs* come to the Dutcheſs when ſhe liv'd at *Mill-bank*?

A. Yes.

Q. How long did ſhe live with her after?

A. I can't tell; but a ſhort time.

Q. Do you know *Sufanna Barrington*?

A. Yes.

Q. When did you ſee her laſt?

A. About three Weeks ago,

Q. Is ſhe not in the Dutcheſs's Service ſtill?

A. I'll tell you the Truth: She receiv'd a Letter from *Flanders*, acquainting her that her Mother was dead. She was very much afflicted with it: And when the Dutcheſs came in, I told her Grace that *Suſan* had receiv'd a Letter that her Mother was dead; and I did deſire my Lady to give her leave to go to *Holland*, and ſhe's there.

Q. Did you ſee the Letter?

A. I ſaw it.

Q. Was it from her Mother, or from her Siſter?

A. Yes, 'twas from her Siſter, that her Mother was dead.

Q. Was *Sufanna Barrington* in the Dutcheſs's Service when this Bill was depending?

A. No.

Q. How long is it ſince ſhe received that Letter?

A. 'Tis about three Weeks ago.

Q. How long is it ſince ſhe went?

A. A Fortnight to Day.

Q. Did you ſee her any Time theſe three Weeks?

A. No, No.

Q. Did you not live with her in the Houſe, and did you not ſee her?

A. She has been gone about a Week.

Q. D'you know Mrs. *Judith*?

A. No.

Q. D'you know Mrs. *Briane*?

A. I have heard of her Name, but am not acquainted with her.

Q. Had you any Diſcourſe with *Vanefs*, when ſhe came to *Mill-bank* to live with the Dutcheſs?

A. No, I never lik'd her Diſcourſe.

Q. Did you ever hear the Dutcheſs ſay that ſhe liv'd at *Fox-hall*?

VOL. V.

A. No.

Q. Do you know Sir *John Germaine*?

A. I know him by Sight.

Q. Did you never ſee him at the Dutcheſs's?

A. No.

Q. Did you ever ſee him at *Mill-bank*, or at her Houſe here?

A. No, my Lords, never.

Q. Did *Vanefs* come along with the Dutcheſs when ſhe came to *Mill-bank*? or was ſhe hired after her return?

A. See came after her return to *Mill-bank*.

Q. What Time went ſhe away?

A. I can't tell the Day; that's a hard Queſtion. She went away, on my ſpeaking to the Dutcheſs, that ſhe was haunted with bad Company.

Q. Did not ſhe dreſs the Dinner, when the Dutcheſs dined at home?

A. Yes, but ſhe never dined at home but very ſeldom.

Q. Can't you tell when *Vanefs* went away?

A. No.

Q. Did you know *Nicholas Hoſier*?

A. No, I know no ſuch Man. There were many people came to Mr. *Keemer*, Lords Servants, and others, I don't know ſuch People.

Q. You have heard that the Dutcheſs liv'd at *Fox-hall*.

A. Yes.

Q. At what Time did ſhe live there?

A. I can't tell you; I was ſick in Bed,

Q. You may recollect about what Time was it.

A. I was lame in *March*, this Month: I can't tell what Year.

Q. D'you know what Houſe ſhe liv'd in?

A. Yes; 'twas one Sir *Thomas Grovesner's*, at *Mill-bank*.

Q. I aſk you what Houſe ſhe liv'd at, at *Fox-hall*?

A. I know not.

Q. How came you to know the Dutcheſs liv'd at *Fox-hall*?

A. You aſk what I can't tell you.

Q. You dare not tell.

A. Yes, I'll tell the Truth, before all the Houſe of Lords.

Q. You ſaid ſhe liv'd at *Fox-hall*?

A. No, I never ſaid it.

Q. Whence came the Dutcheſs, when ſhe came to *Mill-bank*?

A. She came from the Place ſhe did; I did not aſk her the Queſtion, I durſt not be ſo bold.

Q. Can't you tell when ſhe came to *Mill-bank*? nor from what Place ſhe came?

A. I can't tell the Day when ſhe came. I don't aſk from what Place People come.

Q. When did you know Sir *John Germaine* firſt?

A. I ſaw him firſt with my Lord Duke there; at his Houſe in the Square.

Q. Did you never know him keep Company with the Dutcheſs?

A. No, but only with the Duke of *Norfolk* there; I ſpeak in the Preſence of God.

Sign'd,

FRANCES KNIGHT.

Die Luna 4^o Martii, 1699.

William White Sworn, *Deposeth as followeth.*

Quest. DID you live with the Dutcheſs of Norfolk, for ſome years paſt?

Anſ. I liv'd with her ſince the firſt Week of the firſt Trial, about ſix, or ſeven, or eight Years ago.

Q. What Care was there taken about the Dutcheſs's Door in the Park?

A. I generally went out the Firſt in the Morning; the Door had two Bolts, a Croſs-Barr, and an Iron Chain; beſides, theſe I unbolted every Morning, and unbarr'd, when I went out early.

Q. Did you ever hear or underſtand that Hoſier had a Key to that Door?

A. I never knew any thing of it, nor know not of what Uſe it could have been; for he could not come in, till the Door was unbolted.

Q. Say poſitively, whether ever you have heard, that this Man had a Key to that Door?

A. I never heard of it.

Q. Did you never ſee him come in at that Door?

A. Yes.

Q. How? Upon what Occaſion?

A. I happen'd to be going out myſelf, and to open the Door for him. His Buſineſs, I was told by my Lady Dutcheſs's Maid, was, That ſhe had lent Money to a Man in *Holland*, and ſhe wrote a Letter to be carry'd by this Man to her Siſter, to get this Money; and ſhe ſent another Letter by one *Bull*, to carry to *Holland*, to get the Money, as ſhe told me.

Q. Did you let him in?

A. I unbolted the Door, and let him in.

Q. Did you find that this Man uſed to come freely to the Houſe, at that Door, by any Key?

A. No, I never knew it.

Q. Who did he come to?

A. To *Suſan Barrington*.

Q. Did you ever ſee him above Stairs with her?

A. No; he might come in, and I not ſee it.

Q. Did the Dutcheſs or Servants ſay any thing that he had leave to come in?

A. I never examin'd that, becauſe any body that had Buſineſs had leave to come in, as Tradeſmen, and others.

Q. Did they tell you in the Houſe that Hoſier was at liberty to come into the Houſe with a Key?

A. No, never.

Q. Had you ever any Diſcourſe with Hoſier?

A. I was one Day coming from *Change*, and met Mr. *L'Eſtrange*, and this Hoſier. *L'Eſtrange* told me that he was ill of the Gripes. I told him, that the beſt thing for it was burnt Claret; and he and I and Hoſier went to a Tavern in *Smithfield*. And while we were together, Hoſier reflected upon his Maſter, ſaying, his Maſter had uſed him ill, and deſerv'd to be ill uſed. Mr. *L'Eſtrange* heard theſe and ſome more Words; Mr. *L'Eſtrange* told me that he ſpoke to that purpoſe, he was reſolved to be reveng'd of his Maſter.

Q. What did he ſay of his Maſter?

A. He ſaid his Maſter had uſed him very ill; he had many threatenng Words; he ſaid his Maſter was an ill Man, and deſerv'd to be ill uſed, and the Time would come when he ſhould repent it.

Q. When did he ſay theſe Words?

A. 'Twas about *Michaelmas* two Years ago or a Year ago, I can't tell which.

Croſs-Examined.

Q. You ſay you liv'd with the Dutcheſs the firſt Week of the firſt Trial; Was *Vaneſs* there at that Time?

A. She was gone before I came.

Q. How long?

A. I can't tell, I never ſaw her there, to the beſt of my Remembrance, but have heard there was ſuch a one in the Family.

Q. Did you know Hoſier?

A. I ſee him come in at the the Back-door.

Q. Whoſe Servant was he then?

A. The firſt Time I did not know; but a little after, I was told he was Sir *John Germaine's*.

Q. What Occaſion had he to come to the Dutcheſs's Houſe?

A. I know not, but about the Buſineſs of the Letter.

Q. How often did you ſee him there?

A. Two or three Times, more.

Q. With whom?

A. With *Suſan Barrington*.

Q. What was his Buſineſs with her?

A. About the Money, as ſhe told me. He went along with that Woman; ſhe ſent a Letter by him; and ſhe ſent Letters by ſome other *Dutchmen*, into *Holland*, about the Money.

Q. Did he aſk for any other Servant?

A. Not that I know of.

Q. Did you ſee him above ſtairs with her?

A. I never ſaw them in any Apartment but that Place below, where the Lumber is, near the Park-door.

Q. D'you know *Suſannah Barrington*?

A. I know her very well.

Q. D'you know where ſhe is now?

A. Her Mother died about the 10th of *January*, and then I ſaw her all in Tears, and ſhe went away after this Account of her Mother's Death.

Q. When did you ſee her laſt?

A. I have not ſeen her this Fortnight or Month, that I know of, that I could diſtinguiſh her from another Woman, except ſhe had a Mask on.

Q. How long before this Trial ſaw you her?

A. About a Fortnight. She gave me an Account that her Mother died the 10th of *January*, in *Holland*?

Q. When did ſhe go away?

A. I did not take Notice of the Time ſhe went away?

Q. Did you know Hoſier at any other Place but at the Lady Dutcheſs's?

A. Never, but as I have ſeen him in the Park, and with Mr. *L'Eſtrange*.

Q. Was you never with him at Sir *John Germaine's*?

A. Never.

Q. D'you know Sir *John Germaine*?

A. After I had lived with the Dutcheſs ſome Time, I was told by ſome in the ſtreet, that that was his Coach, and his Livery, and that he was the Man that there was ſo much Noiſe about.

Q. Did you never ſee him in the Dutcheſs's Houſe?

A. I never ſaw him in no Part of my Lady Dutcheſs's Houſe, nor in no Apartment, and I am the only Man that goes up and down Stairs.

Q. Did

Q. Did you never ſee him in the Dutcheſs's Company at any other Place?

A. No.

Q. Did you conſtantly lie at the Dutcheſs's Houſe?

A. When the Dutcheſs was laſt at Drayton, I lay at Richmond, two or three Nights.

Q. Did you lie conſtantly there, when the Dutcheſs was there?

A. I was ſick near a Month, and all that time I lay at my Wife's; but moſt commonly lay at the Dutcheſs's ſince ſhe is come to Duke-ſtreet to live.

Q. You ſay, You uſed to open the Door in the Park firſt in a Morning: What time did you uſe to open it at?

A. At Six, Seven, or Eight a-Clock in a Morning; there was no certain Hour, but I generally open'd that Door.

Q. Did you ever know Hauſeur come in at any other Door but that?

A. Yes; one wet Day he came in at the Street-door, before the Porter and all the Servants, and ask'd for the ſame Woman.

Q. Did he never aſk for any other Body?

A. I never heard him aſk for any but Susan Barrington, for ſhe was his Country-woman.

Q. If Nicholas got in at the Park-door, could not he get up Stairs?

A. If he could get in at that Door he talks of, he could not get into the Dutcheſs's Apartment; for there was a Room betwixt that, where the Plate and Jewels lay, that no Key could open: That if he could get up two pair of Stairs, he could not get in there.

Q. If he had a Key, and got in at any Door, cou'dn't Susan Barrington, when he came in, without any difficulty, lead him round the Houſe?

A. I can't ſay but ſhe might, but I never ſaw him, but below Stairs with that Woman, and then he went away without going up Stairs.

Q. Did you never ſee him bring any Thing to the Houſe?

A. No.

Q. You nam'd one L'Eſtrange, that you ſaw with him at the Tavern, What is he?

A. He was my Old Fellow Servant at the late Duke of Norfolk's.

Q. What Diſcourſe had you with him then?

A. He complain'd to me of his being ill, and I gave him the beſt of my Advice.

Q. What Time was it that Nicholas had thoſe threatenng Words againſt his Maſter?

A. About Ten, Eleven, or Twelve a-Clock at Noon.

Q. How long ago is it?

A. I can't tell if it be a Year, or two Years. 'twas a little after Michaelmas, but whether it be one Year, or two Year, I can't tell.

Q. Cou'dn't Mr. L'Eſtrange tell.

A. I aſk'd Mr. L'Eſtrange, and he cou'd not tell.

Q. Whoſe Servant was Nicholas then?

A. He was no body's Servant then. He rail'd againſt his Maſter at that Time for turning him away.

Q. Did you not know who was his Maſter a Year or two ago?

A. He told me, he was out of Place.

Q. Did you not know him to be Sir John Germaine's Servant, when he came to the Dutcheſs's?

A. I did not know it when I firſt ſaw him and Susan together; but ſome Time before he went

away, I heard he was his Servant.

Q. But you ſay, you did not know Sir John Germaine about Two Years ago?

A. I did not know him ſo as to ſpeak to him.

WILLIAM WHITE.

Die Luna 4^o Martij, 1699.

Matthew Mac-Donnell ſworn, Depoſeth as followeth.

Q. HOW long have you liv'd with the Dutcheſs of Norfolk?

A. Four Years at Lady-day next.

Q. In what manner was the Door going out to the Park kept? Had any body a Key to it that was not of the Family? Did it uſe to be left open?

A. 'Twas not to be left open; 'twas very unſafe to be left open: Beſides, it was bolted and lock'd.

Q. Was there particular Care taken of that Door?

A. Yes; I myſelf bolted it very often at Night.

Q. Did you often unbolt it in a Morning?

A. Yes.

Q. Whether or not, the Time that you lived there, did you know any body, that was not of the Family, come with a Key to open that Door?

A. Never.

Q. Did you know Hauſeur or Nicholas? Had he a Key to that Door?

A. I never knew it.

Q. Did you ever ſee him come in at that Door?

A. I open'd that Door for him once or twice when he rung.

Q. When was that?

A. In an Evening.

Q. What did he come about?

A. I do not know? but he aſk'd for Susan, my Lady Dutcheſs's Servant.

Q. Did you ever ſee him go up Stairs?

A. I never did hear he went up in my Life.

Q. When he aſk'd for Susan, did he go up then?

A. No; I call'd her to him, and I never ſaw him go up Stairs.

Q. Did you ſtay with him all the while Susan was with him?

A. No, I had no Buſineſs; I went my way.

Q. Was Nicholas, when he rung, in the Park, or at the inner Door?

A. In the Park.

Croſs-examin'd.

Q. Did you know whoſe Servant Nicholas was?

A. I did not know, nor I aſk'd no Queſtions.

Q. How often have you ſeen him at the Dutcheſs's?

A. Three times.

Q. Did he always aſk for Suſannah Barrington?

A. One time he aſk'd for Mr. Keemer.

Q. Who was Mr. Keemer?

A. He was the Dutcheſs's Servant.

Q. Did you uſe to ſtay with him? or, did you leave him?

A. No, to tell you the plain Truth, I thought he

he came to court *Susan*, and did not stay with him.

Q. Did you ever see him up Stairs, in *Susan's* Room?

A. I never saw him there.

Q. What Employment have you, under the Dutchess?

A. I am her Footman.

Q. When did you see *Susan* last?

A. On *Tuesday* Seven-night, in the Morning.

Q. Not since?

A. No.

Q. Where did you see her then?

A. At the Dutchess's House.

Q. What became of her after that?

A. She said, her Mother died lately in *Holland*, and she was going there.

Q. Then did you hear her say so?

A. I heard her say so several times before she went away; a Month, or a Quarter of a Year, before she talk'd of going to *Holland*.

Q. Upon your Oath, Don't you know that she is at the Dutchess's?

A. I know not of her being there.

Q. Can you take it upon your Oath when she was first wanting?

A. I saw her on *Tuesday* Seven-night last, in the Morning.

Q. How came you to know she was gone, if you don't know the Time when she went?

A. I did not know she was gone, till I went home from the House here.

Q. Who told you she was gone?

A. The Servants.

Q. She was there when you came hither?

A. On *Tuesday* Morning I did see her.

Q. Has the Dutchess another in her Station?

A. There is one Mrs. *Cambell*, that dresses my Lady Dutchess, but she does not live there.

Q. Did she use in *Susan's* Time, to come and dress the Dutchess?

A. Yes, she used to come sometimes.

Q. Has the Dutchess taken any body to do *Susan's* Work?

A. I know not of any.

Sign'd,

MATTHEW + MAC-DONNEL.

Die Luna 4^o Martii, 1699.

Mr. Robert Welbourn Sworn, Deposeth
as followeth.

Q. WHAT Account can you give of Mr. *L'Estrange's* having Notice to be a Witness?

A. I was told by the Dutchess that *L'Estrange* had been with her, and gave her an Account of some Particulars between *White*, and him, and *Nicholas*? That having the Gripping in the Guts, they went into a Tavern together; That he heard *White* and *Nicholas* talk together very loud, but he told me he had the Gripes, and could not so well mind what he said, but he heard him use hard Words against his Master, but he could not remember that he said he would be reveng'd upon his Master; but he would recollect himself, and, if he could remember, he would say what he

could. He told me, he had been bred in the *Norfolk* Family.

Q. Did you ask Mr. *L'Estrange* about this Matter?

A. Yes. Mr. *L'Estrange* told me, He remembered they were together, and heard *Nicholas* speak very hard, ill Words against his Master, but he could not be positive what they were; but what he could remember he would speak, if that would do the Dutchess any Service. He desir'd my Lady Dutchess would give him Notice the Night before, and he would appear.

Q. When was this?

A. 'Twas *Tuesday* or *Wednesday*; I think 'twas *Wednesday*.

Cross-examined.

Q. Did the Lady Dutchess tell you what Mr. *L'Estrange* said?

A. Yes; that gave me the Occasion to speak of it. He said, he heard *Nicholas* say hard, ill Words against his Master, but not, that he heard him say he would study to be reveng'd. Perhaps, says he, there might be some other Words. That he was in the Kitchen, and would endeavour to recollect who was there besides; and if he had two or Three Days time, he would enquire.

Q. Did you let him know you was concern'd for the Dutchess?

A. Yes; and he told me he would tell me what he could say in this Matter; and he should be ready to appear at any Time, if that would be for the Dutchess's Advantage.

Q. Did he tell you he was going abroad, into *Holland*?

A. Not one Word.

Q. Did you intimate to him, when the Dutchess was to make her Defence?

A. I think I did, but I can't be positive; but he took no notice to me, that he would not be there.

Q. D'you know Mr. *La Fountaine*?

A. Yes, I know one *La Fountaine*.

Q. Is he in the Dutchess's Service?

A. I believe not.

Q. D'you know whether he is at *Drayton*?

A. I have seen him at *Drayton*.

Q. Did he live with Sir *John Germaine*, that you know of?

A. Never that I know of.

Q. When saw you *Susan Barrington*?

A. I can't be positive; but I think not this Month or six Weeks.

Q. Han't you seen her since this Bill was brought in.

A. Positively, I have not.

ROBERT WELBOURN.

Die Luna 4^o Martii, 1692.

Eleanor Monfort Sworn, Deposeth as followeth.

Q. TELL the Lords if you know *Nicholas Hosier*, and on what Account you came to know him.

A. This *Nicholas* lodg'd two or three Times at my House. My Husband was a Dutchman, and he

he was a *Dutchman*; they were, like Brothers, they lov'd one another.

Q. What know you of this Man, this *Nicholas*?

A. My Husband told me, that this Man *Nicholas*, I did not know no other Name he had; my Husband told me, that he had a design to rob his Master, and that he knew where his Gold and his Jewels lay, and had made false Keys, and would watch his Opportunity, when his Master was at Play, or out of Town; and left the Keys at our House.

Q. Your Husband told you so?

A. Yes, my Husband bid me send for this Man; these were his last dying Words.

Q. Your Husband had a sad Misfortune. When was't your Husband told you so?

A. When he was in Prison.

Q. How long ago is that?

A. About eight or nine Years ago last *Christmas*. I would not have your Lordships think my Husband was so bad a Man; he was only condemn'd and executed for changing Ten Pounds of his own Money.

Q. What were your Husband's last dying Words?

A. He desired me to send for this Fellow, and deliver those Things he left at my House: I sent for him, he came; and had some Keys in a Drawer, that my Husband told me he had left there. He took two or three Keys, and put them in his Pocket, and look'd mightily out of Countenance.

Q. What did your Husband say to you?

A. He bid me give *Nicholas* the Keys, and bid him have a Care and keep good Company.

Q. When was that?

A. A Week or a Fortnight before my Husband was executed.

Q. Did you acquaint *Nicholas* with what your Husband said of him?

A. No, an't please your Honours; I only told him, my Husband charg'd me to give him those Keys; but being in Trouble, and having a great many Enemies, I talk'd no further with him.

Q. What did *Nicholas* say to you?

A. He look'd out of Countenance, and told me he would come and see me another Time, but he never did; so that I did not see him again till I saw him in the *Meuse*, and then he told me that he would come to see me; but he never did, but always shun'd me.

Q. How long have you known *Nicholas*?

A. These eight or nine Years. I knew him when he was Footman to Sir *John Germaine*, and I knew him when he was his Gentleman. I knew him when he went, and I knew him when he came. He is like a Sea-Rat, he comes and goes when he pleases: I hope in God Almighty it will be consider'd by this House, that such a Fellow's Witness should not be taken in such a great Concern.

Signum,

ELEANOR + MONFORT.

Then the Dutcheſs's Counsel pray'd that *Mac-Donnel* may be examin'd, as to the withdrawing Witnesses, and that it be taken in Writing: Which was agreed to, and he examin'd.

Then the Dutcheſs's Counsel proceeded to

examine other Witnesses, and their Evidence taken in Short-hand.

Then Mrs. *Pitts* being call'd for, and not appearing, *William Godfrey* being Sworn, said to this effect:

I Went to serve Mrs. *Pitts*, on Friday Morning: When I came to her House there was no body. A Woman with a Pitcher of Water went in: I ask'd her for Mrs. *Pitts*; she said, She was not at home. I shew'd her the Order and left a Copy of it upon the Table. She was loth to receive it; she said, the Lady would be within quickly. The Woman's Name was *Olivet*. The last night I went again, and a Woman came out and said Mrs. *Pitts* was not at home. Then she spake in *French* to me: I did not understand her. I left a Note for her to attend this Day.

Then the Dutcheſs's Counsel pray'd, that some Agreements between the Duke and Dutcheſs, in 1694, may be read out of the Deeds executed for that purpose: Which was agreed to, and read accordingly.

Die Martis 5^o Martii, 1699.

Francis Negus Sworn, Depoſeth as followeth.

Quest. I Desire Mr. *Negus* may be ask'd, Whether the Dutcheſs of *Norfolk* did not send some Message by him? The Words I don't confine him to; but, Whether the Message sent by him to my Lord Duke was not to this purpose, That notwithstanding the Articles, she desir'd to know from his Grace in what manner she should live; and that she would be govern'd by his Directions?

Anſw. I think 'twas much about the Time of the Transaction of these Articles the Dutcheſs sent to me. Mr. *Longueville* was Counsel for the Duke, and Sir *Thomas Powys* for the Dutcheſs: Mr. *Longueville* took what Care he could; and when they came to talk of their living separately, I took it only to be an Apprehension and Fear that my Lord Duke would confine the Dutcheſs to some House. My Lady Dutcheſs sent for me; I waited on her, and she express'd herself very sensibly of the Misfortunes of the Duke and herself, that such Differences should have been between them; and she was desirous to let my Lord Duke know, and desir'd me that I would let my Lord Duke know it, that she would avoid all Company that should give him any Offense, and that she would not so much as pay a Visit, but where he liked. I acquainted my Lord Duke with something to this purpose; for she often said to me, more than once or twice, That if she happen'd to die before my Lord Duke, she would leave him her Estate; and I know I have said so to my Lord Duke.

Q. Whether, from that Time, do you know that the Duke sent any Message of Complaint to the Dutcheſs, to the Place where she liv'd, that he would have her live in any other Way?

A. I know nothing of that Matter.

Q. Do you know whether my Lord Duke ever desir'd her to come and live with him?

A. I never heard of any such Thing.

Q. Did he ever send to her, to avoid any Company?

A. I never heard of any such Thing.

Q. Whether

Q. Whether had you any Directions to attend the Duke, That he would give Way in a Controversy between the Dutcheſs and a Noble Lord of this Houſe, whether he would wave his Privilege?

A. I have great reaſon to deſire Sir Thomas's Favour in this Matter; I know not what he aims at. I was call'd to the Bar before, to ſpeak the Truth as to the Matter of the Privilege; I know not what he means by it.

Q. I meant it only as an Inſtance of a Civil Meſſage between the Duke and Dutcheſs, owning her as his Wife, and that this was a Meſſage that beſpoke a good Underſtanding between them?

A. Will you have me to give an Answer to Sir Thomas, my Lords? I confeſs, the Duke did ſend for me, and ask'd how the Settlement and Agreement were betwixt the Duke and the Dutcheſs, becauſe of this Matter of the Privilege.

Q. I did not mean that; but only as a late Inſtance of the Duke's owning the Dutcheſs ſo far?

A. When the Duke ſent for me, he would know, whether by the Agreement he was oblig'd to let her have the Privilege: I ſaid, I underſtood it ſo; and tho he had no Mind to do it, but as he had waved his Privilege, in the Caſe of an Uncle, he would do it for her.

Q. What would have been the Conſequence, if the Duke had not waved his Privilege? Would not that have defended her from a Suit?

A. That you may make uſe of as you pleaſe.

Sir Thomas Powis. I would only make this Uſe of it, as an Inſtance of Kindneſs between the Duke and Dutcheſs.

FRANCIS NEGUS.

After the Examination of Francis Negus, he being before ſworn, the Dutcheſs's Counſel declar'd they had finiſh'd their Evidence.

Whereupon the Duke's Counſel deſir'd to call a Witneſs or two, to ſupport Nicholas Hauſeur's Reputation. Then William Allen was ſworn and examin'd.

Die Martis 5^o Martii, 1699.

William Allen ſworn, Depoſeth as followeth.

Q. D^y You know Nicholas Hauſeur?

A. Yes.

Q. How long have you known him?

A. Three Years.

Q. Did you not know him before that Time?

A. I knew him about Three Years ago.

Q. Had you any Dealings before that Time?

A. I had Dealings with him when he liv'd with Mr. Germaine.

Q. What were his Dealings?

A. As honeſt and fair as any Man could deſire.

Q. What Office had he under Mr. Germaine?

A. He was Cook to Mr. Germaine, I ſuppoſe.

Q. What! Was he Cook to him?

A. He bought in the Goods, and he paid me honeſtly for what he bought.

Croſs-examin'd.

Q. What Trade are you?

A. A Butcher.

Q. Then he paid you his Maſter's Money for his Maſter's Goods?

A. Yes, he paid me very honeſtly.

Q. When ſaw you him laſt?

A. I ſaw him when I was ſummon'd here by the Order of this Houſe, but not before of late.

Sign'd,

WILLIAM^{ALLEN} ALLEN.

The Duke's Counſel mov'd for Copies of the Examinations and Journals; which was granted, and then the Counſel withdrew. The following Orders were made.

It is Order'd by the Lords Spiritual and Temporal in Parliament aſſembled, That Copies of the Examinations, ſign'd by the Witneſſes this Day, and Entry in the Journal, be deliver'd to either Side; and, That the Examinations taken this Day in Short-hand be tranſcrib'd, in order to be read to the Witneſſes to-morrow.

It is Order'd by the Lords Spiritual and Temporal in Parliament aſſembled, That to-morrow, at Twelve a-Clock, this Houſe will proceed to hear the Examinations taken this Day, read to the Witneſſes, relating to the Duke and Dutcheſs of Norfolk, and all Lords ſummon'd to attend.

Die Mercurii 6^o Martii, 1699.

After the Examination taken yeſterday, relating to the Duke and Dutcheſs of Norfolk, were read to the Witneſſes, and they ſigning them, the Dutcheſs's Counſel mov'd to have Copies of the Depoſitions taken on either Side, and then withdrew.

Die Martis 5^o Martii, 1699.

Matthew Mac-Donnel ſworn, Depoſeth as followeth.

I Was going to Mr. Strange's Houſe, and I ſaw my Lord Howard of Eſcrick coming that Way, and he went to the Door and knock'd. I made up to the Door, and a Girl open'd the Door. My Lord ask'd if Mr. Strange was within; and ſhe answer'd, Yes. Then I went to the Door, and ask'd if Mr. Strange was at home; ſhe answer'd, No, he went away on Thursday. I ask'd, By Pacquet-boat, or how? She ſaid, By Long-Sea. I thought ſhe told my Lord he was within, and ſo I came away.

Signum,

MATTHEW + MACDONNEL

Die Martis 5^o Martii, 1699.

Richard May ſworn, depoſeth as followeth.

Q. D^y O you know Nicholas Hauſeur?

A. I never ſaw him till Sunday Fort-night laſt.

Q. Where ſaw you him then?

A. At my Lord Duke of Norfolk's. I had a Command from my Lord Duke to take him in there.

Q. Where?

Q. Where?

A. To lodge him in my Lord Duke's Houſe: I am his Houſhold-Steward; he commanded me to provide for him in the Houſe.

Q. I don't deſire you ſhould do any Thing unbecoming to my Lord Duke; but you are upon your Oath, and you muſt tell the Truth?

A. I'll freely tell what I know.

Q. Can you give me any Account where he was before that Time?

A. I never ſaw nor heard of him till then.

Q. Hath he been there ever ſince?

A. Yes; I made Proviſion for him, by his Grace's Command.

Q. Do you know *Vanefs*? Where hath ſhe been?

A. On *Sunday* was Fortnight ſhe came thither likewiſe, and I was order'd to take Care for her.

Q. Where was ſhe lodg'd?

A. In my Lord Duke's Houſe in *St. James's Square*.

Q. Has ſhe been there a Fortnight?

A. Yes, a Fortnight laſt *Sunday*, and coming here to attend the Lords.

Q. Had ſhe the Liberty of the Houſe? or was ſhe kept cloſe?

A. They were kept only as they deſir'd themſelves; no body was deny'd Liberty to ſee them. They deſir'd to be there, ſooner than any Place.

Q. D'you know that thoſe People have been ſent for, and how long before they came?

A. I was never privy to any thing of that nature: I had no Knowledge of their Names, nor whence they came.

Q. Do you know of any Money iſſued out for their coming over?

A. Not one Penny.

Q. Do you know of any Reward they have had, or are to have?

A. I know not of any Reward they have had, or are to have.

RICHARD MAY.

Die Martis 5^o Martii, 1699.

Chriſtopher Raine Sworn, *Depoſeth as followeth.*

Q. ARE you Servant to the Duke of *Norfolk*?

A. Yes.

Q. D'you know *Hauſeur*?

A. I have ſeen him, but am not acquainted with him.

Q. How long is it ſince you ſaw him?

A. It is within this Fortnight.

Q. Did you not ſee him any time further off?

A. No, I am poſitive of it.

Q. Where did you ſee him firſt?

A. In *St. James's*.

Q. In what Place there?

A. At his Grace's Houſe?

Q. Hath he been there ever ſince?

A. Yes.

Q. Was there a Woman call'd *Vanefs* with him.

A. Yes.

Q. Did they come at the ſame Time?

A. Yes.

Q. How long ago?

A. A Fortnight; it may be; not ſo much.

Q. Had they the liberty of the Houſe, to take notice where they were?

A. They had liberty to go where they pleaſed.

Q. Did they go abroad ſince they came there?

A. I can't tell; not to my knowledge.

Q. D'you know whether they went out of the Houſe, upon any Occaſion?

A. Not to my knowledge.

Q. Who brought them there?

A. I don't know.

Q. D'you know whence they came?

A. No.

Q. Did you not underſtand where they lodg'd before?

A. No, I am a Stranger to them both; I never ſaw them before.

Q. Saw you them when they came firſt?

A. No, I was not at home.

CHRISTOPHER RAINE.

Die Martis 5^o Martii, 1699.

Edward Cotter Sworn, *Depoſeth as followeth.*

Q. ARE you Servant to the Duke of *Norfolk*?

A. Yes.

Q. D'you know *Nicholas Hauſeur*?

A. I did not know him but ſince this Trial.

Q. How long ago is that?

A. About a Fortnight.

Q. Do you know where he had been before?

A. No: I knew nothing of him, where he was, nor what he was.

Q. Came *Helena* a Dutchwoman with him?

A. Yes, the Woman came with him ſince the Trial; I never ſaw them before.

Q. Did you never know them go out of Doors ſince they came, but to this Houſe?

A. Never, no where elſe.

Q. Who brought them to the Duke's?

A. I know not.

Q. Whence came they, d'you know?

A. I can't tell.

Q. Did they never report in the Houſe whence they came?

A. No, I never heard where they lived, nor how they behaved themſelves.

Q. Do you know whether ever any Reward was given them?

A. No.

Q. I deſire he may be ask'd, whether he has not known before, for ſome Time paſt, within this Fortnight or three Weeks more or leſs, Meetings in *Somerſet-houſe*, in order to this Trial?

A. The Thing is this; I was one Night at *Somerſet-houſe* with my Lord Duke, 'twixt Six and Seven a-Clock; but I can't tell how long it is, whether it be three Weeks or a Month; it is no more, that I know.

Q. What were you there about?

A. I went there with my Lord Duke.

Q. Upon your Oath, was there any Thing then done there, relating to this Trial?

A. Upon my Oath, I did not know but 'twas concerning my Lord *Howard of Eſcrick*.

Q. Was he there with the Duke?

A. Yes.

Q. Did

Q. Did you know who they went to?

A. No.

Q. Upon your Oath, don't you know whether they went to *Madam Pitts*, or no?

A. They went to some House, but I don't know her Name they went to?

Q. Was there any body else there, but my Lord Duke, and my Lord *Howard*?

A. God knows. My Lord Duke call'd me to the Door, and sent me on a Message; and I went, and came again.

Q. Who did you see there when you came again?

A. I saw none but my Lord Duke, and another that I did not know.

Q. Who did you see go in?

A. None but my Lord Duke, and my Lord *Howard*?

EDWARD COTTER.

Die Martis 5^o Martii, 1699.

Francis Huddleston Sworn, Deposeth as followeth.

Q. UPON your Oath, d'you know of any Meetings, relating to this Trial, that have been within some Time past?

A. For Meetings, I know not any thing of them.

Q. Do you understand the Question?

A. I know nothing of any Meetings.

Q. Have you not been at any Place where anything has been done, relating to this Trial, against the Dutchess of *Norfolk*?

A. I don't understand any thing of the Trial. I know nothing of the Dutchess of *Norfolk*.

Q. Pray give a positive Answer: have you not been present, or do you know of no Meeting, relating to the Proceedings against the Dutchess of *Norfolk*?

A. I never was at no Meeting.

Q. Who do you live with?

A. I live with my Lord *Howard*.

Q. Was you ever present at *Somerset-house*, Where my Lord *Howard* and others met?

A. I have been at *Somerset-house*, but know nothing of any Concerns.

Q. D'you know *Vane's*?

A. I know no such Person.

Q. D'you know *Nicholas*?

A. I don't know him.

Q. Pray answer positively; Do you know one *Nicholas* call'd *Hauseur*?

A. I know several of that Name, but I know not who you mean.

Q. I mean one that liv'd with Sir *John Germaine*?

A. I know him not. I never had any Conversation with any body that liv'd with Sir *John Germaine*.

(*Nicholas* call'd in.)

Q. Did you see any such Man as appears here, at *Somerset-house*?

A. I know no such Man as is call'd *Nicholas Hauseur*. I know several call'd *Nicholas*, but none of the *Hauseurs*?

Q. Look upon this Man: Have you seen him before or not?

A. Yes; I have seen him twice or thrice, but I knew not who you meant before.

Q. How long is it since you saw him first?

A. About a Fortnight ago.

Q. Have you not seen him at *Somerset-house*?

A. Never.

Q. Where did you see him?

A. In *Gerrard-street*.

Q. Was that all the Places you saw him at?

A. I saw him no where else.

Q. Whose House did you see him at?

A. At Captain *Soames's* Lodging.

Q. Did you not see a Dutchwoman there, one *Helen Vane's*?

A. There was a Woman with him; I do not know her Name.

Q. Did you see her at Captain *Soames's*?

A. She was with this Gentleman there.

Q. Did you see her at no other Time or Place?

A. No.

Q. Who else was there then?

A. Captain *Soames*, my Lord *Howard*, and one or two more. I was but at the Door, I have seen this Man go in. I was but a Footman waiting at the Door. I knew not the others that were there.

Q. Did you know no more that were there?

A. My Lord *Howard* was in the House, but I know not if he were with them.

Q. Did you ever see *Helen Vane's* before that Time?

A. I have seen the Woman since, but never saw her before.

Q. Did you never see her any where else?

A. Never any where else but at this House, going and coming.

Sign'd

FRANCIS H. HUDDLESTONE.

The Counsel being withdrawn, the following Orders were made.

It is Ordered by the Lords Spiritual and Temporal in Parliament assembled, That Copies of the Examination, read to, and signed by the Witnesses to Dav, be deliver'd to either Side.

It is Ordered by the Lords Spiritual and Temporal in Parliament assembled, That this House will peremptorily proceed to hear the Duke of *Norfolk's* and Dutchess of *Norfolk's* Counsel, to sum up the Evidence on both sides, on *Friday* next, at Twelve of the Clock, and all the Lords summoned to attend.

The Evidence having been summ'd up, the Lords, after a long Debate, and a Division of the House, committed the Bill, by a Majority of Sixteen.

Whereupon the Dutchess immediately preferred the Petition recited in the Order 8^o *Martii*.

Die Veneris 8^o Martii, 1699.

UPON reading the Petition of *Mary*, Dutchess of *Norfolk*, shewing, that by the Bill now depending for dissolving the Marriage between the Duke of *Norfolk* and your Petitioner, her Jointure and Marriage-Agreements are to be set aside, and other Things in the Petition mentioned

tioned, and praying to be heard by her Counſel, touching the ſeveral Claims and Intereſt, and ſeveral Clauſes in the Bill: It is ordered by the Lords Spiritual and Temporal in Parliament aſſembled, That the Petitioner ſhall be heard by her Counſel to Morrow at Eleven of the Clock, at the Committee of the whole Houſe, to whom the ſaid Bill ſtands committed; at which Time ſhe is to produce her ſaid Marriage-Agreement and Writings, as in the Petition is ſet forth: At which Time the Duke's Counſel may be preſent, if he think fit.

Matth. Johnſton, Cler. Parl.

Upon which an Order was made for Counſel to prepare a Clauſe for the 10000 l.

The Dutcheſs's Counſel having reſuſed to join in drawing any Clauſe, tho they adviſed a Petition about the Jointure and Marriage-Agreement, the Duke's prepared a Clauſe, to which the Lords added a few Words, and paſſ'd it as in the Bill. The Bill being ſent down to the Commons, the Dutcheſs preſented the following Petition.

To the Honourable the Knights, Citizens, and Burgeſſes, in Parliament aſſembled.

The Humble Petition of *Mary, Dutcheſs of Norfolk.*

Sheweth,

THAT for putting an End to all Differences between the Duke of *Norfolk*, your Petitioner's Husband and your Petitioner, ſeveral Articles of Agreement were entered into, and executed in *April*, 1694, by the ſaid Duke, your Petitioner, and your Petitioner's late Father, the Earl of *Peterborow*, whereby, and by Deeds executed purſuant thereunto, the Duke had his then deſired Advantage, and hath fully enjoyed the Benefit thereof; that your Petitioner, about the Time of Perſecting the ſaid Deeds, ſignified to the ſaid Duke by Mr. *Negus*, that ſhe ſhould always readily comply with all ſuch Orders in her Way of Living and Converſation, as he ſhould think fit to appoint. Notwithſtanding which, and without ever ſignifying any Diſſatisfaction to or with your Petitioner, and without any manner of Notice, or previous Proceeding in the common and ordinary Courſe of Juſtice, and to take from your Petitioner that legal Trial in the Eccleſiaſtical Court, which by the Laws of this Realm (as ſhe is adviſed) ſhe is entitled unto, did, on the 16th of *Februray* laſt, exhibit a Bill in the Houſe of Peers, entitled, *An Act to diſſolve the Duke of Norfolk's Marriage with the Lady Mary Mordaunt, and to enable him to marry again.* Upon which the Pro-

ceedings were ſo very quick, two Witneſſes lately brought from beyond the Seas being forthwith examined againſt your Petitioner; and your Petitioner charged with Facts ſuppoſed to be committed many Years ſince, and long before the Date of the ſaid Articles, could not be prepared to make her Defence as ſhe would have done, if the Proceedings had been againſt her according to the known Laws of the Land. The Places of Abode of the Witneſſes produced againſt her being yet not known or diſcovered to your Petitioner: And your Petitioner having Notice that the ſaid Bill is paſſed the houſe of Lords, and ſent down for the Concurrence of this Honourable Houſe,

Your Petitioner prays ſhe may be heard by her Counſel at Law and one Civilian againſt the ſaid Bill, before any Proceedings be had thereon by this Honourable Houſe,

And your Petitioner ſhall pray, &c.

M. Norfolk.

A Day being appointed by the Houſe of Commons for the Committee to proceed, the Duke cauſed the Papers following to be publiſhed.

The Duke of *NORFOLK*'s Caſe: With Reaſons for paſſing his Bill.

IF Want either of Precedent for a Parliamentary Divorce, before going thro' the tedious and ineffectual Methods of *Doctors Commons*, or of Demonſtration of Fact, have hitherto deprived the Duke of *Norfolk* of that Relief againſt his Wife's Adultery, which the Divine Law allows; the late Statute made in the like Caſe, and the coming in of two, who, while the Duke's former Bill was depending, had been ſent away, to prevent that Diſcovery which they now make; cannot but be thought to remove all Objections againſt an Act of Parliament,

VOL. V.

not only for the Benefit of the Duke, but of the Publick, as a Means to preſerve the Inheritance of ſo great an Office and Honours, to Perſons of the true Religion.

And ſince Biſhop *Coxens's* Argument, in the Lord *Roffe's* Caſe has made it evident, that thoſe Canons which govern the Spiritual Court in this Matter, are but the Remains of Popery; nothing can be now requiſite to ſatisfy the moſt ſcrupulous of the Reformed Religion, but to ſet the Duke's Proof of his Lady's Adultery in a true Light.

The Reputation which the Dutchess had maintained of Wit and Discretion, made it difficult for many to believe, that she could be surprized in the very Act of Adultery, as had been formerly proved. And tho it then appeared, that one *Henry Keemer* lived with the Dutchess while she went by a feigned Name, at a House hired for her at *Fox-Hall*, by Sir *John Germaine's* Brother; and that *Nicola*, who then lived with Sir *John*, used to receive Wood sent from the Dutchess to Sir *John's* House by the Cock-pit; the withdrawing of *Nicola*, and carrying with him the Dutch Maid, equally entrusted with the Secret on Sir *John's* Side; left no Evidence of their constant Conversation, but *Keemer* since dead, and *Susannah Barrington*, who had the like Trust from the Dutchess.

Keemer, tho very unwillingly, some Years since confessed his living with the Dutchess at *Fox-hall*, where he pretended she was obliged to conceal herself for Debt; and what share *Susannah* had in the Secret was unknown, till *Nicola* appeared: *Nicola* coming into England some time since, in Expectation of a Service, express'd his Readiness to discover what he knew, and to endeavour to bring with him the Dutch Maid.

She proves, that for two Months the first Summer after the King came for England, Sir *John Germaine* and the Dutchess lived together as Man and Wife, and were seen in Bed together by her, Mr. *Briane*, and his Wife Sir *John's* Sister; and that *Nicholas Hausfeur*, Sir *John's* Valet de Chambre, used to be assisting to him; as the Dutchess's Woman *Susannah Barrington*, was to her, at going to Bed, and rising.

She proves the like Conversation at *Fox-hall*, and the Dutchess's House at the *Mill-bank*, till the Duke's first Bill for a Divorce was depending; within which time, *Nicholas Hausfeur*, by Sir *John's* Order, carried away her, and *Susannah Barrington*, with Intention of going for *Holland*, to prevent their being examined to what they knew; but the Wind proving contrary, they could not go till the Bill was rejected; and then Sir *John* fetch'd back *Susannah*, who was most useful to the Dutchess; but *Hausfeur* went for *Holland* with *Ellen*.

He confirms *Ellen's* Evidence in every particular; and besides the Persons mentioned by *Ellen*, asprivy to Sir *John's* lying with the Dutchess, names Sir *John's* Brother, *Daniel*. *Nicholas* having been found very trusty, his Master sent for him to return to his Service; and gave him the Opportunity of proving the Continuance of the same adulterous Conversation, at several Times and Places from the Summer 1692, to the 26th of April 1696. He swears he had after his Return to Sir *John's* Service, seen them in Bed together at Sir *John's* House, at the Cock-pit, and at the Dutchess's Houses at *Mill-bank*, and where she now lives; and used to be let into the Dutchess's Apartment by *Susannah Barrington*, or *Keemer*. Nor can any Man who shall read the Testimonials given Mr. *Hausfeur* by Sir *John*; by the last of which it appears, that he served him faithfully as his Steward, reasonably question *Hausfeur's* Credit.

Another who had been advanced by Sir *John*, from his Footman to Mr. *Hausfeur's* Place, and from thence to a good Office in the Excise, very

unwillingly confirmed the Testimony of *Hausfeur* and the Dutch Maid, not only as to the Time of their going from the Service of Sir *John* and the Dutchess; but tho being no Foreigner, he could not so easily be sent away to prevent Discovery, and therefore was not let so far into the Secret as *Hausfeur* and the Dutch Maid; yet he swears, the Dutchess used to come mask'd to his Master's House; that he has gone with him as far as the *Horse-Ferry*, towards her House at the *Mill bank*; that then his Master sometimes lay out all Night, and the next Morning he has carried Linen and Clothes for his Master to *Keemer's* House, or *Keemer* has fetched them from him: And this he proves to have been since the rejecting the former Bill, and about five Years since, when he was succeeded by *Hausfeur*, as before he had succeeded *Hausfeur*.

Two other Foreigners, *La Fountain*, who lived with Sir *John*, and was served with Summons at the Dutchess's House at *Drayton*, and *Hugonee*, who ran away from the Lord *Haverham's* since Summons was taken out against him, seem to have had the same Trust that *Hausfeur* had; for both declared, That nothing should oblige them to betray their Master's Secrets: One said, No Court could dispense with an Oath of Secrecy; and both declared, They would immediately go beyond Sea. Summons have been taken out for Mr. *Briane* and his Wife, and Sir *John Germaine's* Brother (who are, or lately were in Town) to confess or deny what *Nicola* and *Ellen* appeal to them for; and it cannot be imagined, that Sir *John* should chuse the Honour of being thought to have to do with a Dutchess, before the clearing her and himself from the Imputation, by bringing his Relations to disprove the Charge, if what is sworn to be within their Knowledge is false.

And if Sir *John's* Vanity should prevail with him, at least it is to be presumed that his Relations would be more just to him and the Lady, than to suffer any thing to pass against them, which they could with Truth and Justice prevent.

But since none of them appear, the World will believe their absenting more than a thousand Witnesses, in Confirmation of what Mr. *Hausfeur*, *Ellen*, and *Bayly*, have sworn. Whose Evidence not only stands untouched by any Thing offered by the Dutchess's Witnesses, but is plainly confirmed by them in the principal Parts.

This being the Nature of the Proofs, 'tis observable,

1. That there never yet was any Case of this kind, where the Evidence was not liable to greater Objections than can be made to this.

The in the latest Case of this kind, there was full Conviction of the Lady's having Children, while she lived separate from her Husband, and the Presumption was very violent whose the Children were; yet this was but Presumption, and that was weakened by the Presumption in Law that they were the Husband's; especially, since there was no direct Proof of the Lover's ever lying with her.

2. Tho in that Case, by reason of the Interval of Parliament, and Fear of the Deaths of Witnesses, a Suit was began in *Dofors Commons*, 'twas taken from thence while the Suit was depending; therefore that was rather an Objection

¹ *Elleanor Vaness's* Exam. 22 Feb. 1699.

² *Nicholas Hausfeur*.

³ *William Bayly*.

againſt proceeding in Parliament, than an Argument for it.

3. In that Caſe, ſeveral Witneſſes were examined at the Bars of both Houſes, who had not been examined at *Doctors Commons*, nor any Notice given of their Names before their Examination.

4. It appears by that Caſe, and the preſent, that the Examinations in Parliament, are more ſolemn and certain than thoſe of the Spiritual Court; which depend too much upon the Honesty of the Register, or his Deputy.

5. Before that Caſe, Parliaments have either broken thro' the Rules which bind the Spiritual Court, as in the Caſe of the Duke of *Norfolk*, where the Parliament ratified the Marriage, 'as lawful according to God's Law; tho' protracted and letted, by Reason of certain Decrees and Canons of the Pope's Law; or elſe have diſſolved a Marriage where there had been no Application to *Doctors Commons*, as in the Caſe of Mrs. *Wharton*, who had been married to Mr. *Campbell*; and yet there had been no Examination of Witneſſes, but what had been before the two Houſes.

' So, long before, in the Caſe of Sir *Ralph Sadler*, upon Proof before the two Houſes, that the Lady *Sadler*'s former Husband had deſerted her, and diſappeared for four Years before ſhe married Sir *Ralph*, the Parliament legitimated her Children by Sir *Ralph*.

Whereas ſome object againſt the paſſing the Bill, as if it would countenance a Jurisdiction in the Houſe of Lords to examine to ſuch Matters in the firſt Inſtance, or originally; the Objection would be the ſame if it had begun, as it might, in the Houſe of Commons, but in truth would be of equal Force againſt moſt private, and ſeveral publick Acts, occaſioned by the Examination of Witneſſes, or Notoriety of Fact.

Since therefore the Duke has ſo long, and ſo often in vain endeavoured to be freed from a Lady, publicly famed and proved to have lived with Sir *John Germaine*, as his Wife; the Duke's former Diſappointments cannot but be powerful Arguments for his ſpeedy obtaining that Juſtice which the Spiritual Court cannot give him, their Power reaching no further than to that liberty of living as ſhe liſt, ſome Years ſince ſettled by Articles. But as none of leſs Art and Oratory than her Counſel, could have turned this into a Licence to commit Adultery, if ſhe liſt, or a Pardon afterwards; had there not been Evidence of her acting according to ſuch Conſtruction, the Duke would have hoped ſhe had repented of the former Injuries he had received from her; but now hopes, ſhe ſhall no longer continue to bear the Name of his Wife, and put him in Danger of being ſucceeded by Sir *John Germaine*'s Iſſue, or deprive him of the Expectation of leaving his Honours, Offices and Eſtate, to a Proteſtant Heir.

Bishop COZEN'S Argument, Proving, That Adultery works a Diſſolution of the Marriage.

Being the Subſtance of ſeveral of Biſhops Cozen's Speeches in the Houſe of Lords, upon the Debate of the Lord *Rofs*'s Caſe.

Taken from Original Papers, writ in the Biſhop's own Hand.

THE Question is indefinitely to be ſpoken of, Whether a Man being divorced from his Wife, who hath committed Adultery, and is convicted of it, may marry himſelf to another Wife or no, during the Life of her which is divorced?

The Place in St. *Matthew* the 5th, repeated again St. *Matthew* the 19th, has great Perſpicuity: If it be not lawful for a Man to put away his Wife, and marry again, except it be in the Caſe of Fornication (for the diſplacing the Words, by putting the Exception before the Marriage, cannot alter the Senſe) then *à contrario*, it muſt of neceſſity follow, that if the Wife be put away for Fornication, the Husband, by the Tenour of Chriſt's Words, is left free to marry again; which Freedom is not allowed to the Adultereſs herſelf, nor any Man elſe that ſhall marry her.

St. *Mark* and St. *Luke* have been oppoſed to St. *Matthew* and it has been ſaid, that Chriſt's Words in St. *Matthew* did not properly belong to Chriſt's Diſciples, or the Chriſtian Church, as the Words in St. *Mark* and St. *Luke*, which are abſolute, do: which is a Saying that neither I,

nor, I think, no body elſe ever heard of before: For Chriſt's Sermon in the Mount was ſpoken to his Diſciples, and eſpecially belonged to Chriſtians.

'Tis clear they are ſpoken to his Diſciples: for he ſays to them, that they are, *the Salt of the Earth, and the Light of the World*; and that they are bleſſed, *when they ſuffer Perſecution for his Name's Sake*; which no Man will ſay or apply to the *Jews*.

'Tis true, that in the 19th Chapter of St. *Matthew*, Chriſt answers the Scribes and Pharisees, who came to tempt him with their Question, *Whether it was lawful for a Man to put away his Wife for any Cauſe*, as they ſaid, *Moses had permitted 'em to do*. But the Answer that Chriſt gave them, *That it was not lawful, but only in the Caſe of Adultery, for Men to put away their Wives, and marry another*, was a Rule which concerned all Chriſtians to obſerve for ever after; and for that Reason was recorded by St. *Matthew*.

The Words in St. *Mark* and in St. *Luke*, are not to be taken abſolutely, but to be ſupplied and underſtood by his Words in St. *Matthew*, as in many other Caſes is clear; viz. the Thief upon the Croſs, Baptiſm in the Name of the Father, Son,

and *Holy Ghost*, &c. whereof many Instances may be brought as the Destruction of *Nineveh*, &c.

But for *Christ's Words*, the Exception confirms the Rule, and infers a Concession, that in the Case of Fornication, the putting away one Wife, and marrying another is allowed. It is alike with divers other his Exceptions, which are found in Scripture: For brevity, I will instance in this one (*viz.*) *Except ye repent, ye shall all likewise perish*. Upon which Text, if I or any Bishop else were to preach, I believe we should not discharge our Duty, unless we should tell the People, That if by the Grace of God they did repent, they should not perish.

The Exception here, *si non, nisi*, unless, is parallel with *1 Kings 3. 11.* *None were in the House except we twain*; they two therefore were, others were not.

Such Exceptions proceeding from natural Equity, are tacitly implied in Laws, tho pronounced in general Terms.

But as to the Exception here, the Words are not capable of any other Sense than as I have observed; for except that Restraint be referred to marrying again, the Sense would run thus, *Whoever puts away his Wife, commits Adultery*; which stands not with Truth or Reason; since it is not the Dismissal that is adulterous, but the Marriage of another. It is therefore the plain Drift of our Saviour to teach the *Pharisees* that the Marriage of a second Wife, after a Dismissal of a former, *Upon any other Cause, except for Fornication*, is no less than Adultery; thereby inferring, That upon a just Dismissal for Fornication, a second Marriage cannot be branded with Adultery.

Besides, the *Pharisee's Question* [*Is it lawful for a Man to put away his Wife for every Cause?*] was not without a plain Implication of Liberty to marry another, which our Saviour well knowing, gives a full Answer, as well to what he meant, as what he said; which had not been perfectly satisfactory, if he had only determined that one Part concerning Dismissal, and not the other concerning Marriage; which Clause if two *Evangelists* express not, yet it must be fetch'd necessarily from the third; since it is a sure and irrefragable Rule, That all Four *Evangelists* make up one perfect Gospel.

The *Rhemists* and College of *Doway*, urge for the *Papish Doctrine*, *Rom. 7. 2.* *The Woman which hath an Husband, is bound by the Law to her Husband as long as he liveth.* But,

1. This Place is to be expounded by *Christ's Words*.

2. *St. Paul* hath no Occasion here to speak of Divorce, but of Marriage whole and sound, as it stands by God's Ordinance.

3. He speaks of a Woman who is under a Husband; so is not she that is divorced from him.

4. *St. Paul* useth this to his Purpose of the Law being dead, to which we are not bound.

Nor is their Doctrine more favoured by *1 Cor. 7. 10.* *Let not the Woman depart*; as being in her Choice whether she would depart or not; but in the Case of Fornication she was to depart, or rather be put away, whether she would or not.

The Bond of Marriage is to be enquired into, what it properly is. Being a Conjugal Promise solemnly made between a Man and his Wife, that each of them will live together according

to God's Holy Ordinance, notwithstanding Poverty or Infirmary, or such other Things as may happen during their Lives. Separation from Bed and Board, which is Part of their Promise so to live together, doth plainly break that Part of the Bond whereby they are tied to live together both as to Bed and Board. The Distinction betwixt Bed and Board and the Bond, is new, never mentioned in the Scripture, and unknown to the antient Church; devised only by the Canonists and Schoolmen in the *Latin Church* (for the *Greek Church* knows it not) to serve the Pope's Turn the better, till he got it establish'd in the Council of *Trent*, at which Time, and never before, he laid his Anathema upon all them that were of another Mind; forbidding all Men to marry, and not to make any Use of *Christ's Concession*.

Bed and Board, or Cohabitation, belong to the Essence and Substance of Matrimony; which made *Erasmus* and *Bishop Hall*, say, *That the Distinction of those two from the Bond, is merely chimerical and Fancy.*

The Promise of Constancy and mutual Forbearance, if it hinders Divorce as to the Bond, hinders it also as to Bed and Board; and because the same Bed and the same Table, were promised in the Marriage Contract: but the Promise does not extend even to tolerating Adultery, or malicious Desertion; which according to God's Ordinance, dissolves the Marriage.

Our Saviour speaks of Divorces instituted by the *Mosaical Law*; but they were no other than Divorces from the Bond.

The Form of the Bill of Divorce among the *Jews* was this, *Be expelled from me, and free for any body else.* To give the Bill of Divorce, is from the *Hebrew Root* כרת, which is to break, or cut off the Marriage. With this agree the antient Canons, Councils, and Fathers of the Church.

Concil. Neocesar. & Elib. forbid the retaining an adulterous Wife. *Concil. Eliber. Aurelian. & Arelatens.* give Liberty in such Case to marry again. *Clemens's Constitution, Tertullian, St. Basil*, in his Canons, approved by a General Council, are for marrying again. *Concil. Venet.* If they marry in any other Case than Fornication, they are to be excommunicated, and not otherwise. *Concil. Wormat.* gives Liberty to the innocent Party to marry after Divorce. *Concil. Lateran.* gives leave for the innocent Party after a Year to marry again.

Concil. Lateran. If any one take another Wife while a Suit is depending, and afterwards there be a Divorce between him and the first, he may remain with the second.

Lactantius, St. Hierom and Epiphanius, are for Allowance of Marriage after Divorce. *Chrysostom, Hom. 19. 1 Cor. 7.* says, *That the Marriage is dissolved by Adultery; and that the Husband, after he hath put her away, is no longer her Husband.*

Theophylact on the 16th of *St. Luke*, says, that *St. Luke* must be interpreted by *St. Mathew*. *St. Hilary* is for Marrying again, as *Dr. Fulk* saith upon *St. Matthew* the 7th. The *Eastern Bishops*, in the Council of *Florence*, are for Marrying again: *Justin Martyr* speaks of a Woman's giving a Bill of Divorce to a dissolute Husband, without finding any Fault with it.

St. Ambrose says, a Man may marry again, if he puts away an adulterous Wife; *Theodoret* said of a Wife who violated the Laws of Marriage, Therefore

Therefore our Lord requires the Bond or Tie of Marriage to be dissolved.

All the Greek Church to this Day allow it. Erasmus, Cajetan, and other Papists: The Civil Law, and the Laws of the Emperor are clear for it: And the Constitutions of our own Church of England, in the Time of H. 8. Ed. 6. and Queen Eliz.

The Practice of the English Church: in the Stat. 1 Jac. c. 11. against second Marriages, Divorces are excepted; and in Canon 107. 'tis provided, they shall not marry again; but it is not said such Marriages are void, only the Caution is forfeited: Neither doth the Canon speak of such Separations, wherein the Bond itself is broken, as 'tis by Fornication.

Even the Canon Law allows marrying, again in case a Woman seek her Husband's Life, and in case of a Bond-woman. Gratian says in the Case of Adultery, Lawful Marriages ought not to be deny'd. In the Case of an incurable Leprosy, it was the Advice of St. Gregory to Austin the Monk, That he that could not contain, should rather marry. Bellarmine owns, That the Bond of the Marriage of Infidels is dissolvable; but the Marriage of the Faithful and of Infidels is of the same Nature: And Justinian, a Jesuite, confesses, That it is simply lawful for the innocent Party to marry again. And the Roman Doctors allow a Dissolution of the Bond of Marriage, if the Parties should, after Consummation, transfer themselves into a Friery or Nunnery.

* The Canons, which, in the Case of Adultery, prohibit Marrying in the Life-time of the guilty Person, are contrary to two Acts of Parliament made 25 Hen. 8. and 3 & 4 Edw. 6. wherein no Canons are allow'd that be any way repugnant to the Laws of God, or the Scripture, the Kings Prerogative Royal, and the Statutes of this Land. Thirty two Persons were to review the Canon-Law, in which Review, drawn up by Archbishop Crammer, the innocent Person is permitted to marry again, according to Christ's Law and Concession.

We have Examples of such Marriages in H. 4. of France, and H. 8. of England, Lord Mountjoy, Lord Rich, Bishop Thornborough, and divers others. And 'tis observable, That in the Case of the Marquis of Northampton, 5 Edw. 6. who had been divorced for his Lady's Adultery, and married another before any Act of Parliament made concerning it, an Act which passed afterwards (only two Spiritual and two Temporal Lords dissenting) declares, he had been at liberty by the Laws of God to marry, and did lawfully marry another: Where the Act manifestly supposes, that whatever had obtain'd for Law till that Time, was void, as being contrary to God's Law.

The most considerable Men of the Reform'd Churches, both at home and abroad, are of this Opinion: Grotius quotes Tertullian, in whose Time it was lawful for the innocent Party to marry.

Lancelot, Instit. Jur. Can. acknowledges, that Divorce is a Dissolution of the Marriage.

Selden, who is not likely to contradict the Laws of this Kingdom, maintaineth, That Marriage after Divorce is to be allow'd; and, in that particular, Dr. Hammond doth not contradict him, but is clearly for it.

The Opinion of Amesius deserves to be set

down at large: "Marriage, says he, cannot be dissolv'd by Men at their Pleasure; and for that reason, as 'tis consider'd simply and absolutely, 'tis rightly said to be indissoluble, because Marriage is not only a Civil, but a Divine Conjunction; and is also of that nature, that it cannot be dissolv'd without Detriment to either Party: Yet it is not so indissoluble but it may be dissolv'd for a Cause which God approves as just; for the Indissolvability, was not instituted for a Punishment, but for the Comfort of innocent Persons; and it admits an Exception, wherein God ceases to conjoin. By Adultery two are made not to remain one Flesh: Hence it is that a contagious Disease is not a Cause of dissolving Marriage. By Adultery the very Essence of the Contract is directly violated; but the Contract ceasing, the Bond depending on the Contract necessarily ceases. It is against all Reason, that all Matrimonial Duties should be for ever taken away, yet the Bond or Obligation to those Duties should continue. The Words of our Lord, Mat. 5. 32. and 19. 9. have no Distinction or Limitation of the putting away; but simply and absolutely approve of putting away; therefore they approve of putting away, not Partial, or to a Particular Purpose, from Bed and Board, but Total."

None are against the Reform'd Divines, but Dr. Howson, Mr. Bunny, and Dr. Prideaux.

Dr. Howson was a profess'd Adversary to Dr. Reynolds, who was a great Maintainer of the Church of England against all the Points of Popery, and particularly in this.

Dr. Taylor, Bishop Hall, Dr. Fulk are for Second Marriages; no Authors against them but the Council of Trent, and those of the Church of Rome; whose Credit is only sav'd by those of our Church who agree with them.

Upon the Difference of Explication between St. Ambrose, Origen and St. Austin, a new kind of Divorce has been thought of, from Bed and Board; but this Divorce, or Name of a Divorce, was unknown to the Jews and Antient Christians.

I said so much before, at the first and second reading of this Bill, that I was in good Hopes to have had no further Occasion given me of answering any Objections against it now; but seeing divers new Arguments have been studied and framed against it since that Time, I shall now endeavour to satisfy and clear them all.

1. The first Argument against it is, That the Separation from Bed and Board doth not dissolve the Bond of Marriage. To which I must reply as I did before, That this is a Distinction without a Difference, newly invented by the Canonists and School-men, and never heard of, either in the Old or New Testament, nor in the Times of the antient Fathers, who accounted the Separation from Bed and Board to be the Dissolution of the Bond itself.

2. That first Institution of Marriage, that they may be one Flesh, is by Adultery dissolv'd, when the Adulteress makes her self one Flesh with another Man, and thereby dissolves the first Bond of her Marriage.

3. The Objection, that if the Bond be dissolv'd, and afterwards, if the Man or Woman be reconcil'd, they must be married over again; is no necessary Consequence, no more than 'tis in a Person baptiz'd, who may break his Covenant, and renounce his Baptism, and yet upon true Repentance be receiv'd into God's Favour by virtue of the first Covenant, without any new Baptism. Suppose a Witch, who, they say, makes a Compact with the Devil to renounce her Baptism, should afterwards, by the Grace of God, seriously and truly repent herself of the Wickedness; I do not believe that any body would take upon him to baptize her again: And if a Priest should renounce his Orders, and turn Turk, and yet afterwards repent him, and return into the Church, he need not be re-ordain'd a second time. The Case will be the same in Marriage.

4. I said heretofore, That the Roman Doctors allow'd this Dissolution of the Bond when the Man and Wife, even after the Consummation of Marriage, would transfer themselves into a Friery or a Nunnery; but because it hath been since doubted, that no Authority can be shew'd for this particular, I shall here shew it out of the old Constitutions of the Church of England.

* "And, in the Case of Religion, that is the true Understanding, That, to wit, either of them betaking themselves to Religion before Carnal Knowledge, the Bond of Marriage be dissolv'd: But if both enter into Religion, and make solemn Profession, then such Marriage is dissolv'd, even as to the Bond."

5. It hath also been said, That if the Bill pass, it will pass against the Church of England; which,

I confess, I do not understand; for the Church of England is within the Kingdom of England, and if the Laws of this Kingdom be for the Bill, and have declar'd it by the Assent of the King, Lords and Commons, as in the Case of the Marquis of Northampton was heretofore declar'd, in the Time of King Edward the sixth, That by the Laws of God the innocent Party was at liberty to marry again; certainly the Spiritual Lords, as well as the Temporal and Commons, are bound to admit it: And I know not why they should be call'd the Church of England, that join with the Council of Trent, and plead so much to uphold it, rather than others that joyn with all the Reform'd Churches, and plead against that Canon of the Church of Rome which hath laid an Anathema upon us, if we do not agree with them.

As to the suppos'd Inconveniencies that will follow upon marrying again.

1. More Inconveniencies will follow if they be forbidden to marry again.

2. The Father would be in an Uncertainty of the Children, if he should retain the Adulterers.

3. There would be danger of poisoning or killing one another, if no Second Marriage were allow'd.

4. Where the Parties should consent to New Marriages for their own Lusts, the Magistrates have Power to over-rule such Practices.

5. If they be kept altogether by Divorce from Marrying, it would occasion the innocent Party to sin.

A little before the main Question about passing the Duke's Bill, the Dutchess's Agents handed about this Paper, among such as they thought to be her Friends.

The CASE of Mary Dutchess of Norfolk.

UPON the Marriage of the Dutchess with the now Duke of Norfolk, in the Year 1677, her Father, the late Earl of Peterborough, paid as part of her Portion 10000 l. and settled on that Marriage Lands of near 1000 l. per Annum, the Remainder of which, on Failure of Issue, was limited to the now Duke and his Heirs for ever; and the Earl, after his and his Lady's Death, secured to the Duke the Forfeiture of Drayton, worth 10000 l. more; and the Duke receiv'd also, by Agreement, 1000 l. per Annum for Twenty Years out of the Earl's Estate, besides very rich Jewels, Plate, and other things of great Value, which the Dutchess brought with her into the Duke's Family: And great Debts having been contracted for the Support of the Duke's Honour and his Service, while he cohabited with the Dutchess, she hath, since his Separation from her, paid them out of her own Estate.

That by the evil and malicious Insinuations of the Dutchess's Enemies, the Duke was prevail'd on to carry her, then a Protestant, into France, and to put her into a Monastery (where she could not be admitted without changing her Religion)

and left her there, on great Assurances of sending for her home in a short time, and so parted with great Expressions of Kindness.

That a considerable Time after, by the Duke's Consent, she return'd into England, and lived retiredly at Drayton in Northamptonshire; and at the Time of the Revolution she again retir'd to France, where she continued till she heard of her Father's Imprisonment in the Tower, and then came back to England, and lived privately till her Father obtain'd his Liberty, when she came home to him.

That the 8th of January, 1691, the Duke was prevail'd on, by the Instigation of her Enemies, to exhibit a Bill in the House of Peers, to the same effect with the Bill now depending, and divers Witnesses were examin'd on both sides, after which, and a long solemn Debate and due Consideration had by their Lordships of the Witnesses, and what was sworn by them, the 17th of February, they were pleas'd to reject the Bill without a second Reading.

Notwithstanding which, the Duke was again prevail'd on, the 22d of December, 1692, to exhibit

* Prov. Will. Lyndewode, five Const. Ang. fol 94. Ver: nullatenus separentur.

bit a Second Bill in the Houſe of Peers, to the ſame effect with his Firſt; which, after ſeveral Debates, was the 2d of *January* following again rejected.

Some Time after this, and for accommodating all Differences between them, Propoſals were made to the Dutcheſs, which, after long Agitation, on [the 28th of *April*, 1694, were reduced into Writing, and executed by the Duke and Dutcheſs; the Preamble of which Articles is in the Words following. *Whereas diverſe Controverſies, Debates, Demands, and Suits of ſeveral natures, have for ſome Time ſince been agitated, and continued, between the ſaid Duke and the ſaid Dutcheſs his Wife, &c. unto all which it is at laſt held fitting (it being conducive to their reſpective Quiets and Eaſe) to have an End put, and the like for the future prevented. It is therefore hereby, and by the Parties to theſe Preſents, declared and agreed in manner following; whereby the Dutcheſs convey'd to the Duke's Uſe the Manour of Caſtle-Riſing, &c. And alſo the ſaid Dutcheſs and her Truſtees aſſign'd their Intereſt in a conſiderable part of the Manour of Sheffield in Yorkſhire to the Uſe of the ſaid Duke; ſo that by theſe Articles, and that Deed executed thereupon, the Duke had his then deſir'd Advantages.*

That after the execution of theſe Articles, the Dutcheſs ſent for one Mr. *Negus*, the Duke's principal Gentleman, and expreſs'd herſelf very ſenſible of the Miſfortunes of the Duke and herſelf, and deſir'd Mr. *Negus* to tell the Duke, That ſhe would avoid all Company that ſhould give him any Offence; and, That ſhe would not ſo much as pay a Viſit, but where he liked: Which Mr. *Negus* lately teſtified before the Lords, and that he acquainted the Duke with it; as alſo, that ſhe had ſeveral times told him, If ſhe died firſt, ſhe would leave the Duke her Eſtate.

That notwithstanding the ſaid Agreement, whereby the Duke and Dutcheſs agreed to live ſeparately, yet without his ſignifying any Diſſatisfaction to or with the Dutcheſs, and without any manner of Notice, or previous Proceeding in the common and ordinary Courſe of Juſtice, but by taking from her that Legal Trial in the Eccleſiaſtical Court, which by the Laws of this Realm ſhe is entitled unto, he did, on the 16th Day of *February* laſt, exhibit in the Houſe of Peers the Bill now depending, for diſſolving the Duke's Marriage with the Dutcheſs, and for enabling him to marry again: Upon which the Proceedings were ſo very quick, two Foreigners (a *French Foot-man*, and a *Dutch Cook-maid*) lately brought from beyond Sea, being forthwith examin'd againſt her, charging her with Facts ſuppos'd to be committed many Years ſince, and long before the date of the ſaid Agreement, and on which the two former Bills were founded, that it was impoſſible for her to make her Deſenſe, as ſhe might have done if the Proceedings had been againſt her according to the known Laws of this Land.

The Dutcheſs thought herſelf under a Neceſſity of complying with all the Orders of the Houſe of Peers; and accordingly, as well as ſhe could, made her Deſenſe, tho' leſs than a Week's Time was allow'd her for doing it: and upon examining the Evidence of the Duke's Witneſſes, many Contradictions appear'd, ſome whereof follow, as doth appear by the Depoſitions taken in Writing, and now remaining in the Houſe of Peers.

For *Hauſeur* the Foot-man ſwears, the Dutcheſs was at the *Cock-pit*, when, and before he came to live with Sir *John Germaine*; and, that he continued there fifteen Days after; and, that after the Dutcheſs left the *Cock-pit* ſhe went to *Fox-Hall*.

Vanefs the Cook-maid ſwears, *Hauſeur* came to Sir *John* when the Dutcheſs was at *Fox-hall*.

Hauſeur ſwears, that the 8th of *Feb.* 92, he left Sir *John's* Service, when the Trial was between the Duke and Dutcheſs in Parliament, and after lived privately Six or Eight Weeks, till he and *Vanefs* could get for *Holland*, and arriv'd there in *Eaſter* following.

And yet in another place he ſwore, he deſir'd Leave to go; and afterwards, That he alſo went for *Holland* as ſoon as the Wind was fair.

But note, all the Evidence was cloſed and order'd to be ſumm'd up the Ninth of *February*, ſo that he needed not afterwards to have gone. And whereas he inſinuates, That he and *Vanefs* were ſecreted, and kept from being Witneſſes;

Note, It doth no where appear, that either he or *Vanefs* were ever thought on for Witneſſes.

Hauſeur ſwears, He return'd again to Sir *John* in Summer 92, being often ſent to by Sir *John*.

Whereas *Bayly*, another of the Duke's Witneſſes, ſwears, he did not return again to Sir *John* in Two Years, after he went away, *Bayly* the Witneſs being all that Time, and Three Years before, a Servant in the Houſe.

Note alſo, That this very Summer, 92, to wit, in *Eaſter* Term, the Duke brought his Action againſt Sir *John*, which was tried *Michaelmas* Term 92; at which Time it had been more likely, if Sir *John* had believ'd he could have done him any harm, he ſhould have kept him in *Holland*, rather than have ſent for him over, eſpecially conſidering that this Fellow afterwards ſwears, Sir *John* ſwore in a Rage this Fellow would betray him.

Hauſeur being ask'd who ſent for *Vanefs* over,

He answer'd, That after he had promis'd the Duke and Lord *Howard* to ſpeak the Truth of what he knew, they deſir'd him, if he met *Vanefs*, to deſire her to come over, and ſpeak the Truth of what ſhe knew.

And being ask'd how long after he met *Vanefs*, answer'd, About Twelve Months ſince.

And being ask'd when was the firſt Time he ſpoke to her about her coming over to ſpeak the Truth, answer'd, 'Tis about a Year ſince.

And being ask'd how long it was ſince they reſolv'd to come over, answer'd, Twelve Months.

Vanefs being asked, Whether ſhe was not ſent for from *Holland* to be a Witneſs? answer'd, She knew nothing of it till eight or nine Weeks ago.

Vanefs ſwears, ſhe was ſent away on account of the Trial.

Whereas *Peacock*, *Hawthorth*, and *Knight*, three Servants of the Dutcheſs's, ſwore the Dutcheſs turn'd her away before the Trial, for keeping company with *Dutch* Soldiers; and they do ſwear a new Cook-maid there before the Trial.

Hauſeur ſwears, he had a Key of the Door going into the *Park*, and could come in when he would.

And yet owns, he knew but two of the Servants, one whereof is long ſince dead.

And alſo the Dutcheſs's Servants ſwear, they never heard any body had a Key; and, that if any Key had been, they muſt have known of it.
They

They also prove the shutting up, bolting, and chaining the Door every Night, and opening it every Morning; and but one of the Servants remembers ever to have seen him at the Door, and then he rung the Bell, but came only to see a Country-woman of his, and to carry Letters to *Holland*, and brought Answer back to her, but was not admitted beyond the Passage.

Hauseur and *Vaness* swear, They saw the Dutchess and Sir *John* in Bed together at *Mill-bank*.

The Dutchess's Woman swore, she has put the Dutchess to Bed, and taken her up every Night and Morning several Years, and never saw him in the House. And two others swear, they were constantly in waiting Night and Morning, and positively deny any Knowledge of any such Thing, and say, they never saw *Hauseur* there; and, that *Vaness* was never admitted up Stairs, she was so dirty a Creature, much less to dress or undress the Dutchess, as she pretended often to have done.

Vaness swears, She could not tell the Places she has been at these Six Weeks last past. Whereas

Mr. *May*, and two other of the Duke's Servants, swear, she has been Fourteen Days in the Duke's own House, with the full liberty of the House.

Vaness being ask'd, Whether she ever told any body of the Occasion of her going away, she swore, Yes, she told it to a great many in *Holland*, and not here.

Yet being afterwards ask'd, Whether she ever discover'd that she was sent out of the way, she swore directly, No.

These are some of the many plain Contradictions and Disproofs of these Evidences, besides the great Improbability in their own nature, in several Things sworn.

But it is also to be noted, that *Hauseur* left Sir *John*'s Service in a Disgust; and so 'tis prov'd by *Bayly*, another of the Duke's Witnesses, and that what *Hauseur* swore could be nothing but Spight and Malice: Yea, 'tis prov'd on the Dutchess's part, that he swore he would find a Way to be reveng'd of him, and that perhaps it might not be long first: And Mr. *Strange*, Mrs. *Pitts*, and her two Maids, who could have depos'd very materially for the Dutchess, refus'd to appear, tho' often summon'd, being Persons not in the Dutchess's Interest or Power.

This *Hauseur* has been out of Place ever since he left Sir *John*'s Service, April 96, and is so still, as he swears, and so in consequence likely to be necessitous.

Note also, that *Hauseur* swears Sir *John* gave him seven Guineas to pay the Charges of himself, *Vaness*, and another, which were order'd to be kept private till they could be shipp'd off, and also for their Passage into *Holland*, which was in Time from the 8th of *Febr.* 92, till *Easter*.

Which does not look like a Bribe for a Secret of this nature, being hardly sufficient to maintain three People, and pay their Lodgings, for two Months.

Hauseur would be thought a mighty Confident, so as to have a Key to the Dutchess's House, to come in and go out when he pleas'd; and yet, as well acquainted as he pretended to be with the House, and the Dutchess's Bed-chamber, he could not tell on what Floor it was, nor what Furniture it had, nor whether wainscoted or hang'd. And

when he was asked which way the Windows of the Bed-Chamber look'd, he trifled in that Question, and concluded, He could see the Water, but was afraid to go near the Window, for fear of being discover'd; and yet had no Scruple of coming into the House with his Key, at any time. These Things being observ'd, it must be consider'd, that the Facts now in effect charg'd against the Dutchess are suggested to be done many Years since, and were debated and consider'd before the Peers, before the Rejection of the two first Bills, and long before the Agreement for putting an end to all Controversies and Debates. Now 'tis very hard to put the Dutchess to account again for those very Facts, considering that after Eight or Nine Years many People are dead, others dispers'd, and not in a little Time to be found out, and Circumstances of Times and Places (which in the nature of all these Cases is almost all that is left to discover a Fallity) forgot.

The Dutchess is also under the unavoidable Necessity of proving a Negative against downright Swearing, and that without any Matter introductory; and also by two mean Servants, the one turn'd out of her Place for keeping company with Foot-Soldiers, and the other leaving his Place in disgust, because he could not have the Play-Money.

Masters are already too much in the Power of their Servants, and if they charge their Masters with Adultery, Felony, and even Treason, it is not easily in the Power of the Master to defend himself against downright Swearing; Servants having those Opportunities of the knowledge of Times, and Places, and Company, which cannot be denied or avoided, and which others have not, whereupon they may frame and build false Evidence, and many times are of ill Principles and desperate Fortunes, and of Tempers very revengeful; so that whoever turns away a Servant, he is in his Power for his Estate, Honour, and even Life itself; and therefore, for the Safety and Freedom of Families, in other Countries, they are not permitted to be Evidence against their Masters, in any Matter criminal whatsoever.

Note also, that the Dutchess thinks, she, as an *English* Subject, has by *Magna Charta* the same Right to a Trial in the legal and ordinary Way of Justice as the rest of the King's Subjects, especially considering that there never yet was in *England* one Precedent of a Bill exhibited in *Parliament* to dissolve a Marriage at the first Instance, without any previous Proceedings in the Ecclesiastical Courts, (which in these Cases is the Law of the Land) and not above Five or Six Bills, in above 600 Years, ever pass'd to dissolve Marriages, or make Second Marriages good, even after there had been a Divorce in the Spiritual Courts, and those Bills too in Cases generally where the Husbands were without any Recrimination.

No Impediment appears why the Duke should not have endeavour'd a Divorce at Law before he had attempted a Bill to dissolve the Marriage; for any Application to the *Legislature* for the Trial of Matters of private Right is improper, because there are proper Judicatures, that give that Remedy the Law allows.

To ask any thing of the *Legislature*, in private Causes between Party and Party, beyond what the known Laws in force give, seems to be improper; because,

1. It is to make a Law in one Perſon's Caſe, which is not the Law in another's.

2. It is to retroſpect Actions, and after the Fact, to augment or alter the Penalty. Our Laws are certain and known, that Perſons may conform their Actions to them.

3. The Courts and Forms of Law are equally the Subjects Right with the Law, and the Application to the *Legiſlature* takes away all that Right of Form and Charging: Whereas a Certainty in Time to answer, and Exceptions to Witneſſes, and other legal Defenſes of the Fact, cannot be denied the meanest Subject.

The Conſequence that ſhort and ſummary Ways of Proceedings may have on the Settlements of Eſtates and Families, may be very dangerous; and tho the Duke of *Norfolk's* Bill paſſed the Houſe of Peers, yet a great Number of the Peers, both Spiritual and Temporal, enter'd their Proteſt againſt its Paſſing, and their Reaſons for it.

It ought to be no Prejudice to the Dutcheſs, that the next Heir preſumptive to the Duke doth not yet appear to be a Proteſtant, becauſe when a Bill which hath lately paſſed both Houſes is become a Law it is not likely that Noble Family will be without a Proteſtant at the Head of it.

If any of the Witneſſes formerly examined on the Bill in 1691. be now again produced, it is humbly apprehended, that as the Validity of their Teſtimony they then gave was totally overthrown by a greater Number of Witneſſes, ſo it will be again, tho under the Diſadvantage of the great Diſtance of Time.

Martis 19 die Martii, 1699.

The Reading the Bill for diſſolving the Marriage of the Duke of *Norfolk*, the ſecond Time, and hearing Counſel as well on the behalf of the Dutcheſs againſt the Bill, as on behalf of the Duke for the Bill, being the Order of the Day, before the Counſel was called in, to prevent the Inconvenience of People crouding into the Houſe; the Houſe made an Order,

That none but the Counſel, Sollicitors, and Parties ſhould be called in, and that the Witneſſes ſhould have Notice to attend without, ready to be called in, if the Houſe ſhould think fit.

It was alſo intimated, That if the Duke and Dutcheſs did think fit to come into the Houſe, they ſhould be accommodated with Chairs, that being a Reſpect ſhewed to the Nobility when they come into the Houſe.

And then the Counſel, and Sollicitors, and Parties of both Sides were called in: And firſt the Bill was read to them.

And then the Lady Dutcheſs's Petition was read.

The Counſel that appear'd, were,

Sir *Thomas Powis*,
Mr. *Dod*,
Dr. *Pinfold*, } for the Dutcheſs.

Mr. *Serj. Wright*,
Mr. *Northey*,
Mr. *Arwood*,
Dr. *Oldiſh*, } for the Duke.

And Mr. *Speaker* then ſpoke to this effect.

Mr. *Speaker*. You are here, I ſee, Counſel on both ſides. The Houſe have order'd, that my

Lady Dutcheſs ſhould be heard according to the Prayer of her Petition; and my Lord Duke had likewiſe an Order to be heard to make good his Bill. I think the Petitioner is to be heard firſt, to make good the Allegations of her Petition; and when the Houſe have heard you both, as to that, they will conſider whether they will proceed to hear the Allegations of the Bill made out.

Sir *Thomas Powis*. Mr. *Speaker*, with your Favour, Sir, I am of Counſel with the Petitioner; the Dutcheſs of *Norfolk*, againſt this Bill that is now before you, and I believe I may ſay with ſome Assurance, that this Bill, in the manner it is now brought before you, is the firſt that ever was attempted in this Honourable Houſe. It's, Sir, true, that ſeveral Years ago this Bill, or another of the ſame Nature, was attempted twice in the other Houſe, and as often rejected; but 'tis as true, at laſt it does come from thence hither, but not without a Proteſtation there; and I humbly hope that you will take notice, that this is a Bill of Divorce in Parliament, in the firſt Inſtance, without a previous Proſecution to examine the Fact in any of the ordinary Courts, that have Authority in theſe Matters.

It is a Bill not only to divorce the Dutcheſs upon a very ſhort Warning, who hath been a Wife twenty three Years, but to render her infamous to all Poſterity by Act of Parliament, which I account to be the greateſt Miſfortune poſſible to befall any Perſon; and at the ſame time it takes from her the legal Trial of the Fact whereof ſhe is accuſed, and which ſhe hath a Right to by the Laws of the Land, ſure as much as the meanest Subject; and which we don't apprehend ſhe has in any wiſe forfeited, nor is there any Reaſon assigned, why his Grace has not been pleaſed to proceed in the ordinary Courſe. I hope, Sir, you will take notice alſo, that this is in truth nothing but a Suit between Party and Party. 'Tis merely a Cauſe Matrimonial between Husband and Wife, began originally in the Houſe of Peers; and as hitherto the Beginning of Cauſes between Party and Party, in that Houſe, hath been ſtrongly oppoſed, ſo I hope it will be thought reaſonable to do ſo always, becauſe it deprives the Subject of that legal Deſenſe due to him by the Law of the Land. If this was always complained of, when the Proceedings were in a Judicial Way, ſurely 'tis a great deal worſe to begin there a private Cauſe between Party and Party in the Legiſlative Way. I can ſee no manner of Difference with reſpect to the loſs of thoſe great Advantages the Party is intituled to, only this ſeems rather to be the moſt againſt Reaſon.

Sir, this is a ſummary Proceeding with a Witneſs. It began but the 16th of *February*, and but a Week's Time given to the Party accuſed of ſo high a Crime, and of ſo great Conſequence to the Party accuſed, to be heard to it; and tho perhaps we may with Reaſon enough find Fault with the tedious Proceedings in ſome Courts, where Appeals and Writs of Error are juſtly due, as where Property is well fixed, it muſt needs be reaſonable. I ſay, from various Cauſes, tho Suits in the Ordinary Courts are very tedious; yet I am ſure a ſummary Way of Proceeding without due Warning, or any certain Way of making Deſenſe by any known Rules, and without Oath, as here without Appeal, without any poſſibility

of retrieving the Matter again, with great Submission; and if it is must be for all that one has in the World, such a summary Way is a very terrible Thing.

I would be glad any one would make it his own Case, and think with themselves how they should like it, if their Life, Estate, and all they had, were put upon such a summary Way of Proceeding. 'Tis true, in some Kingdoms, where the Government is arbitrary, the Proceedings are summarily, and most commonly they go together; and if we were in a Place where the Judges were infallible, and there were no false Witnesses, and Truth could be discovered at an instant, a summary Way would be best; but since Men are fallible, since there is Passion and Partiality in the World, since oftentimes there is notorious Detections of Perjury, and several Things are difficult to be disclosed, and require a reasonable Time for examining into Facts; from thence it is that there are settled Courses for determining all Questions in *England* between Party and Party; and there are known Rules and good Methods, for the relieving against any ill Judgment that is given.

Whatever you may think of this particular Case of the Dutches of *Norfolk*; the Example is of mighty Consequence to all Parents, that perhaps make hard shift to give their Daughters considerable Portions, and may think they have married them well, and made Provision for them and their Children. I say it will be hard, if their Daughters should be sent home to them upon a Fortnight's Warning, and that Witnesses should be examined against them without their having Notice so much as of the Places of their Abode; and a Thing should be determined before the Witnesses can be well known. And it must be agreed to be of great Consequence to all collateral Heirs, if Marriages are so easily and suddenly set aside for want of Issue, which I find to be one of the Causes assigned for this Bill, and that it might be in a summary Way, perhaps, before they can well hear of it. I am sure, this is a Matter of too great Temptation to be put upon Men that may grow weary of their Wives, and desire a better Fortune, or desire Change, or may be moved by a thousand Reasons we can't think of, to revive old Quarrels, and think of Things long since passed, if you will set such a Precedent of Divorcing in such a summary Way.

This is sure of infinite Concern to us in higher Matters. A Bill of Divorce of a Woman in Parliament, without a legal Trial, is just the same Thing as a Bill of Attainder against a Man for Treason; the one forfeits the Estate, corrupts the Blood, and takes away his Life, and the other does very little less: For I find according to the Bill; 'tis to forfeit her Jointure, to defame her Person, corrupt her Reputation; and tho it leave her Life, it is left with Infamy, which is worse than Death; and in a Case of this high Moment, sure you will be careful how you alter the Course of Trials. I beseech you, Sir, will not the reason be the same, that a Bill of Attainder may be brought against a Man, and that Witnesses against him may be fetch'd from beyond Sea, which he had formerly discharged from his Service, and put the other Side to prove what is always very difficult, the Negative, to make his Defence, which must needs require a reasonable Time for the making out of Circum-

stances, and laying Evidence together. Where will be the Difference between proceeding against a Man for his Life, without a Trial, and proceeding against a Woman for her Jointure, where her Name, Family and Reputation is concern'd, and perhaps her Children, the Legitimacy of whom must come in question? and in a Case, where the Person by no Behaviour of hers hath forfeited such a Trial, nor the Person that prosecutes this Bill, can't shew, that he hath been obstructed in his Proceeding in the ordinary Way. I need not take notice of what every body knows, that we have a happy Constitution, if we can keep it; every Man can call his Wife his own, and his Estate his own, because it can't be taken away, but by legal Trial; but if you will go into these extraordinary Resorts, when the Courts and the Law is open, without any previous Preparations for that Matter, by having a fair Examination, that the Party can't say there is a Surprise, I know not where it will end; and tho in one Case it may be desirable that there should be an extraordinary Relief; but will this go no further? Can any body say that?

That which we find in *Magna Charta* is not to be forgot, where there is so much Care in the several Instances of it for the preserving of Property, and the Right of Trials, *Quod nullus destruat, nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum vel per legem terra.*

Why, in this Case the Ecclesiastical Law is *Lex Terra*. And if that be to be taken away without any Reason, why may not the Law in any other Case?

We have perhaps, in Time of great Emergency and publick Difficulties, had some extraordinary Laws grounded on extraordinary Reasons; but now we are in a Time of settled Peace, when there may be a just Determination according to the Law of the Land, I can't see any Reason for this Proceeding, no not in this particular Case.

I would, Sir, with your Favour, take Notice of those few Instances of this kind, that have been in *England* by Act of Parliament, and in what manner they have proceeded.

There have not passed hardly six in six hundred Years, I think I may challenge them on the other Side to shew so great a Number, but those I have I shall quote: But they proceeded in another manner than this has done.

'Tis true, where Persons have had a fair Trial in a proper Court, and Witnesses have been examined, and Sentence final been pronounced, and where the Party as to the Fact hath been concluded according to the Law of the Land, when all this hath passed, some Instances there have been, that afterwards an Act of Parliament has passed to strengthen the Sentence, and to carry it farther than the Ecclesiastical Court will allow, even to the dissolving the Marriage, and enabling the innocent Person to marry again, but you will find all those Acts are founded and built upon the Sentence of those Courts, and recite those Sentences as a great Inducement to the passing of those Acts, and I crave leave just to take Notice of those. The first we find, is that made in the Case of the Marquess of *Northampton*, which was in 5 E. 6. He was married to a Daughter of the Earl of *Essex*, and she eloped from him, and was prosecuted

prosecuted in the Ecclesiastical Courts, and there was Sentence against her of Divorce. The Marquess from hence took upon him to marry a Daughter of the Lord Cobham, and after four Years Marriage of her he obtained an Act of Parliament to ratify the second Marriage, which Act recites a Sentence of Divorce in the Ecclesiastical Court.

This took its rise from Examination according to Law, and that Act of Parliament is grounded upon it, and recites it as a previous Matter necessary to induce that Act.

The next that follows was the famous Case of the Lord Roſs, afterwards Earl of Rusland, tho there perhaps was as great a Notoriety of Fact as can be pretended in this Case, and he did not stand impeached of any immodest Behaviour, but even in that Case the Divorce by the Act, followed a Divorce in the Ecclesiastical Court, and that passed with such Difficulty that it was four Years in Hand, it began in sixty six, and was not passed till seventy. I have a Copy of it, and it says, that forasmuch as *Manners*, commonly call'd Lord Roſs.

And it proceeds thereupon to enable him to marry again; but this, Sir, could not be but by two Acts of Parliament, besides the Sentence in the Ecclesiastical Court; for he first got that Court to declare the Children illegitimate, and then in the Year (70) the Parliament passed this Act.

I know of no other till we come to a Case that happened within our Memory; 'tis the Case of a Person of great Worth, and I hope it will give no Offence when I cite the Precedent.

It was the Case of Mr. *Lukenor*, who had been grossly abused by his Wife, by Elopement and open Adultery, but the Act he obtained went no farther than to disable the Children born while she lived in open Adultery, and that Act recites a Sentence of Divorce; I have a Copy of it, and I crave leave I may read a few Lines of it, It recites that Mr. *Lukenor's* Wife had eloped from her Husband.

There was indeed a famous Case not long ago, of a Lady that was taken away by Force, and pretended to be married, and an Act of Parliament came afterwards to declare that Marriage null and void, but even there was a Proceeding at Law with a Witness. The Person that had been concerned, was actually indicted and executed, it was not there to make a Divorce and so it had been a vain Thing to have gone into the Spiritual Court, where there was no Marriage, for it was only a Law after the Fact declaratory by Way of Caution, to give the more Satisfaction that that Marriage was null and void.

Sir, the last I know of (and it may be proper for you to observe how quick these People come after it) was that of a noble Earl, that did obtain last Parliament, an Act for divorcing him and his Lady: It is the Case of the Earl of *Macclesfield*, but in that Case it will be proper to take Notice to you, that there were previous Proceedings in the Ecclesiastical Court, there was a Libel exhibited against her, a Charge upon her, and Witnesses examined, and she had a fair Opportunity of making her Defense; there was a regular and a long Proceeding against her, and a Prosecution of her, in order to a Sentence of Excommunication; and then there came the

Earl's Petition into the House of Peers, setting forth, that there had been such a Proceeding as this, and that she stood in Contempt, having been prosecuted as far as that Court could go: After an Examination of Witnesses, in all the Cases I have heard of a Divorce by Act of Parliament, there have been Proceedings in the Ecclesiastical Court: this was the Way of former Times, but now we are beginning where the Matter ought to end.

And now the first Application is to that Place where in all these Instances (as I think it ought to be) was the last Resort. 'Tis true, this Method may not please the Duke, for we know his Grace is in haste for cutting the Knot afunder, at once, by the Legislative Power; but, I hope, upon these Precedents, you will think it more reasonable it should be at first untied, or at least loosen'd by a judicial Proceeding. If you will, I do not see how in Justice the Parliament can deny the like Remedy the next Sessions to any other that may be in the like Case; it may be in worse, for here is no Pretence of any spurious Issue: Can the Parliament of *England*, whence we take our Measures of Justice, deny the like Remedy in Justice to any others that are in the like Case? What is it that guards you from an infinite Application of this Nature, but requiring Persons to take the ordinary Course first, and to come round about to the Parliament, as the last Remedy, to carry the Sentence perhaps farther than the Ecclesiastical Court can do; but if Persons can come up directly hither, I am apt to think your *Lobby* will be crowded with Petitioners of this Nature the next Sessions: tho the Sessions now are long and frequent, this single Business may be so great as to obstruct all other Business; I am sure a Committee for Adultery would have a full Employment.

Let it be consider'd how strange it would be, if some poor Man upon this Precedent, shall come and make Application, and tell you he stands in Need of such a Bill from the Condition of his Family; that his Wife plunders his House, sells his Goods, and lives in Adultery, and prays this Matter may be examined in a summary Way, because he is not able to go thro' the costly Course of Ecclesiastical Courts, and be favoured with a Divorce; would not this poor Man's Case seem to have the like Justice, or possibly more: and yet if such a mean Man should come with such a Petition, perhaps it would look strange; but yet in Justice there is no Respect of Persons, the Law in *England* is, *unum pondus & una mensura*, and if this should be done in the Case of a great and rich Man, and not for a poor Man, they may say what has been said by some, *That our Laws are like the Spider's Web, which only hold the lesser Insects.*

Shall those that expect the best Fortunes and greatest Advantage by Marriage, not undergo the bad Fortune of Marriage too? I am sure if this be so, it's a Privilege of *Peerage* never thought on before.

You may see, Sir, by this Bill, how Precedents grow upon you; at first in the Case of the Marquiss of *Northampton*, it was hard to get an Act after a Divorce: So it was in the Case of my Lord Roſs; the last Sessions in the Case of the Earl of *Macclesfield*, it went farther there, because there had been a previous proceeding in the Ecclesiastical Court, and his Lady had obstructed

that

that Sentence : that Act passed before Sentence ; but now we are come to have it done without so much as a Trial to get a Divorce in the Ecclesiastical Courts ; to have all passed at once in a summary Way : it will be but to petition the *Parliament*, and all shall be determined without a Possibility of being re-heard.

I know nothing can be said on the other Side with good Reason (unless that which I heard in another Place) why they should not go to the Ecclesiastical Court, which is that those Courts cannot divorce a *Vinculo* Matrimony, therefore it would have been a vain Thing. This may be a good Reason for them to come to you afterwards, but 'tis no Reason for them to come here at first, unless they would say at the same Time, that every Thing ought to be begun in Parliament, because 'tis possible every Thing may be brought to the House of *Peers* at last. Will they say that all Ejectments ought to be begun originally in the House of *Peers*, because after the Parties have been at great Charge and Trouble in the Courts below, they may be brought thither by Writ of Error at the last ? This would have been a good Expedient, in a Cause lately where a Deed was tried over and over, if the Persons concerned in so many Verdicts, had once thought of having begun in Parliament to have had it settled, whether it was a just Deed or no ; if this be the Rule, it would be well it were known, and made to be the Law of the Kingdom, for that Law will be always reckoned hard which is made in one Case, if it may not be had in another ; the Law of *England* does go throughout, and if it be Law for one 'tis for another. I have but one Thing more to lay before you, and that seems worthy of your Consideration, besides all that I have said.

You observe the Bill is general without Restraint of Time and Place, or Description, or Circumstances relating to the Fact ; now, Sir, I must take leave to acquaint you, that so long ago as *April*, 1694, his Grace the Duke, who complains of this Matter, as if some Misfortune had befallen him, having made former Complaints and Attempts for obtaining what he now desires, did at last in *April*, 1694, not suddenly, but by Advice of Counsel, with his Friends about him, after a long Time of Agitation come to Articles with his Wife the Dutchess, of which I crave leave only to read the *Preamble*.

The Articles are between his Grace the Duke of *Norfolk* and the Earl of *Peterborough*, and recite —

* It is therefore determin'd by the Parties, and agreed as followeth : and thereupon the Articles proceed to settle every thing between the Duke and Dutchess to his own Satisfaction, and according to his own Desire. His Grace hath reap'd the Benefit of those Articles, by having receiv'd a great Sum of Money ; and the Dutchess parted with her Interest in that Great and Noble Manour of *Sheffield* ; his Grace hath had all that he on his part was to have, and hath executed abundance of Deeds, pursuant to his Agreement. Now if, after all this there be a Prospect of farther Advantage by another Marriage, that will not move you to give him a Liberty for a Departure from so solemn an Agreement. In what a Condition are People that have purchas'd their Peace as the Dutchess has, if they may have Liberty to go

back beyond this, for the Bill has no stint. Surely all Reconciliation between Men and their Wives, and all Acts towards them and all Acts of Kindness, are to be favour'd, and Matters of a Divorce are of an odious nature, and not to be encourag'd after such Composure of Differences, and Reconciliation. We have Instances of some that have taken their Wives again, and liv'd comfortably afterwards ; surely it shall not be in their power to go back and say, *Pray let us be divorced* ; 'tis contrary to the Use of all Acts of Pardon. What is the End of all Acts of Parliament of General Pardon, and all Statutes of Limitation, but to ease People in such a Case ? For 'tis impossible that any Person can be able to defend their Actions nine or ten Years ago ; they can't keep their Witnesses alive, and therefore the Law hath often limited a Time, beyond which Persons shall not go back : And this, we think, the Duke hath done by Articles, and surely they are conclusive both before God and Man.

I shall say no more, but that I don't apprehend the Nation will be in any great Danger, if the Duke do, betwixt this and the next Session, proceed in the ordinary Course, and prepare Matters against another Session, I am sure it is of great Consequence : No Man can deny but we have a good Constitution, but if it is in the Case of a particular Person to be broken, such a Breach in this Constitution may not be very easily recover'd.

I hope this Cause, that is precipitated here out of Time, and before those Preparations were made that have been in all other Cases, shall be remitted to its proper Place, where her Grace will give the Duke a Meeting, if they be not before that Time reconcil'd.

Mr. *Dod*. Mr. Speaker, I desire the Favour of a Word on the same Side. These Bills are not common, I think there are not above three Instances to be found in the Records of this Kingdom.

This Bill is to dissolve a Marriage after Twenty three Years Continuance, and that not upon so many Days Notice as there have been Years of the Marriage, for to serve the particular Purposes of one Person : 'Tis a Law after the suppos'd Fact committed ; the Law should go first, and the Fact follow : It is not a general Law for all the People of *England* ; as such, it would have another Consideration : there is no occasion for a particular Law : 'tis a Bill from the Lords, and in a little time, for what I know, the Lords will prescribe to it. There is not one of these Bills for a Commoner, unless in my Lord *Ross*'s Case, who was of a Noble Family.

'Tis not pretended by this Bill, that the Dutchess hath had any spurious Issue, tho that was the Circumstance of one of the Bills that did pass, and that was a material Circumstance in the Case ; and that is not alledged here. These Bills are not to be made use of, but upon extraordinary Occasion, and the utmost Extremity, and till then I hope such Bills shall not be made use of ; and we think the Proceeding upon this Bill, in this Case, will appear much harder : for 'tis the first Instance of this Nature, when there has been no Proceeding in any Court whatsoever, to convict the Dutchess of this Offence, no Citation all this while in the Ecclesiastical Courts, where the Dut-

* Vide her printed Case *ut supra*.

cheſs might have an Opportunity to make her Deſenſe.

If thoſe Courts have Jurisdiction in any one Thing, 'tis in caſe of Matrimony; if this was brought into thoſe Courts, the Dutcheſs would be allowed to make her Deſenſe, not only by way of Recrimination, but Examination of Witneſſes; a Commiſſion might be had to examine Witneſſes beyond Sea, if ſhe had any Witneſſes there, or in the Country; ſhe might appeal to a Superior Court, and thence to the Delegates: theſe are all proper Deſenſes that the Law allows, that there may be no Surprize upon the Party; and if injur'd, he may be righted in another Place. Theſe Proceedings, we think, are neceſſary to go before a Bill of this Nature, for then the Fact would be plain; and if the Dutcheſs had been convicted in this manner, as to the Fact, we muſt not have opened our Mouths againſt it.

By the ſame Reaſon that a Bill is brought to diſſolve this Marriage, in a little time you may have a Bill to marry People. Be it enacted for ſuch and ſuch Reaſons, Such Perſons ſhall be married; this would be a much readier Way in Caſe of Contracts, than any Proceedings in the Eccleſiaſtical Courts. And tho they may ſay the Law of England takes notice of Contracts of Matrimony, as well as any other Acts, that is no Answer; for the Fact is, whether there is any Contract of Matrimony, or no; and ſo 'tis here, whether my Lady is guilty of the Crimes charged here in the Bill: and for this ſhe ought to have a proper Trial, and ought to be called to an Account, in the Ordinary Methods of Law, and then it might be proper to carry the Sentence farther than thoſe Courts can. I hope you will be very tender of making a new Precedent; and I do not know of any Bill before this to convict a Woman of a ſuppoſed Crime; then this is the firſt Bill of this Nature, and you will conſider, whether you will make a Precedent of it or no. Tho this before you is the Caſe of a great and honourable Perſon; yet your Juſtice will be the ſame, if it ſhould happen that any other Man in the Kingdom ſhould be in the ſame Circumſtances, and willing to ſlip over all Trials, whereby the Perſon accuſed might have an opportunity of making her juſt Deſenſe as is the Caſe of this noble Lady, who is hurried on after twenty three Years Marriage to a Determination in as many Days in this extraordinary manner.

I hope therefore you will not proceed in a Bill of this extraordinary Nature, of which there is not one inſtance to be given, where you have begun to examine a ſuppoſed Crime, but you have always left it to the Determination of the Law in the ordinary Courſe, and we think it ought the rather to be ſo in this Caſe, becauſe 'tis not pretended by the Bill, that there is any ſtop put to their Proceedings there; there is no Abſence of Witneſſes, no Incapacity, but his Grace may proceed there to convict this Lady of the Crime he ſuppoſes her guilty of, and ſhe will there have her juſt Deſenſe, and till then there is no Crime for you to judge upon; and I hope you will think fit to reject this Bill.

Dr. Pinfold. Mr. Speaker, I deſire to ſpeak a few Words as to the Eccleſiaſtical Law, which is a part of the Law of England, as much as any other, for our Law does not receive *Majus & Minus*; and the Eccleſiaſtical Courts have been ſettled for ſeveral Ages, and are govern'd by ſuch Rules

which every Subject has a Right to. Sir, this Bill is to diſſolve the Bond of Marriage, and to give leave to marry again; and I crave leave to ſhew the Houſe what our Eccleſiaſtical Conſtitutions are in that Caſe, and how tender they have been in that Point, and how thoſe Conſtitutions are grounded upon the Canons and Decrees of Councils.

The Caſes where the Bond of Marriage is to be diſſolv'd are but few, and they ariſe before Marriage: 'Tis in the Caſe of the Precontract, or Nonage, or Conſanguinity, and there the Bond is broken by the Sentence of the Judge, and the Perſon hath Liberty to marry again; but for what comes afterwards, whether it be the Caſe of Adultery, or any thing elſe, the Law Eccleſiaſtical, which, as I ſaid before, is part of the Law of England, hath been very careful not to diſſolve the Marriage.

The 48th Canon ſays, If any Layman ſhall put away his Wife, and marry another, he ſhall be excommunicated: That was the Senſe of thoſe early Days; and ſure they did not think it an indifferent Matter, becauſe they puniſh'd it with ſo heavy a Punishment. So 'twas in the Council of Arles, 314, and there it was decreed, that if a Man took his Wife in Adultery, he ſhould be forbidden to marry. There what was to be done? Couſel ſhould be given him not to marry while ſhe lived, tho ſhe was an Adultereſs.

And in the Council 402, the Neapolitan, Evangelical, Apoſtolical Couſel, it was decreed, That if a Man was divorced from his Wife, or a Wife from her Husband, there they were not to marry, but ſhould remain unmarried, or be reconciled.

And in the African Council, Canon 102, there it was provided, That they who were divorced, whether 'twas a Husband from his Wife, or a Wife from her Husband, they ſhould remain unmarried. This was the Senſe of the antient Canons and Councils, and this is receiv'd into our Eccleſiaſtical Conſtitution. In the 15th Year of the Reign of Queen Elizabeth, in the Chapter of Divorces, 'tis ſaid, That upon a Sentence of Divorce there muſt be an Admonition, and a Prohibition, that the Party ſhall not marry again.

And in the Year 1602, in the beginning of King James's Reign, there was a farther Proviſion made to keep them from being married again; and that was this, That they ſhould give Bond and Security that they ſhould not marry again; this is certainly our Eccleſiaſtical Conſtitution, and grounded on the Senſe of the antient Canons.

Now it remains to ſhew ſome Advantage this would have had: If ſhe had the Trial, which of common Right is due to the meaneſt Subject, ſhe would have had the Advantage of Challenges, which ſhe can't have here; for here the Evidence muſt drop from the Witneſſes Mouths, who are Foreigners, and have been long abſent; there they muſt give an Account of themſelves, which here hath not been done by any body. The Lady might have given her Exceptions to thoſe Witneſſes, and had a Commiſſion into Holland, to have examined how theſe Witneſſes behaved themſelves, and whether theſe Perſons were to be believed and credited; here ſhe would likewiſe have Liberty to give an Account how this Deſign began. I do not ſpeak with reſpect to the Duke, but

but I do say it does seem to have begun a Year and a half ago. She would likewise have had the advantage of a thorow Reconciliation; and here are some Deeds in (94) between the Duke and the Dutcheſs, which I hope, if the Houſe will take an Account of, will have its due Effect; ſhe would likewise have had the Advantage of an Appeal, the common Right of the Subject, and grounded upon good reaſon; and in caſe there had been a neglect in the firſt Inſtances, the Party may be righted in another Place.

By this Bill ſhe is debarr'd of the Advantage of Recrimination, to which ſhe hath a Right, for the Text Law is—

And the Text Law, *de Divortijs*, were the Charge moſt true, which we do not admit; yet if ſhe can prove the ſame Thing againſt her Husband, the Fault of one muſt be ſet againſt the Fault of another, and he can't have the Advantage of his Prayer.

I ſhall repeat only one Thing more, and that is the Caſe quoted already of the Earl of *Macclesfield*, but in that Caſe the Lady withdrew herſelf five or ſix Days before Sentence; yet there the Lady *Macclesfield* had all her Defenſes, and even her Recrimination, and had a Time to prove it; there was a Publication, and a Day ſet down for Sentence, but ſhe ſpun out the Time till the Parliament was ready to riſe, and then my Lord's Friends adviſed him to begin in Parliament; and when the Lords were acquainted of my Lady *Macclesfield*'s ſtanding in Contempt of the Court, and ſhe was proſecuted ſo far that ſhe was almoſt ready to go to Priſon for her Contempt, then the Houſe of Lords did think fit to receive my Lord *Macclesfield*'s Bill, and not before: but before my Lord *Macclesfield* brought his Bill in Parliament, there was nothing remain'd to be done in the Eccleſiaſtical Courts but Sentence. And I hope for all theſe Reaſons you will not proceed upon this Bill.

Mr. Serj. *Wright*. Mr. *Speaker*, I am of Council for the Duke of *Norfolk*, who is your Suppliant for this Bill, for Redreſs againſt the higheſt Injury that can be offer'd; the Rights of his Marriage-Bed have been invaded, and he comes for that Relief here, which no other Court can afford him; for the Learned Doctor on the other Side, tells you plainly from the Canon Law, that there can be no Divorce *a Vinculo Matrimonii* in their Courts: now to ſend us to a Court for Relief, that they tell us before-hand can give us none, is in Effect to tell us we ſhall have none at all.

The Bill is founded upon the Suggestions contained in the firſt three or four Lines of the Bill, that the Dutcheſs of *Norfolk*, hath for divers Years lived in Separation from the Duke her Husband, and hath had unlawful Familiarity, and adulterous Converſation with Sir *John Germaine*, and is guilty of Adultery on her Part, and hath broken the Bond of Matrimony; theſe are the Reaſons for which the Duke deſires this Bill may paſs; 'tis for the adulterous Converſation of the Dutcheſs; not for one ſingle Act but a continual Series of the like Acts for many Years; for we ſhall not give only one ſingle Act or Inſtance in Evidence, but prove this Converſation for ſeveral Years, beginning in Eighty ſeven, and carry'd on to the latter end of Ninety five.

It hath been objected, that this is the firſt Inſtance of a Divorce, the firſt Bill of this Kind,

where there has been no Proceedings in the Spiritual Court. That 'tis the firſt Bill of this Kind, we deny; but that there have been no Proceedings in the Spiritual Court, we own; for the Earl of *Macclesfield*'s was the ſame to all Intents and Purpoſes, as this is: for tho' 'tis true, they had been in the Spiritual Court, 'tis as true, they came here into Parliament, before any Sentence in the Spiritual Court; now to what Purpoſe is it to go into the Spiritual Court, and not to ſtay for the Determination of that Court, if the Judgment of that Court is to have any Weight, in the Caſe of the Earl of *Macclesfield*. 'Tis true, they had been there and examined Witneſſes on one Side, with all Precipitation, yet would they not ſtay for a Sentence there, but quitted their own Proceedings and came to the Parliament; now I do take it that they had better never been there, than to have come away before Sentence; for when they were in the Spiritual Court, and were proceeding there, to leave that Court, ſhewed rather a Miſtruſt of their own Caſe. But it was no Objection in that Caſe, that it was taking it away from the Jurisdiction of the Spiritual Court. We don't come to you for any Thing the Spiritual Court can grant us; for that Court goes no farther, if the Fact be proved, than to make a Separation *à menſâ & thoro*, but the Bonds of Marriage is to be continued ſtill now, with Submiſſion, this is to puniſh the innocent inſtead of the guilty; would the Dutcheſs deſire more, than to be ſeparated from the Bed and Board of her Husband, and be left free to accompany Sir *John Germaine*; but we go further, for we come to the Parliament to diſſolve this Marriage for that, which is allowed for that, which is allowed by ſeveral learned Writers to be a juſtifiable Reaſon for ſo doing, for Adultery committed by the Wife; 'tis expreſſly ſaid that a Man ſhall not put away his Wife, except in Caſe of Fornication. This Text plainly allows, that in Caſe of Fornication, a Man might put away his Wife, but the Popiſh Canons the Doctor has named, have put a Conſtruction upon it; ſay they, you ſhall put her away, but how? She ſhall be removed from your Bed and Table, but you ſhall not marry another. Then they ſay, there is no Precedent of a Bill of this kind, but there hath been a previous Proſecution in the Spiritual Courts; I agree the Marquiſs of *Northampton*'s Caſe, that that Act does recite the Proceedings in the Spiritual Court: But that Caſe is ſtronger than this, for there the Maquiſs of *Northampton* had married even in the Teeth of their Canon Law, and comes afterwards an Act of Parliament to make this Marriage good, and there the Divorce was no Ingredient upon the Paſſing of the Bill; but the Parliament enacted the Marriage to be lawful. In my Lord *Rofs*'s Caſe, there is no mention of any Divorce.

I appeal to the Journals of your own Houſes for that; but notwithſtanding the Divorce, the whole matter was examined over again, Witneſſes were examined both in the Houſe of Lords, and here upon the firſt Bill which was brought, which was to illegitimate and baſtardize the Children; and the Witneſſes proved, that my Lord *Rofs* and his Lady had not lain together for a long time, and that ſhe had kept Company with others; ſo that the Parliament did not found the Bill upon what had been done upon the Divorce.

I appeal

I appeal to your own Memory, that in the Earl of *Macclesfield's* Caſe there was no Uſe at all on that Side the Bill was brought, that there had been Proceedings in the Spiritual Court, nor is any ſuch Thing recited in the Bill, but only an expreſs downright Charge of Adultery; nor was it proper for them to have mentioned any Proceedings in the Spiritual Court, ſince they waved that Proſecution, but we on the other ſide inſiſted on it, as a Reaſon why the Parliament ſhould not proceed in it, it being to take upon them an original Jurisdiction; but we were then answered by a Learned Gentleman againſt this Bill, that it was in vain to go there, for they could not give the Remedy that might reaſonably be expected. I beg the Favour to mention a Caſe or two, where Divorces have been in Parliament, and there have been no Proceedings in the Spiritual Court. One of them was the Caſe of Mrs. *Knight*, who was married *infra annos Nubiles* to Mr. *Goodwin*: Every one knows, that a Marriage *infra annos Nubiles* is a good Marriage, and if the Woman be above nine Years Old, ſhe ſhall be endowed; and yet notwithſtanding, for ſome irregular Proceedings, without going into the Spiritual Court, they came into Parliament, a Bill was paſſed by which this Marriage was diſſolv'd, and I think 'tis expreſſly enacted,

That ſhe ſhall not marry till ſuch an Age. This goes farther, for here I am ſure the Doctör would have explained, and told you, if there had been Reaſon to diſſolve the Marriage, they could have done as great a Feat in the Spiritual Court, that they could have examined Witneſſes upon Oath, and could have told you whether there was proper Evidence; yet the Parliament without any Regard to what they could do, would aſſert their own Jurisdiction.

The Caſe of Mr. *Wharton* was mentioned on the other ſide, and therefore I need not ſay any thing to it. There was nothing of Divorce, nor needed any.

They ſay, this Bill begins where it is proper for Matters of this Nature to end; and that after we have taken a turn into the Spiritual Court, and travelled three or four Years there, then it will be fit for the Judgment of Parliament. I would know if they had been ſeven Years in that Court (and perhaps if they come there, we ſhall not get out ſooner;) to what uſe the Examination of that Court would be. This Houſe, I preſume, would not let thoſe Depoſitions be read here, eſpecially if the Witneſſes to the Faſts were living.

They ſay this is a very ſummary Way of Proceeding; it may be too quick for the Dutcheſs, but you may be pleas'd to conſider, that there was a Bill brought into the other Houſe ſome Years ago and rejected; upon what Terms, that will reſt upon us to ſhew you by and by.

But the Matter was, the Witneſſes that proved the Faſt were ſent out of the Way by the Dutcheſs and Sir *John Germaine*, when Things were under an Examination: and we hope a Matter of this Nature never ſhall be baffled by keeping the Evidence out of the Way.

We told them long ago, who the Witneſſes were; they were the Dutcheſs's Servants, ſuch as they thought fit to entrust.

They ſay this Bill deprives the Dutcheſs of her Trial; I hope no body thinks the Parliament will

paſs a Bill without due Examination of Witneſſes, and legal Proof of the Faſt; if ſo, what Matter is it, whether the Proof be made before the Parliament, or ſome inferior Court: if the Dutcheſs be guilty of this Crime, we come here for a Relief, which the Spiritual Court, the Doctörs tell you, can't give us. Since the Dutcheſs hath broke the Bond of Matrimony, we come to you to diſſolve that Marriage, and I hope we ſhall have it.

The Doctör inſiſted on one Thing, that I think is very extraordinary: He tells you by the Rules of their Law, if the Woman can recriminate, and prove her Husband guilty, in ſuch a Caſe, they muſt ſet the Fault of one againſt the Fault of the other.

I with the Doctör could have told you the Offence had been equal; that the Injury to Families had been equal; a Man by his Folly of this kind brings no ſpurious Iſſue to inherit the Lands of his Wiſe, but a Woman deprives her Husband of any legitimate Iſſue, for when ſhe converſes in this Manner with another Man, the Iſſue may be equally look'd upon to be that Man's, if not more, and this Lady hath kept this Converſation ever ſince the Year Sixteen Hundred Eighty Seven, and left the Duke.

One Thing is farther objected, and they inſiſt upon certain Articles of Agreement in Ninety four, and they read to you the Preamble of them; why, Sir, the Articles if they come to be read thro', I am ſure it won't amount to what they pretend; it does not amount to this, that the Dutcheſs might uſe her Body as ſhe pleaſed, there is no Agreement that ſhe ſhould live after her own pleaſure: Indeed ſhe was to have the uſe of her Houſhold Goods, and Servants, and live where ſhe pleaſed, but that will not juſtify her in her Way of Living.

Then to tell you, theſe are Matters of long ſtanding, they are ſo, and of a long continuance; for, if my Inſtructions prove true, we ſhall prove this Scene of Adultery for matter of eight Years ſucceſſively, and that by Servants that were privy to the Intrigues, who were ſent away to *Holland*: but no ſooner was the Bill baffled but the Man was ſent for again, and the ſame Converſation continued that was between the Dutcheſs and Sir *John Germaine* before he left *England*.

The ſame was continued after he came back to his Service in (1691) only they were ſomething more cautious, and People were not admitted ſo familiarly to ſee them in Bed together in (1692) and ſo it continued till 1695.

They mentioned the Statute of Limitations, which was to put an End to frivolous and vexatious Actions; how they can apply it to this Caſe, I can't ſee. Becauſe a Man ſhall not bring frivolous and vexatious Actions after a long diſtance of Time, therefore a Man ſhall not complain when he hath received the greateſt Injury that can be done to Mankind.

Sir, They are kind to us again, in recommending it to the Duke to go into the Spiritual Court till next Sessions; but we think we are in proper Method here, for that Relief which the Spiritual Court cannot grant; and ſince we have ſo good Reaſon to come here, if we prove the Faſt I hope this high Court will not ſend away a Complaint of this Nature, without ſuch Relief as is ſuitable.

Mr. *Northey*. Sir, I am of the same side: I would beg leave to say this, As to what the Counsel have said in relation to the Evidence, That there were three Witnesses examined upon Oath, in the House of Peers, before the Bill did pass there; and I believe they are aware of that, and that when you hear our Witnesses, there will be no Answer to be given on their side; and indeed the Witnesses they brought, were so far from contradicting our Witnesses, that they did really confirm them. But that is not the Case now, what our Evidence is, or whether it be fit for you to believe them, that will be when you have heard them; and for the matter of the Time, that you can't take notice of neither, till you hear our Evidence. But this I may say, we shall bring a Man that will speak to within four or five Years.

But the Matter they apply themselves to, which is material, is, Whether it is proper for you to proceed upon this Bill, that is, to give such a Relief as we desire by dissolving this Marriage. And in the next place, Whether this be a proper Time to ask this Favour.

For the first, the Learned Doctor tells you 'tis not proper at any time to do it, for he would have the Canon Law govern here, as it does in their Courts. But the Counsel on the other side have cited you several Precedents where it hath been done. In the Case of the Marquiss of *Northampton*, the second Marriage was contrary to the Canon Law, and yet that Marriage was confirmed according to God's Law. And this Bill is to relieve against the Canon Law.

Now, whether we are here in a proper time. Sir *Thomas Powis* has said a great many Things, which may be proper to many other Purposes. One Argument was, because the Witnesses can't be upon Oath, but that we know will not prevail in this Place. In the next place they except, because this Proceeding is in a summary Way. I would know of them, whether there is not the same Objection to all Proceedings before a Jury, that they have no notice what Witnesses will be produced.

Then in the next place they bring a great Argument from the Recital of some of these Bills, That there had been a Sentence in the Ecclesiastical Courts. Now, 'tis true, they have been so in some of those Cases; but I beg leave to observe, that in the Case of the Marquiss of *Northampton*, the Bill was not to confirm the Sentence, or to enable them to marry, but to deliver them out of the hands of the Ecclesiastical Courts, who said it was not lawful in that Case to marry, for they were married before.

I beg leave to say, That in the Case of my Lord *Macclesfield*, there was no Notice in the Bill that came down to you, of any Proceedings in the Ecclesiastical Courts. And I take this to be the Reason, because there was no Sentence; tho where there was a Sentence, they had good Reason to take notice of it. And I think there is as much Certainty, and as good ground to proceed on this Bill, as in the other Case, for the Witnesses have been already examined in the House of Lords. In the Case of my Lord *Ross*, there was no Regard to the Determination of the Ecclesiastical Courts, as a Guide to the Parliament: and it was looked upon as of no Consequence, for the Witnesses were examined again.

'Tis true, when we came before you without such a Proceeding, we came under this Disad-

vantage, you will be sure to expect a plainer and fuller Proof; but for that we will undertake to make the Fact so plain, that they can't give the least Pretence to answer to it.

We are here asking what we can't have any where else: Their great design is Delay, and that we have learnt from the Civilian, who tells you, their Methods are very grave and deliberate; and, that they may have a Commission to examine Witnesses beyond Sea; and that is to enquire how their own Servants have liv'd beyond Sea.

As to what Sir *Thomas Powis* would have, that is, that we should go into the Spiritual Court, and apply our selves here again next Sessions, I do not think the Legislature will send us back to ask that in the Spiritual Court which both have submitted to: For after the Duke had miscarried in the Relief he sought by another Bill, by the Dutche's sending the Witnesses out of the way; why truly, after that, to prevent any Prosecution in the Spiritual Court, the Dutche's submitted to a Separation by Articles, and that was all the Duke could have pretended to by the Ecclesiastical Law: We follow her upon that, and come to enforce that Separation. And, to make it effectual, and for that which we humbly hope will be thought but Justice to the Duke, that is, to be deliver'd from this Wife, and to have Liberty to marry again; we think there is no Occasion for Delay, and that no body can be hurt by a Precedent that carries Relief in this nature, and delivers us from a Law which in the Days of Popery was put upon us. Upon the whole Matter, I hope you will think that we are here very properly for Relief and that we shall have the Favour to call our Witnesses.

Dr. *Oldish*. Sir, the great Objection against the passing of this Bill was, because Witnesses had not been examin'd in the proper Court. 'Tis very true, generally speaking, in Cases it ought to be so; but here is a very great Exception to that Rule, and which, I think, can't admit of an Answer, and that is, the Notoriety of the Fact; and in that Case they begin with Execution. And if that be so, I think there never was a clearer Demonstration in the World; for when formerly the Dutche's came to give in her Answer in the House of Lords, to the Charge against her, she did declare, That in the Year 83, or thereabouts, she went out of *England*, and married Three Years, and return'd about the Time of the Revolution. And it does plainly appear there, beyond all question, that she was at *Lambeth*, and went under the Name of the Lady *Beckman*, and was attended by one *Keemer*, who went then by the Name of *Goodman*. Besides this, there are Witnesses that speak to particular Facts. Now, I say, here is that which amounts to Demonstration, and where there is a Notoriety of Fact, that is an Exception out of the General Rule, and 'tis proper to begin with Execution.

There is an Exception to the General Councils and Canons that have been mention'd, That there shall not be a Divorce à *Vinculo*. Sir, I say, it was an Ecclesiastical Constitution which was against the Law of God; and 'tis demonstrably so; for where our Saviour says, That a Man shall not put away his Wife, except in case of Fornication; it is plain, that in case of Fornication he may.

There

There is another Thing inſiſted on, and that is, That there was a Reconciliation between the Duke and his Dutcheſs. 'Tis true, a Reconciliation ſhould drown all Things before that time, but when the Law takes notice in caſe of a Relapſe, that does *recrudescere*, it rubs upon the old Sore, and then that which was before laid aſleep is brought again upon the Stage, and will return with greater Vengeance. And we have plain Proof of her living in the ſame manner ſince, as before.

But they would inſinuate to you, That in caſe there was a Trial in the Eccleſiaſtical Court, there might be a Recrimination, but there muſt be a Compensation, which can't be thought in this Caſe; for, I think, in this Caſe, under Favour, there is no Compariſon. I don't think they are *Paria*, for 'tis impoſſible for the Husband to do that Injury as the Wife may; for ſhe may bring a Baſtard into the Family, and then the Eſtate does not go according to the Law of God and Nature, for every body deſires his own Blood ſhould ſucceed him.

Sir *Tho. Powis*. Sir, I ſhall ſay but very little. But three or four Things have been mention'd on the other Side, which they offer as if they conceiv'd them to have great Weight, and yet they ſeem to me as very capable of being answer'd; and I crave your Favour to do it.

They have gone much upon the Proofs that they are ready to make, and, I think, not very properly, becauſe we ſpeak againſt their proceeding upon this Bill; but I am ſure it turns upon them: For, according to their own ſhewing, they are very well prepar'd to proceed in a regular Courſe, for they have their Witneſſes ready, and nothing does obſtrudt them.

Mr. Serj. *Wright* mention'd a Thing which, I muſt confeſs, I was ſurpriz'd in; for when I told him, he could not find any Precedent of ſuch a Bill as this, without a previous Proceeding in the Spiritual Court; Mr. Serj. *Wright* ſaid, It was quite otherwiſe; and, to ſhew you it was ſo, he cited two Caſes where there was no Marriage: Now I always underſtood, a Divorce muſt be in any Caſe where there was a Marriage, for the Caſe of Mr. *Knight's*, that was very lately: That was the Caſe of an Infant, who they pretended to have married *infra annos nubileſ*, and therefore, ſays he, the declaring of that Marriage to be null and void by Act of Parliament, was a Divorce. The other was the Caſe of Mrs. *Wharton*, which was no Marriage neither, for Marriage muſt be by Conſent, and that was a Force: And that he fancies to be a Caſe, where there was a Divorce too, without proceeding in the Spiritual Court; and yet, of his own ſhewing, it was no Marriage.

Another Thing I am much more ſurpriz'd at, we inſiſted, that they could not ſhew an Act for making a Divorce without giving the Party an Opportunity to make a Deſenſe; and the Doctor ſays, in Common Caſes it ought to be ſo. And they cited the Earl of *Maccleſfield* we firſt mention'd, and the Doctor told you the Progreſs it had, and that there was a full and regular Proceeding, of great length of Time; and, that my Lady *Maccleſfield* had all her Witneſſes examin'd, and my Lord proſecuted her to an Excommunication, which is in effect a Sentence, for it is in our Law as in Caſes of Outlawry. This he calls a Precedent wherein they proceeded to

get an Act of Parliament, without a previous Proceeding in the Spiritual Court.

He tells you in the next place, That notwithstanding the Divorce in the Caſe of my Lord *Rofs*, the Parliament did examine Witneſſes; 'tis true, they did, for I don't think they will ſo entirely pin their Faith upon thoſe Proceedings, as to have no other Satisfaction. But will he therefore ſay they took no Notice of it, when 'tis the Foundation and Ground of the Bill?

He tells you in the next place, That the Crime does not ſeem equal between the one and the other; and ſo, in ſome ſort, they ridicule the Doctor's Notion of Recrimination. But I apprehend the Doctor is right in it; for it would be hard if a Man ſhould marry a young Woman, and give her an ill Example in his own Family, (I do not ſay 'tis this Caſe) and bring her acquainted with looſe and ill Company, and by his Example or Provocation lead her into the ſame Offence. Would that Man deſerve to be rewarded with a new Wife, and another Portion, becauſe his firſt Wife had only follow'd his Example?

They ſay, the Offence is not equal, becauſe the Man brings no Children into the Family.

I doubt it happens oftentimes to them that go abroad, that they bring home that to their Wives which ſticks longer by them than their Children.

Then to come and ſay, The Articles can't be of any Uſe to us at all; and to imagine that we uſe the Articles ſo, that the Dutcheſs might be at perfect liberty to live in Adultery; I wonder how that Conceit hath follow'd him hither, when we told him we had not ſuch a Thought as to live in Adultery, but they do direct her to live ſeparate; and ſo we uſed them, as an Answer to that Part. We uſed them likewiſe as an Act of total Oblivion and Remiſſion of any Thing beyond that Time; and, I hope, to ſuch Purpoſes they ſhall be thought ſacred.

Now I beſeech you, Sir, on the whole Matter, have they on the other Side ſaid one Thing but what does totally tend to bring all Caſes of Adultery immediately before you? Have they diſtinguiſh'd this Caſe from the Caſe of any other Perſon? And then, if they have not, I do not ſee from henceforward, that any but Fools will go to the Eccleſiaſtical Courts for Relief: For, ſays the Serjeant, they cannot give them a final Relief, and enable any Perſon to marry again, and therefore let no body think to go there again; but here is a Relief to be had worth a Man's having. But, I hope, we ſhall have the Benefit of the Law, as it is, till you think fit to alter it, and then you will erect ſome Judicature, where People may have their Trial. Now therefore the Argument goes too far, or it argues nothing at all, becauſe, if there be any thing in it, it goes to take away the Proceedings of thoſe Courts totally.

But thoſe Courts cannot do all that theſe Gentlemen deſire, they can do what is very proper to be done. They can examine Witneſſes, and pronounce Sentence, and give the Party a full Opportunity of knowing the Accuſation and Accuſers; and then the Caſes we have mention'd have had the Aid of an Act of Parliament.

Sir, we have ſpent a great deal of your Time already; you ſee what Uſe they make

of the last Precedent of my Lord *Macclesfield*, where he did proceed to an Excommunication: Now from thence they argue, that you should proceed originally in this Case. When is the Time to make a Stand, but in the first Case? And then no Man can complain of any Injury. If you grant this to my Lord, I think in Justice you cannot deny it to any other that stands in need of it. I believe there never was the like before, and therefore, I hope, you will put a stop to it here.

Mr. *Dodd*. The Gentlemen on the other Side have told you, that our Saviour hath said, *That no Man should put away his Wife, except for Fornication*. 'Tis true, the Text is so, but he cannot shew you any Text wherein our Saviour says, *That the Man may marry again, tho he might put his Wife away*. Another Thing was said, as to the Proceeding in the Ecclesiastical Courts. Dr. *Oldish* says, There is to be nothing but Execution where there is a Notoriety of Fact; and here the Fact is notorious, and therefore you may come up to order Execution: but that is a strange Doctrine to our *English* Constitution. Would they hang one first, and try him afterwards? That would make work. Let the Fact be never so notorious, yet 'tis the Right of all the People of *England* to have a legal Trial; and, I hope, you will not interpose till there hath been a regular Trial in another Place.

Then Sir *Thomas Powys* offer'd to produce the Articles, but they were not admitted.

Lunæ 25 die Martii, 1700.

The House resolv'd themselves into a Committee of the whole House, to consider of the Duke of Norfolk's Bill.

Sir *Rowland Gwynne* took the Chair of the Committee of the whole House.

And the Counsel and Solicitors were call'd in, and the Bill read to them; and then Mr. Northey, of Counsel with the Duke, open'd the Evidence thus.

Mr. *Northey*. I Am of Counsel for the Duke of *Norfolk*. I shall not trouble you now (because I think it not fit) to say any thing for the Bill, for that you have approv'd of by Commitment of the Bill, and declar'd it to be a reasonable and just Relief against the Dutcheffs, for the Adultery charg'd in the Bill. I shall not spend any of your Time in aggravating the Crime of Adultery.

But that which is incumbent on his Grace's Counsel now, is to lay before you the Proofs of the Fact suggested in the Bill; and the Facts to be prov'd are the Introduction of the Bill, That the Dutcheffs has liv'd, for divers Years, in separation from the Duke, and had unlawful Familiarity and adulterous Conversation with Sir *John Germaine*: and for that Fact we will call our Witnesses.

And our Evidence will make this out to you, as plain as 'tis possible to expect a Matter of this nature to be prov'd.

However, I think they have manag'd Things in that manner, as we shall be able to give as plain a Proof of these Facts as might be expected of those Acts which are in their own nature most publick. However, in the nature of the Thing, there were but a few Persons to be entrusted

with it, and those were generally Servants, who had attendance on the Dutcheffs's Person. We shall produce you Servants both of the Dutcheffs and Sir *John Germaine*; and, I hope, it cannot be an Objection, That they are Servants; for to object to them for that Reason, is to say, You shall prove the Fact, but you shall have no Witnesses; for these are Facts that cannot be prov'd but by such as were concern'd with the Dutcheffs.

For our Evidence, it will fall out to be this: The Duke and Dutcheffs were married in the Year 1677, and they liv'd together till about the Year 1685: And then the Duke having some Account of her Conversation of this nature, they did part, and afterwards she came to live openly with Sir *John Germaine*; for, in May, 1689, the Witnesses will give you an Account, that for two Months together she lodg'd with Sir *John Germaine*, at the Cock-pit; and they liv'd there as Man and Wife, as the Witnesses phrase it. During the Time they liv'd there, there was a near Relation of Sir *John Germaine's*, Mr. *Daniel Germaine* his Brother, and Mrs. *Briane* his Sister, did frequently come to the House; and Two of the Witnesses were frequently in the Room while they were a-bed together.

After two Months time, the Dutcheffs thought fit to be a little more private, and it was given out she was gone to *France*, but in truth she remov'd to *Fox-hall*, to a House that was taken by Sir *John Germaine's* Brother, and went by the Name of my Lady *Beckman*. And she liv'd there two Years successively; and Sir *John Germaine* came there frequently, once or twice in a Week, and lay there a-Nights during that Time. We have two Witnesses that did attend the Dutcheffs, as well as at the Cock-pit; one of them is *Ellena Vaneffe*, who was hired by Sir *John Germaine's* Sister, and liv'd with the Dutcheffs at the Cock-pit two Months. We have a second Witness, one *Hosier*, who was with Sir *John Germaine* at the Cock-pit fifteen Days before the Dutcheffs went to *Fox-hall*; and afterwards he went to *Fox-hall* when she remov'd there, and stay'd with her all the two Years.

These are both Foreigners, and Dutch People; and it was reasonable enough to expect foreign Witnesses, when an *English* Dutcheffs had a foreign Gallant. They are such as he thought fit to entrust about her.

After she had liv'd two Years at *Fox-hall* (this brings her to the Year 1691) she remov'd home again to her House at *Mill-bank*, and there Sir *John* and she were frequently together, and have been seen a-bed together.

This brings us to the Time when the Duke, having an Account that she had this Conversation with Sir *John Germaine*, brought a Bill into the House of Peers for a Divorce; but it happen'd that the Dutcheffs and Sir *John Germaine*, to avoid the Condemnation, kept the Witnesses out of the Way, and afterwards caused them to be sent into *Holland*.

The Woman stay'd abroad till about Three Months ago, but the Man return'd before into Sir *John Germaine's* Service; and he will give you an Account of what Observations he made there, for the Familiarity continued between them then. He was admitted into the Room where they used to be, and he will give you an Account how

how he hath ſeen them frequently together; and he brings it down to within the Year 1695.

We have another Witneſs, one *William Bayly*, who likewiſe was a Servant to *Sir John Germaine*, and came into his Place when *Hofier* went beyond Sea. He is an unwilling Witneſs, becauſe he hath been preferr'd by *Sir John Germaine*; but when he was upon his Oath in the other Houſe, he did give an Account, That while he continued in *Sir John Germaine's* Service, notwithstanding this publick Reproach in 1695 and 1696, ſhe frequently came to *Sir John Germaine's* Houſe, with one *Keemer*, whom ſhe had great Confidence in, and one *Sufannah Barrington*, I think yet in the Dutcheſs's Service. And this *Mr. Bayly* will give you an Account, that his Maſter was often from home; and when he was ſo, he uſed to carry his Linen to this *Keemer*, who was the Dutcheſs's Servant, or this *Keemer* would come to him for it: And this will bring it down to 1696. There are ſeveral Witneſſes to confirm this; but we think, with Submission, after the Dutcheſs had been ſo accus'd in the Houſe of Lords of ſuch a Familiarity, any Evidence of a Converſation between them afterwards, is as much as a Thouſand Witneſſes; for no Woman that valued her Reputation, having been accus'd as ſhe was, would have had any Converſation with *Sir John Germaine* afterwards. But we don't want Circumſtances to ſupport the Evidence of Fact: We have as plain Evidence in this Caſe as can be expected in a Caſe of this nature. We will ſpend no more of your Time, but beg Leave to call our Witneſſes.

Mr. Atwood, *Sir Rowland Gwynne*, pleaſe to favour me with a few Words on the ſame Side; I ſhall not miſſpend the Time of the Committee in repeating any thing ſaid by *Mr. Northey*: I ſhall only obſerve, that the Witneſſes, *Hofier* and *Vaneſs*, ſay, That *Sufannah Barrington* was privy to this Adulterous Converſation; and this *Sufannah Barrington* has withdrawn herſelf ſince the Bill was depending in the Houſe of Lords.

'Tis further prov'd, That *Mr. Daniel Germaine* and *Mr. Briane's* Wife were in England lately, and that theſe were privy to the ſame Converſation.

Then the Witneſſes were call'd in one by one, and Interpreters allow'd.

The Witneſſes that were examin'd before the Committee of the Commons were *Ellena Vaneſſe*, *Nicholas Hofier*, *William Bayly*, and *Anne Read*.

But all, except *Anne Read*, were examin'd in the Houſe of Lords, and their Evidence there being at large ſet forth, the Reader is referr'd to the ſame. The Evidence of *Anne Read* is as follows.

Anne Read being ask'd, Whether ſhe had ever ſeen the Dutcheſs go to *Sir John Germaine's* Houſe, and when; ſays, That about April 1692, (which was ſoon after the Duke's Bill had been rejected in the Houſe of Lords) ſhe ſaw the Dutcheſs of *Norfolk* go in a Chair to *Sir John's* Houſe: That the Door was immediately open'd upon her Chair's being ſet down, and ſhe went into the Houſe with her Mask off.

She being ask'd, Whether ſhe had ſeen *Sir John* come to the Dutcheſs's Houſe, and when; ſays, She, within a Twelve-month laſt paſt, or thereabouts, follow'd him to the Dutcheſs's Houſe, about Three of the Clock in the Afternoon, and, That ſhe did not ſee him come out.

VOL. V.

After the Witneſſes were examin'd on the part of the Duke of *Norfolk* for the Bill, *Sir Thomas Powis* of Counſel with the Dutcheſs of *Norfolk*, being call'd upon to make Deſenſe, ſpoke to this effect:

Sir Thomas Powis. I am at a loſs, Sir, and under ſome kind of a Surprize, becauſe, as far as I apprehend, you call upon us to make our Deſenſe. I hope, in a Caſe of ſuch moment as this is, (and it may be there cannot be greater) and ſince you are pleas'd to take this Caſe out of the uſual Way of Trials, and to try it in the firſt Inſtance, you will be pleas'd, that we ſhould be fairly and regularly heard. And ſince it was not allow'd us, upon our being heard againſt the Bill, that we ſhould have a Time to make our Deſenſe; now we have heard what the Witneſſes ſwear, we ſhall deſire but a ſhort Time, no more than what is abſolutely neceſſary to make our Deſenſe. This hath ſpent us Six Hours already; and I am ſure the Witneſſes that have been examin'd have given ſuch Variety of Answers, that it doth afford a great deal to be ſaid to it. We have likewiſe a good many Witneſſes to be examin'd, but I am far from propoſing any thing to delay it. We had a Week's Time allow'd us in the Houſe of Lords, but that is no Rule for you, and we don't expect it here: But, even while we are at this Bar, a Perſon from a very worthy Member gives us Intelligence, upon ſight of this Cook-maid, of a Matter that will defame her; and he will be ready to make it out, That ſhe was turn'd away for being a common Thief in *Holland*; and therefore, Sir, you ſee how Time is neceſſary in point of Accidents that do happen; and I cannot make our Deſenſe now.

Thereupon the Counſel withdrew; and the Committee having conſider'd of the Deſire of the Counſel for the Dutcheſs to have Time allow'd them to make their Deſenſe, were of Opinion, That the Counſel ſhould proceed then to make their Deſenſe; and Candles were order'd to be brought in.

And the Counſel being call'd in again, *Sir Rowland Gwynne* being in the Chair of the Committee, acquainted them with the Determination of the Committee.

Then *Sir Thomas Powis* obſerv'd upon the Evidence that had been given, and inſiſted, that the Evidence given before the Committee of Commons did differ from the Evidence given by them upon Oath in the Houſe of Lords; and offer'd to produce the Examination of the ſaid Witneſſes upon Oath in the Houſe of Lords. And an Objection being made, That ſuch Examination ought not to be read in that Caſe, as Evidence before this Committee; the Counſel withdrew, and the Committee conſider'd of the ſaid Objection, and were of Opinion, that the ſaid Depoſitions ſhould not be read.

And the Counſel being call'd in again, were acquainted with it, and that if they had any Witneſſes, *viva voce*, to encounter their Evidence, they might produce them.

Sir Thomas Powis. Sir, by this Reſolution my Client is depriv'd of that Deſenſe I thought I could have made for her; but I ſubmit to the Pleaſure of the Committee.

Mr. Atwood. The Examinations in the Houſe of Lords were ſo lately, that 'tis an eaſy thing

for the Solicitors, who were by, to give an Account of a Contrariety in the Evidence, if there were any.

A Member. Whether you have any other Evidence to offer, but as to this Point?

Sir Tho. Powis. All our Evidence would tend to contradict these Witnesses; and if the reading of those Depositions won't be allow'd, we must abide your Pleasure, and submit it to you.

Mr. Dodd. We must submit it to you; our Witnesses were in Concurrence with that sort of Evidence.

Sir Rowland Gwynne. There are several Persons named, who are Persons of Credit and good Reputation, Mr. Briane and his Lady, Mr. Daniel Germaine and his Sister; these would be Witnesses of Credit, against those that are, you say, not of Credit.

Counsel. We have summon'd them, and Mrs. Pitts, and done all that we could on our Side to get them here; and I hope you won't prejudge our Case, to say they are in our Interest; that is to determine the Question. We have likewise summon'd Mrs. Pitts and her two Maids, and whether they will appear, or not, that we cannot tell, but this we are ready to make out to you.

Mr. Atwood. *Susannah Barrington*, the Dutchess's Woman, privy to the whole Conversation, is prov'd to have been with her since the Bill was brought into the House of Lords.

A Member. Whether he has one living Witness to produce, that he can make good his Defense by?

Sir Tho. Powis. Sir, if you expect an Answer by me, I am assur'd that we have Witnesses; but if I cannot bring those People against themselves, if I cannot bring *Nichola* against *Nichola*, I despair of doing any good, if I bring a Thousand other Witnesses against him: And therefore I pray this Favour of you; That since 'tis your Pleasure that this Evidence be not allow'd, you will not make a bad Construction of it, that I do not proceed to make a Defense to this Bill; for I cannot truly do it, unless I had some other Instructions from my Client, but shall defeat her Expectation, to proceed upon the other part of the Case, since what we built upon with good Authority, as we thought, is not thought fit to be admitted.

Sir Rowland Gwynne. Sir, you are at liberty to go on, if you have any thing more to say, than that you cannot proceed without further Directions from your Client.

A Member. Whether they have any thing to offer in the Defense of the Dutchess, upon the Crime she is charg'd with; for, I believe, 'tis a new thing for the Counsel, when their Client is charg'd with a Crime, to say, They cannot defend her unless they go and ask, whether they shall defend her or no: If they have any thing to say in her Defense, we shall be ready to hear it.

Sir Rowland Gwynne. Sir *Thomas Powis*, have you any thing more to say?

Sir Tho. Powis. I cannot but repeat what I have already said, That I would be glad to make the best Defense this Case may bear; and I may say, I have defended it twice with very good Success, and this is a third time; and I would make the best Defense this Case would bear now. And I must own to you, that the Course of our Evidence we did propose to ourselves is so far broke, by the first Determination you were pleas'd to make, that I cannot venture upon the rest of the Defense, if so be your Pleasure be not to admit of this Matter.

Sir Rowland Gwynne. You may, by any Solicitors or Agents that were present when these Witnesses were examin'd in the House of Lords, prove what they swore there.

Mr. Dodd. We apprehend you have already determin'd the Matter, and we cannot now meddle with it; but if I apprehend it aright from the Chair, 'tis your Opinion, that we may produce the Solicitors and Agents to give an Account of what was sworn in the House of Lords. Now we are under this Disability by your Determination, That we, relying upon what you have determin'd against us, are not prepar'd with our Solicitors, or others, to give Evidence of that Matter, but, in a little Time, they will be able to give you an Account of what was then sworn.


Mr. Atwood. It seems they want to be taught their Lesson.

And then the Counsel withdrew, and the Committee proceeded upon the Bill, Clause by Clause, and went thro' it, and order'd the same to be reported; which was done accordingly, upon which the Bill pass'd.





Proceedings between the King and THOMAS KENDALL and RICHARD ROE, in the King's-Bench, on an Habeas Corpus upon a Commitment for High-Treason. Mich. 7 Gul. III. Octob. 31. 1695.

N Thursday October the 31st, 1695. the Prisoners being brought up into Court on the *Habeas Corpus*, the Keeper of *Newgate*, to whom the Writ was directed, returned the Cause of their Detainer to be a Warrant under the Hand and Seal of Sir *William Trumbull*, Kt. one of his Majesty's most Honourable Privy Council, and principal Secretary of State, directed to the Keeper of *Newgate*, or his Deputy, *prout sequitur*, "These
" are in his Majesty's Name to authorize and
" require you, to receive into your Custody the
" Bodies of *Thomas Kendall* and *Richard Roe*,
" herewith sent you, they being charged with
" High-Treason, in being privy to, and assisting
" the Escape of Sir *James Montgomery*, out of the
" Custody of *William Sutton*, one of his Majesty's
" Messengers in ordinary, and charged with
" High-Treason. You are to keep them in safe
" and close Custody, until they shall be delivered
" by due course of Law: And for so doing this
" shall be your Warrant. Given at the Court at
" *Whitehall* the 24th Day of *October*, 1695."

Sir *Bartholomew Shower* moved that the Return might be read, and then that it might be filed: And Mr. Attorney owning that he had been attended with a Copy of it, and having nothing to say against it, the same was accordingly filed.

Then Sir *Bartholomew Shower* took Exceptions to the Return.

Sir *Bart. Shower*. My Lord, I am of Counsel for these two Prisoners; and what we desire at present is only that they may be bailed, tho perhaps we might press to have them discharged, and that upon good Reason.

To induce your Lordship to bail them, I must beg your Lordship's Pardon, and I hope Mr. Attorney will hold me excused, if I make a Question whether the Person committing hath any Authority for such a Purpose; it is for my Clients, who think themselves aggrieved by this Imprisonment; and in Truth they say, That they are somewhat hardly dealt withal in this Case; for the Information against them is only for being privy to and assisting the Escape of the Centinels, who were privy to Sir *James Montgomery's* Escape: But this is Fact, of which the Court will not take Notice, and therefore I shall confine myself to the Return, as it appears before your Lordship.

With Submission I must insist upon it, that a Secretary of State, *quatenus* Secretary, cannot commit for Treason or Felony: he is not an Officer for such a Purpose in common Parlance. The Word *Secretary* imports only a Writer of Letters or other Escripts for a Superior; and as *Spelman* explains the Word, this is the Sense of it, with the Addition of Secrecy, of Privacy; and so is his *Glossary* upon that Word. He is not a Privy Counsellor *quatenus* a Secretary, nor is he a Justice; and tho perhaps in Fact he may be in the Commission, yet unless he hath taken the Oath of that Office upon a *Dedimus*, he cannot act as such: And I have seen five or six Privy Counsellors at a Time appearing at a Sessions of the Peace for this County, in the Case of the Duke of *Bedford's* Power as *Custos Rotulorum*, to remove the Clerk of the Peace; and when Intimation was made to them of the Justices Oath, which they had not taken, they refused to vote, and did thereupon withdraw. Here Sir *William Trumbull* cannot be presumed or intended to be a Justice of the Peace, because the Commitment by him is as Secretary, and not as Justice; and so is the Return: And upon the Return, the Authority by which he commits ought to appear, otherwise the Return is vicious; and here doth appear none but that of Secretary. Now if the Office of Secretary doth not imply and carry in it a Power of committing, then this Commitment is erroneous.

Our Constitution hath distributed the Administration of Justice, both in criminal and civil Causes, into several Courts, and hath appointed several Officers for several Purposes, some for civil, some for criminal Matters; and in Criminals some are to examine and commit, others to obey and carry, others to receive and keep; some to try and sentence, others to execute; each hath his proper Province: And of those your Lordship will take Notice, as also of their several Duties and Powers, and so do our Law-Books. But a Secretary is a Court Officer of State, not relating to the Administration of Justice.

You take Notice, as do our Books, of Headboroughs, Constables, Sheriffs, Coroners, Escheaters, and the like: But neither *Coke*, *Crompton*, *Fitzherbert*, *Smith*, or any Book which treats of the Jurisdiction of Courts, the Pleas of the Crown, or the Officers of Justice, do ever mention a Secretary of State; his Office rather re-

lates

lates to foreign Negotiations than domestick ; and if any home Affairs fall under his Cognizance, it is rather as an Intelligencer, than with any Relation to Criminals, Prisons, or Gaolers, &c. In all the Debates about the Liberty of the Subjects, and wrongful Commitments, which were in Parliament in 4 Car. I. or 1628, and amongst all the Precedents mentioned there upon each Side, which are Multitudes, there is none by a Secretary : It is true, there are divers *per mandatum Dom' Regis*, by Warrant from the Lords of the Council. I have perused Dr. Franklin's *Annals of King James* the 1st. fol. 261. and *Rushworth*, Vol. I. 458. and can find none by a Warrant from a Secretary. I have read *Coke's*, *Selden's*, and *Littleton's* Arguments upon that Subject, but see nothing of a Secretary's Commitment. And it seems very strange, if such a Power were lodged in this State Officer, that there should be no Precedents for it in those Times, when extrajudicial and general Warrants were so frequent, that they became a Grievance to the People, and such a one as laid the Foundation for the *Petition of Rights*.

I shall not controvert the Power of the Council at present, because it doth not concern the present Question : All that I can observe in the Case is, that it first began to be practised in Sir *Lionel Jenkyns's* Time ; and yet even in 1678, when the Popish Plot had increased the Number of Prisoners to a wonderful Degree, it is notoriously known, that the Chief Justice *Scroggs* was frequently and often sent for to *Whitehall*, to examine, and commit, and grant Warrants. And some time since the Secretaries of State have thrown that Burden off from themselves upon their Secretaries under them, who have been sworn Justices of the Peace ; and Mr. *Bridgeman* hath accordingly executed the Office of a Justice of Peace at *Whitehall*, and that frequently. It hath been a Question, Whether a Chancellor or Keeper of the Great Seal can commit ; and the better Opinion hath been that he cannot : And it seems to be agreed by *Glanvill's* and other Cases in *Moore's* Reports, 839, &c. that his Commitment is illegal, unless for a Cause within his Jurisdiction, as a Court of Equity : and the Matters must so appear. I must agree, that any Man may apprehend another for Felony or Treason ; but there is a vast Difference between an arresting of a Traytor or Felon upon Suspicion or Knowledge, and a formal Commitment to Prison, with a Charge of Treason. And I am sure Mr. Attorney General will not insist upon this Reason ; for then the Consequence will be, that any Man may commit as well as a Secretary : And I suppose that Doctrine will scarce be allowed, tho I think that any Man may as well as he. The Reason of an Apprehension upon Suspicion, or Hue and Cry, or the like, is not to detain, but to carry to a Constable or Justice, as in 3 *Inst.* 52. Then here the Gaoler doth not return that he detains him, because he is guilty or suspected, but because by virtue of such a Warrant he is committed to his Custody.

Besides, the Reason of our Law is against it ; for a Secretary cannot administer an Oath. Now the Law requires that no Man should be committed by an extrajudicial Warrant, unless upon Oath. If there be but a Suspicion, there ought to be Oath of the Cause of that Suspicion ; for

the Person committing cannot commit upon another's Suspicion, unless there be Oath of some reasonable Cause for it. He cannot take Bail for any Person accused, he cannot take a Recognizance to prosecute : And I may very well challenge any Man living to shew me any one Recognizance ever returned into any Court, that was taken by a Secretary, either for Appearance of a Criminal, or for the Prosecution of one : And the Practice is always otherwise ; for they have often taken Bonds to the King, with Condition to appear here. And your Lordship and the Court hath often had much Trouble in that matter ; for they being bound to appear here, the Court hath refused to record their Appearance, because no Recognizance returned or taken, whereupon to found such an Appearance.

Now it seems strange, nay absurd, that our Constitution, which we admire for its Wisdom, should appoint an Officer who should commit, and yet cannot give an Oath whereon to found a Commitment, that cannot bail, that cannot take any Recognizance to prosecute : This is to make the Liberty of the Subject very precarious, notwithstanding the many Laws and Sayings of Judges in favour of it.

A Secretary is not obliged within the Statutes that require Justices to return the Informations and Examinations of the Persons accused, and Witnesses ; which is a Method prescribed by the Wisdom of our Ancestors, both for the Service of our King, and the Subject ; and may upon several Occasions prove useful to each.

This I may say, that Mr. Secretary *Coventry* did scruple it, and upon good Advice, even from Sir *William Jones*, he took the Oath of a Justice of Peace. Now, my Lord, I think that those Exceptions to this Power of a Secretary may very well be thought to render it so far a doubtful Question, as to induce Mr. Attorney not to oppose our being bailed, to avoid any further mention of this or any other Question.

But supposing that a Secretary can commit, yet in this Case the Parties ought to be bailed according to the *Habeas Corpus* Act ; for the Act commands, that they shall be forthwith bailed, unless they be committed for Treason or Felony, specially mentioned and expressed in the Warrant ; and if it be specially expressed, then upon Prayer, if not indicted, they are to be bailed the last day, &c. Now here the Commitment of a Person charged with Treason, if it goes no further, then unquestionably the Parties ought to be admitted to Bail, because that the High-Treason is not specially expressed ; so a Commitment for Felony generally would bring a Man within the Benefit of the Act to be bailed, because the Species of the Felony is not expressed. This is plain, and cannot be denied. Then I must further argue, that if the Facts mentioned after the Word High-Treason be not, or cannot be Treason, it must be allowed to me, that it is the same as if it had been for High-Treason generally, and without more Words : For if there be not a Species of Treason expressed, then we are still admissible to Bail ; this must be acknowledged.

Now that the subsequent Matter expressed after the Word Treason is not any Species of Treason, I shall endeavour to make out thus : A being privy to, and assisting the Escape of Sir *James Mont-*

Montgomery, out of the Custody of a Messenger, and charged with High-Treason, is not any Species of Treason, it is not Treason.

First, I may with a great deal of Colour make a Question whether the rescuing or helping the Escape of one in Custody for Treason, be Treason, or only Felony: If the latter, then the Commitment is erroneous.

At the Common Law the helping any Prisoner to escape was Felony, and so is, 2 *Inst.* 589. Now the Law in this Respect is not altered otherwise than by 1 *Edw. 2. de frangentibus prisonam*, and that Statute was rather to make it less penal than more; and if to promote the Escape of one imprisoned for Treason, was at the Common Law but Felony, then this Statute seems not to make it a greater Offence; for it is in the Negative, that none shall undergo Judgment of Life or Member for the breaking of Prison, unless the Cause, for which the Imprisonment was, did require such a Judgment, if the Party were convicted.

The Lord Hale, in his *Pleas of the Crown*, saith, that Breach of Prison turns into Felony only, tho the Party were committed for Treason; tho in another Place he seems to be of another Opinion. Now my Argument to make this a Doubt, is this: By 2 *Hen. 6. Cap. ult.* to break Prison when committed for Treason, is declared to be Treason; which would be needless, if it had been Treason before. By 25 *Ed. 3.* nothing is to be Treason, but what is there declared to be such; and by 1 *Mar.* all Treasons and Declarations of Treasons made by any Act of Parliament since 25 *Edw. 3.* are repealed. So that by this way of arguing such Escape was only Felony.

There is one Case, viz. *Beusted's*, 16 *Car. 1. Jones Rep.* 415. upon an Insurrection in Surrey, where it is held, that if a Man be committed for Treason, and another breaks the Prison, and by that Means the Traitor escapes, this was Treason in the Rescuer, and there was one accordingly indicted and arraigned; but I find that he was acquitted: and tho the Book says it was for want of full Evidence, yet it is more than probable, that it was the best Ingredient in his Case, that the Judges doubted what Offence it was, whether Treason or Felony. Now that Case is founded upon *Stamford's Pleas of the Crown*, 32. and all that is in *Stamford* is a Quotation of a Case in the Year Book, viz. in 1 *Hen. 6. 5.* that the Escape of a Traitor imprisoned was held Treason: But there it is put with a *quod nota*, as a strange Thing, and some call it Petit Treason: But, however, it was a strange Thing, since we find in 2 *Hen. 6.* an Act of Parliament made to declare it Treason; which is improbable that such a Law should be made, if the Judges had the Year before justly condemned the poor Rescuer. So that either they doubted the Law of that Case, or that Case had some other Ingredient in it, than the Book informs us of.

This is not for receiving, aiding, and comforting a Traitor, knowing him to be such, as was the Case of *Abington*, who aided *Henry Garnet* the Superior of the Jesuits, in 3 *Inst.* 138. but this is only for assisting the Escape: But supposing that such an Assistance to escape, or Rescue of one committed for Treason, were Treason, and not Felony, yet in this Case, as this Warrant is, it is neither Felony nor Treason; for,

Secondly, Here is no legal Commitment of Sir *James Montgomery*; and consequently the helping him to escape is not Treason. My Lord Coke 3 *Inst.* 70. on 1 *Edw. 2.* says, that a voluntary Escape of a Prisoner can be no Felony, unless the Prisoner be under lawful Custody by a lawful Warrant expressing the Offence. Now there can be no Pretence, but that the same Rules must hold in Case of a Traitor's Escape, as to the Warrant of Commitment, and Lawfulness of Custody, as doth in Case of Felony. Now if the Party commanded to receive, or the Party to whose Custody he is committed; were no lawful Officer, then such Custody cannot make the Rescuer guilty of any capital Offence. Co. 2. *Inst.* 550. saith, that false Imprisonment is not within the Law in this Case; now there can be no lawful Warrant in this Case, because the Officer was not a lawful one. This is not the Case of one carrying to Prison, for then it would have been so expressed; but here it is under the Custody of a Messenger, and charged with Treason, which supposes it a Custody with a Charge by way of Commitment. Then my Lord Coke explains what is a lawful Warrant, and that is twofold; either when the Offence appeareth by Matter of Record, as a *Capias* upon an Indictment, Inquisition, or Presentment; or when it doth not appear so, but only upon Oath, that a Felony is committed, and the Party is committed for the same to Gaol. And he tells us, that there is a great diversity between them; for in the first, the breaking of Prison is Felony, tho there were none committed; but in the other Case, where there is no Record of an Accusation to found a Commitment on, if there be no Felony committed by him, who is committed to Prison for a supposed Felony, the Breach of Prison is no Felony. Now this makes another good Exception to the Return, that here doth not appear, that there was either an Indictment or Appeal, or that there was a Felony or Treason committed; and one of them is necessary.

There must be a Felony done at the time of the Commitment; for a Relation, which is a Fiction in Law, shall never make a third Person a Felon; as *Plowd.* 401. if there be a Stroke or Wound one Day, and Death ensues upon another Day, this is Murder in the Party from the first Stroke; but the rescuing of such a Criminal before the Death is no Felony; which further shews, that a Felony done is necessary to make the Escape a capital Offence.

In 2 *Inst.* 591. Coke saith two or three times in four Pages, that the Weight of the Business depends upon the Lawfulness of the Warrant, or *Mittimus*; and he saith, that it must be in Writing, in the Name, and under the Seal of him that makes the same, expressing his Place, Office, and Authority, by force whereof he makes the *Mittimus*, and is to be directed to the Goaler; and it must contain the Cause more especially, and with more Certainty, than a Writ of *Capias* need to do, because the latter is founded upon a Record, unto which a Resort may be had. Then he saith, that if a Warrant be not lawful, it is no Felony in the Goaler to suffer him to escape. Now here, we say, it doth not appear what the Warrant was, upon which Sir *James* was in Custody; and a Messenger is not a lawful Goaler; he is merely a Conveyancer of a Message, Notice, or Summons

Summons; and the Practice of making their several Houses Prisons is, but of late date; our Law-Books do take no notice of him as any legal Officer.

Gaolers have Fees, are subject to Prosecutions for Extortion; a Messenger is not within the Laws, concerning it; for he cannot take Fees *colore Officii*, who hath no Office; he is, at most, but a Gentleman Porter. I have often heard this Method of Commitments to the Custody of Messengers severely censured; and tho any Man may be ordered to carry another to a Prison, yet he cannot therefore become a Gaoler to detain him, as some Messengers have done, for Nine or Eleven Months, or more. How long Sir James was in Custody, I cannot tell; but surely the Law, which requires Commitments to the County Gaols, is sufficient Evidence of the Insufficiency of a Messenger's Power to detain; and if he could not legally detain, the Consequence must be, that the Escape or Rescue is no Treason.

Besides, here it doth not appear, that Sir James was in Custody for Treason; it is said, that he was in Custody and charged with Treason: The last might be upon Accusation by Oath, or by an Indictment, and yet not charged in Custody with Treason.

Then it is not said with what Treason Sir James was charged; it might be for such a Treason, wherein the receiving or helping to escape was not Treason; and it might be for Treason generally, and then Sir James was bailable; and it will be hard to exclude the Rescuer from Bail, when the Person rescued might challenge it.

Then further, tho the Warrant be lawful, and in particular for Felony, and the Gaoler do willingly suffer him to escape, yet till the Prisoner is attainted, the Gaoler shall not answer to the Escape, tho the Prisoner be indicted; and there is a very good Reason assigned for it, because the Felony of the Prisoner shall not be tried between the King and the Gaoler, for that he is a Stranger to it. Now a Rescuer or Assistant of an Escape is the same with a Gaoler in this Case, and shall not be in a worse condition. It is true, the Party himself, if he breaks Prison, may be indicted for the Escape before he be tried for the Felony: Now the Reason of this holds for our being bailed, for that it is impossible that we can be tried in this Case, because Sir James Montgomery is dead, and was never attainted, or so much as indicted. Lord Hale agrees with this too, that if the Prisoner break Prison, he may be arraigned of it before he be convicted of the first Felony; but the Gaoler permitting a voluntary Escape, shall not be arraigned till the Prisoner be first attainted; for if the Prisoner be acquitted, the Gaoler is punishable as to any Capital Offence, or if the Prisoner die before Attainder, the Rescuer shall only be fined and imprisoned.

Now supposing the Assisting the Escape of one committed for Treason, as some Books seem to say, shall make the Rescuer partake of the same Crime for which the Party rescued was committed; yet if a Secretary cannot commit, or if a Messenger's House be not a lawful Prison, or if Sir James Montgomery's Offence be not specially enough expressed, or if by reason of his Death the Escape be only finable, then these Prisoners ought to be bailed.

Mr. Attorney General, *se contra*, Sir Tho. Trevor. said, that they ought not to be bailed, because committed for Treason

specially expressed; that harbouring a Traitor, knowing him to be such, was Treason; that there were no Accessaries, but all Principals in Treason; that rescuing him was a comforting of him; that to rescue a Felon, was Felony; to rescue a Traitor, was Treason; that a Messenger was a lawful Officer, and that any man might imprison a Traitor; that Sir James Montgomery's Death was Matter of Evidence upon the Trial; that they need not set forth a Treason committed, or an Attainder, tho perhaps it would be necessary to prove it when the Prisoners came to be tried; that the Power of a Secretary to commit had been settled (but he could not say when) that there were many Precedents, which he doubted not to produce, and therefore prayed time to look into it.

Mr. Solicitor spoke much to the same effect, with this further, That Sir J. Hawles. the Prisoner's Counsel admitted, that the Privy Council might commit, and a Secretary of State was much more antient; that as to the Messenger, a Gaoler *de facto* was within the Law; that those Persons were Wrong-doers, and that they could not take Advantage of their own Wrong; and therefore the Insufficiency of Sir James Montgomery's Commitment was not material; and that this Warrant need not be so certain and special as an Indictment, which must have Time and Place; and that if Commitments be good in Substance, the same was enough; and therefore prayed that they might be remanded.

Sir Bartholomew Shower replied, That the Commitment of a Secretary was never yet allowed; that the same was always complained of; that tho it were Treason to rescue one committed for Treason, yet here it did not appear to be so; that tho in Trespasses a Man cannot take Advantage of his own Wrong, yet that was not the Question; because if Sir James was not legally in Custody, then this Fact was not Treason; that the Insufficiency of his Commitment was an Advantage allowable, especially *in favorem vite*; that tho Sir James's Death did not appear upon the Return, yet it was a Reason to induce the Court to bail, since they might bail in Cases of High-Treason specially expressed; and if the Court were informed that they could not be tried, it would be hard to detain them in Custody.

Lord Chief Justice Holt. How were the Commitments at Common Law before Justices of Peace were instituted? It is true, my Lord Coke saith, that none could be imprisoned till Indictment, but that deserves Consideration. If you were to enquire, and search in the Tower, undoubtedly you will find Commitments there by Secretaries of State; look into the Resolutions in *Anderfon*.

Mr. Just. Rokely. I can see no reason upon the whole matter, why they should not be bailed; but since Mr. Attorney is not prepared, and has had so little Notice, it is fit he should have time. Accordingly Wednesday next was appointed.

Then Sir Bartholomew Shower moved, that they might have their Wives and Friends, and a Solicitor come to them, for that hitherto they had been kept close Prisoners. Which was granted accordingly.

Upon Wednesday the sixth of November the Prisoners were brought up by Rule of Court; and Sir Bartholomew Shower moved again, that they might be bailed, and that if Mr. Attorney thought fit

fit to oppose it, he prayed to be further heard, for that he had more matter to allege to justify the former Exceptions to the Return.

Then Mr. Attorney and Mr. Solicitor and Sir William Williams came into Court.

Lord Chief Justice. Mr. Attorney, here are Kendal and Rowe brought up by Rule, and their Counsel desire to know whether you oppose their being bailed; for if you do, they desire to be further heard to the Return; you had best consider of it.

Mr. Attorney General. I should not have so much opposed it, but that several Questions have been made and argued here at the Bar; as, that a Secretary hath not power to commit, that this Escape is not Treason, that a Messenger is not a legal Officer; and since these things have been started, I must insist upon it that this is a good Return, and that they ought to be remanded.

Lord Chief Justice. Then we must hear them again.

Sir Barth. Shower. My Lord, we do with Submission insist upon it, as I did the other day, that a Secretary is not such an Officer, as hath a Power of committing for Felony or Treason: I have further looked into it, and do find somewhat in the Books concerning it, more than the King's Counsel did last time urge, but not enough to warrant such a Power in the Office of a Secretary, and a great deal more against it. What I find I shall offer to your Lordship's Consideration, as it appears upon the Words of the Books, and submit it to your Judgment.

My Lord, I have perused the Resolutions of the Judges in 34 Eliz. 1 Anderson 297, 298. and I must own that it is there said, that one or more of the Lords of the Council may commit; how far that is Law, I shall endeavour to examine presently: But now I have named it, I would beg your Lordship to observe another of those Resolves; tho it would be more proper anon, yet I will just mention it here, and that is, that there is a Resolution which condemns this Return, it destroys the Power of a Messenger's Office, and, if it be Law, my Clients ought to be bailed; it complains that divers Persons were against Law committed to Prison in private Places, and not to any common or ordinary Prisons, or lawful Officers, as the Sheriff or other Person lawfully authorized to have or keep a Gaol: so that upon Complaint made, the Queen's Courts could not learn to whom to direct her Majesty's Writs, and by this means Justice could not be done. Now this seems directly calculated for the 42 domestick Prisoners, at the Pleasure of the Messengers; and if Mr. Attorney will allow these Resolutions to be of any Authority in one part, he must agree it to be the same in the others.

But I shall not need it in respect of the Messengers Franchises, and therefore shall offer some things to your Consideration against those Resolutions.

In the first place they are extrajudicial, and not the Opinion of Judges upon their Oaths in any Matter before them; and I am sure my Lord Coke did refuse to subscribe his Opinion upon such Occasions. They are such Opinions, as the Judges may and often have varied from, when the Point hath come judicially in Question before them. Several of the Judges did so in the Case of the Ship-Money; and if they were not binding to the Judges, who gave the Opinions, much less

can they be binding to their Successors, as legal Resolutions; and if they be Law, yet they do not relate to the Office of Secretary, but only to that of a Privy Counsellor. Now we do, without any Disrespect to Authority, for our Clients, insist upon it, that that Resolution is not Law, that one single Privy Counsellor may commit for Treason.

In the first place, what is there said, can never be reconciled to the Rules of Law, that Persons committed by them ought not to be delivered; for those general Commitments were illegal at Common Law; and so is it affirmed in the *Petition of Right*; and very great Opinions have been, that there is nothing in the *Habeas Corpus* Act, but the Penalties and Times, that was not Common Law, and that it is affirmative in substance of the antient Law of this Realm, which makes that Resolution to be suspicious; for if what is affirmed by it in express Terms (*viz. That such Persons as they shall commit, ought not to be delivered*) be not Law, then what is implied, that one Privy Counsellor may commit, is more doubtful still.

I shall not inquire into the Occasion of those Resolutions, nor meddle with what our Histories tell us of that Time, and the then Jealousies between some great Men; but, as I said before, those are not judicial Opinions, but only a written Certificate delivered to the then Chancellor and Treasurer: Besides, there is not one Objection which can be made against the Power of a Secretary in this Matter, but stands as firm and forcible against that of one Lord of the Council; we find no Authority for him to administer an Oath, or take a Recognizance, and there is no Precedent of either. And, as I said the other Day, it looks absurd, that a single Person should be an Officer to commit, and yet cannot do that which is necessary in order to it; he ought to have a Power to examine, and that upon Oath; and if upon Examination of Witnesses it appears that the Party deserves not to be committed, he ought to have Power to take Bail, as also a Recognizance to prosecute. A Justice of Peace is fineable by the Justices of Oyer and Terminer, and Gaol-Delivery, if he misbehave himself, or be guilty of a wilful Irregularity therein; but it will scarce be said, that a Lord of the Council is in those Circumstances. My Lord Coke saith, that a Lord of the Council is made by summons and taking the Oath, and that continues during the King's Life: It is true he may be discharged, and generally is by forbearing to summon him; suppose then it be omitted, and afterward he is summoned again, doth he take a new Oath? When doth this Authority begin? How doth it continue or end? Our Law Books take no Notice of it.

Then further, the King himself cannot arrest a Man for Treason or Felony, nor can he command one in his presence to be arrested for Felony or Treason; so said Sir John Markham to Edw. 4. and 2 Inst. 186. *per mandat. del Roy* is by Writ, or by Order or Rule of some Court of Justice; now what Judge is a Lord of the Council? He is to advise the King, and he is sworn to it, and to withstand all Traitors, and to discover all traitorous Conspiracies, and so is every Subject by his Oath of Allegiance, but the Oath of a Privy Counsellor contains nothing relating to Commitments.

At Common Law extrajudicial Commitments were Rarities; the usual Practice was to indict, and then to take them upon a Writ of *Capias*; the antient Law was tender of a Man's Liberty, and then were the Writs framed in the Register *de odio & atia*, & *de tradendo in Ballium*, and the Writ of *Habeas Corpus*.

By *Magna Charta* 19 Hen. 3. cap. 29. which hath been confirmed Forty times by subsequent Acts of Parliament, it is enacted, that *nullus liber homo imprisonetur nisi per legem terræ*, which I shall explain anon. This was made upon a Grievance then complained of, viz. illegal Commitments: What could those be in that Age, but taking Mens Persons without a Record to found a Charge or Accusation? and that it was so, appears by Coke in his Comment upon those antient Statutes: He says, that there was no Invasion upon this Law till Edward 3^ds Time, and then the people quickly resented it; for in 5 Edw. 3. cap. 9. the great Charter is confirmed; but then in 25 Edw. 3. cap. 9. it is fully and more at large expressed, and recited, that whereas it is contained in the great Charter of the Franchises of England, that none shall be imprisoned, unless it shall be by the Law of the Land; it is awarded, asserted, and established, that from thenceforth none shall be taken by Petition, or Suggestion made to our Lord the King, or to the Lords of his Council, unless it be by Indictment or Presentment of his good and lawful People of the Neighbourhood. Tho *Magna Charta*, and the rest of the seven Statutes mentioned in the Petition of Right, usually quoted upon these Occasions, be in the general, and have ambiguous Words in them, or Words made ambiguous by the King's Counsel in most Ages, yet this is plain and express, and needs no strain upon our Side. And I cannot find it ever pretended to on the other Side to be a Strain, they are so plain that the Inference is easy, and hard to be avoided. I will not, I must not say, that they are Authorities against the Commitment by a Privy Council, but methinks they are strong against an extrajudicial Commitment by a single Lord of the Council, unless Mr. Attorney will argue, that the Council cannot commit by reason of this Law, but a single Privy Counsellor is out of the Words of the Act; and when I hear that, he may expect another Answer.

Now for the Words *per legem terræ*: In *Magna Charta* in 2 Inst. 51. my Lord Coke doth indeed say, that in some Cases a Man may be taken and arrested before Indictment or Presentment; and one Case which he mentions is, by lawful Warrant, where there is a Witness against an Offender: Upon Suspicion there may be an Apprehension, but there cannot be a Commitment, with a Charge of an Offence, unless there be an Indictment or Presentment, or a Witness against the Offender; now there can be no Witness, but there must be an Oath: So it is by all Laws, a Man cannot be a Witness, tho he may be an Informer, unless he be sworn; and by our Law, even Peers, if they are Witnesses, must be sworn. Now that a single Privy Counsellor can give an Oath I can find no Law or Precedent for it; it is true, the Privy Council may administer an Oath, and have done so for a long time, but that every single Member can do so, doth not follow: it is no more a Consequence, than that because the House of Peers can give an Oath, therefore every Peer may at home do the same. He is one of His

Majesty's most Honourable Privy Council, and that is all; and that is only (as I may with Respect say) when they are *capitulariter congregati*.

Further, my Lord Coke saith, that to make a Commitment Lawful, the first Requisite is that he, or they, who do commit, have lawful Authority; now whether a particular Lord of the Council hath such a lawful Authority, I must submit to your Judgment.

In antient Times the Practice was for the Privy Council not to send for Men in Custody, but to issue Citations and Summons, and that by their Messengers, as doth the Court Christian by their Pursuivants, who cannot arrest or imprison, as in 12 Co. Rep. 49. In all the Records cited by Coke in his *Jurisdiction of Courts*, cap. Privy Council, or Pryn's *Animadversions* upon that Book, 46. there is no Precedent mentioned of imprisoning, or bringing Men into Custody, but only Summons and Citations to appear; and there are many of them.

I shall not meddle with their Power of committing for a Contempt, or Refusal to answer, or question the Authority of the Countess of Shrewsbury's Case, 12 Co. Rep. 93. but I urge this only to shew the Improbability, that our Law should vest such an Authority in each Member of the Privy Council.

In Pryn's *Animadversions* on 4 Inst. it is in his Comment upon Coke's *Epilogue*, pag. 422. is a very notable Record, Rpt. Parl. Anno 28 Hen. 6. num. 56. where there is an Impeachment of Talbois, for a notable Riot upon several Lords of the Council met within the Palace at Westminster; and it is prayed, that he may be sent to the Tower of London, to be kept without Bail or Mainprize for twelve Months, to answer all Indictments for that and other Riots, before the King and his Justices in his Bench within that Time; and if the Constable of the Tower should suffer him to escape, or go at large, he should forfeit One thousand Pounds; to which Article of the Commons Petition and Bill the King assenteth, so that here was an Act of Parliament (for such it is, tho in form of a Petition granted, as was the antient Form) to enforce a Commitment to the Tower for any Affront to the Lords of the Council: Now I would beg leave to observe, that it was not by way of Punishment for the Offence, but to secure the Parties to be forth-coming to answer an Indictment, the Punishment must be Fine and Imprisonment: Now it seems strange, that an Act of Parliament should be made to secure a Man, in order to answer an Indictment for an Assault and Riot upon the Lords of the Council, when any one Lord of the Council might have committed him, and he might have been indicted the next Term; for the Fact was done at Westminster in Middlesex.

I find a Case in 1 Leon. 70, 71. it is Newell's Case, he was committed *per mandatum Francisci Walsingham, Militis, Principalis Secretarii, & unius de privato concilio Domina Regina*, and the Return was held insufficient. I must agree, that the Book says it was, because the Cause for which he was committed was not alledged, and they amended the Return, and then they made it *ex sententia & mandato totius concilii privati, ita quod corpus ejus paratum habere non possimus*; it is true, that at last the Court took Exceptions to it, because the Body was not brought, and there was a very wise Distinction made by the Court, That where one is committed by one of the Pri-

vy Council, there the Cause ought to be returned; but where the whole Council do commit, there need no Cause to be alledged: Now it is plain, that this was a Distinction without a Difference, for by the Petition of Right, and the seven old Statutes, and all the Records and Law of old Time, no *Englishman* ought to be deprived of his Liberty by an extrajudicial Commitment or Warrant, unless the Cause be shewn; and I would infer, that the then King's or Queen's Counsel thought a Commitment by one Lord of the Council was not legal, and therefore they added *ex sententia & mandato totius privati concilii*; and it seems to me, that the Court did slide over that Question, by insisting upon the other Exception: However at the most, tho it makes against the Novelty of the Commitments, yet it can never make for the Legality of them, when the whole is considered.

Upon these Considerations, I hope it will appear to your Lordship and the Court, to be a doubtful Point, whether a Secretary of State may commit; and the Consequence of that is, that the Prisoner ought to be bailed according to *Bushe's Case*, *Vaughan* 157. that the King's Bench may bail in any Case of Treason, if they think fit, but the Common Bench must remand, if the Cause of the Imprisonment returned be just, and well returned; but then there is this Distinction; if it shall appear to the Court, that the Party was imprisoned against the Law of the Land, they ought by Force of *Magna Charta*, to deliver him; but if it be doubtful, and under Consideration, then he ought to be bailed: And this hath been the Practice upon Convictions by Justices of the Peace; and the Excuse of the Judges in 4 *Car.* for their *Remittitur*, &c. that it was *quousque*, &c. i. e. till further Consideration, was never allowed as a wise or legal one. Now I hope I have said enough to make it doubtful.

Then for Messengers, I have further matter to urge; the Reason why Commitments are required to be to the County Goal, by 5 *Hen. 4. cap. 10.* is mentioned in 2 *Inst. 43.* and 9 *Co. Rep. 119.* that they may have their Trial at the next Gaol Delivery, or Sessions of the Peace; and my Lord Coke saith, that at Common Law the committing to Prison is only to this end, that the Party may be forth-coming to be duly tried according to the Law and Custom of the Realm: And the Abbots of *St. Alban* and *Crowland* lost their Franchises of having Gaols; because they detained Men in Prison, for a long time, without making a Deliverance; and all this doth in Reason argue against Messengers Power to make their Houses Prisons.

My Lord Coke saith, in 2 *Inst. 43.* that the Statute 5 *Hen. 4.* extendeth to all Judges and Justices for two Reasons: First, Because this Act is declarative of the Common Law; and Secondly, *ubi lex est specialis, & ratio ejus generalis, generaliter accipienda est*; and if so, this was a false Imprisonment of Sir *James Montgomery*, and then the Consequence is what I urged the other Day.

I find further, in 2 *Inst. 705.* that by the Parliament Roll, 51 *Edw. 3. numb. 68.* it appears, that Gaols were antiently to be repaired at the King's Charge; and by Lord Coke upon 23 *Hen. 8. cap. 2.* concerning the new erecting of Gaols, his Opinion is, that the same cannot be done with-

out Act of Parliament; and I cannot find any Act of Parliament for making the forty two Houses of the Messengers to be lawful Prisons: If there be any such, I suppose the King's Counsel will shew them to your Lordship; nay, I cannot find any Grant of such a Franchise to them.

Besides, the Reason of the Law is with us. Out of the County Gaols you have at every Sessions of Gaol Delivery, Calendars of the Prisoners that are in Custody there, but of the Prisoners in Custody of Messengers you can have no Notice; and this is no small Mischief in respect of the Subjects Liberty; for at a Gaol Delivery the Calendar is to be called over, and by the Calendars in former times were the Executions made, without any special Warrant from the Judge or Recorder, which is but a late Practice.

Besides, according to 3 *Inst. 209.* a Man regularly before the *Habeas Corpus* Act, if committed for Treason or Felony by a Person having Authority to commit, was not to be discharged until he was inquired of, and either indicted or acquitted, or an *Ignoramus* found, and delivered by Proclamation; now how this could be practised of a Messenger's Ward, is to me unaccountable.

I will in this Case offer to your Lordship what I find in this Matter, with Sincerity, and submit it to your Judgment. There is in 12 *Co. Rep. 129.* a Case cited out of the Year Books, viz. 22 *Affize pl. 49.* One was beheaded for killing *Adam Walton, nuncii Domini Regis, missi ad mandatum ejus exequend'* which is there taken for Petit Treason: This is all that I can find of antient Authority, which mentions such a Creature as a Messenger; but nothing can be inferred from hence to prove the Messengers in Ordinary to be Keepers of Gaols, for the receipt of Felons and Traitors.

Nay, I find further a Case, which seems to overthrow the Commitment to any other Prison than the County Gaol: I will but name it, and submit its Consideration to your Lordship's Judgment; it is in *St. John's* Argument at a Conference concerning the Attainder of the Earl of *Strafford* (it is fol. 46 of the 4to Print of that Argument) the Case of Sir *John Mortimer*, who was drawn, hanged, and quartered for breaking the Prison of the Tower, having been committed thither upon Suspicion of Treason: But this was in 2 *Hen. 6.* and upon an Attainder by Bill in Parliament, and so it is in *Cotton's Abridgment of the Records*, pag. 398. and there it is mentioned as a strange Thing to be done in Times of Peace, and when the Realm was in quiet, for a Man to be condemned without Trial or Arraignment. Now I might infer from hence, that if the Law had been undoubtedly plain concerning an Escape out of the Tower, as a legal Prison, there had been no need of an Act of Parliament to attain him; but however, it may argue thus much, that if a Bill were necessary for such an Escape, that an Act of Parliament is certainly necessary to make a Rescuer of one suspected of Treason out of the Custody of a Messenger to be guilty of Treason; but all these I submit to your Lordship's Consideration. All that I contend for is to make it a doubtful Question to the Court, whether upon this Return, taking it for true, it is possible to indict and convict these

these Prisoners for Treason; for if not, they ought to be bailed.

Then there is another Exception, which I just mentioned the last time, and that is, that it is not mentioned in this Warrant, what the Species of Treason was, for which Sir *James Montgomery* was committed. I shall, as I have already, avoid the Repetition of any thing, which I then offered; there are several Treasons at this Day, where the receiving, comforting, and relieving of them afterwards, knowing them to be such, may not be Treason; and then in such Case the helping him to escape will not be so, and consequently it ought to have been alledged in the Warrant, what the Treason was for which Sir *James Montgomery* was committed. Now it is no Treason to receive and comfort a Counterfeiter of the Great Seal, it is only Misprision, for there are no Accessories in Treason, and Principal he is not, because he did not know of it at the Time; to this effect are the Words of the Book, 12 *Co Rep* 81. so it is of the receiving and comforting a Jesuit, or other *Englshman* taking Orders abroad, and returning into *England*; for by 26 *Eliz.* that is made Felony; which Statute would never have been made, if it had been Treason, *Dier* 296, 297. *Corrier's* Case. If I know that one hath made false Money, and receive, comfort, and abett him, this is only Misprision: How far these are Law I am not to argue, but I suggest the Words or Effect of the Authority, and submit them. Sure I am of this, that if your Lordship and the Court be satisfied that they cannot be attainted of Treason, if the Fact be as this Return is, then you will not remand them.

Mr. Solicitor was pleased to argue, that these are Niceties too subtle for a Return upon a *Habeas Corpus*; but according to *Vaughan*, 136. the Writ of a *Habeas Corpus* is now the most usual Remedy, by which a Man may be restored to his Liberty, if he have been against Law deprived of it; and therefore it is that the Writ doth command to know, whether it be according to Law, or against Law; and therefore the Cause of the Imprisonment ought by the Return to appear, as specially and certainly to be judged by the Court, where the Return is made, as it did appear to the Court or Person authorized to commit, else the Return is insufficient. Now the Reason of adjudging that Return in *Rusbell's* Case to be insufficient, was because it was only said, that their Verdict was against full and manifest Evidence, and did not say what; by the same Reason Sir *James Montgomery's* Treason ought to have been set forth in this Case; and as to Credence, no more ought to be given to a Person committing, when a *Habeas Corpus* is brought, than there is to a Court giving a Judgment, when a Writ of Error is brought to examine it, in order to Affirmance or Reversal; for an *Habeas Corpus* is brought in like manner to examine the Cause of the Party's Imprisonment, either to bail or discharge, or else to remand him, which is to affirm the Commitment to be legal, and upon good Cause.

I have modern Authority to justify much nicer Exceptions to Commitments, than those I have mentioned; such Authority as Mr. Solicitor will

not deny to be good. Complaint hath been of a Warrant of Commitment, that it did not appear in whose Reign the Treason was committed, whether in the late King's, or the former King's; it is observed in the Remarks upon *Cornish's* Trial, and I am sure Mr. Solicitor must own that to be much nicer than what I have offered upon this: I do not justify that, but my Exceptions to the Return.

Mr. Serjeant *Levinz* argued on the same Side, that the Return was ill, because the Commitment was to a Messenger; it ought to have been to a County Gaol, that the Custody upon an Apprehension ought to be but twenty four Hours, *Britton* 19. *Customer of Normandy* 456. *Hl.* 22 *Edw.* 4. p. 4. those Messengers exacted Fees, viz. 6 s. 8 d. or 10 s. per diem. It is in effect to fine the Party before he is convicted. Then he said, that all those Questions might have been spared, if Mr. Attorney would consent to their being bailed.

L. C. J. In truth most of them might have been spared, for they have been argued more for Pleasure than Necessity.

Then Mr. Attorney General, and Mr. Solicitor, insisted that the rescue of one in Custody upon Suspicion of Treason, was Treason; that the setting forth the Overt Act was more for the Advantage of the Prisoner, than barely alledging the Species of Treason: That as to the Secretary's Commitment, it was owned now not to be such a Novelty as was pretended the last Time: That it was very antient; that the Case in 11 *Leon.* is very flat to that Purpose; that in the Tower they found a Commitment in 1660, by Secretary *Morris*, and that many more had been since, but that Sir *Joseph Williamson*, who had the Papers, was now in *Ireland*; that it was not needful, that he who commits, should be able to give an Oath; that the House of Commons could not give an Oath, and yet could commit; and more to the like Effect.

Sir *Bartholomew Shower* replied, that he was glad to hear there were so few Precedents for a Secretary's Power; that if there had been more, Mr. Attorney would have shewn them; that the House of Commons Power was an Instance not fit for him to answer; that he did desire no more of Mr. Attorney, than that a Secretary could not give an Oath, and then he hoped the Consequence would be plain; and so submitted it to the Court.

L. C. J. I did always give Credit to the Resolutions of the Judges in *Anderson's* Case, and it is Part of a Privy Counsellor's Oath to take care of the King's Person against all Traitors, &c. was there not a Gaol Delivery at Common Law? And are not the Commissioners by their Commission to inquire of the Prisoners in that Gaol, and a Grand Jury to be impanelled? And consequently, does not the Law suppose some to have been committed thither before? And then, by whom were they committed? Tho a Messenger be not a proper Officer, yet any Person may be ordered to receive for a convenient Time for Examination, &c. Commitments regularly ought to be to the County Gaols, and I wish the Justices of the Peace, who commit to *New*

* Justices of the Peace are not by Common Law, but appointed by Statutes, the first of which was 1 *Edw.* 3. cap. 16. By Common Law there were only Conservators of the Peace, whose Power was very short of a Justice's now a days. See *Crompton's* and *Dalton's* Justice.

Prison, and the *Gate-house*, were here to hear this. But, Mr. Attorney, the Question is, whether you ought not to have specified these two Things in your Warrants, for what Treason Sir James was committed; and my Reason is, because the Escape will be the same Species of Treason with that, for which the Party rescued was committed; and secondly, that he had done a Treason, that Sir James was guilty. But, Mr. Attorney will you further consider of it, tho I think we must bail them in the mean time, an *Habeas Corpus* being *festinum remedium*; but I would hear my Brothers Opinion.

J. Rokeby. Sir Barth. Shower, I am glad to see that you have rectified a Mistake you were in about a Secretary's Commitment: It was long before Sir Lionel Jenkins's time: *Walsingham* committed near Two hundred Years ago; and there is another Precedent in 2 Leon. 175. *Hilleyard's* Case, I think, that a *Conservator pacis* at the Common Law may commit, and so may a Constable; it is incident to his Power of committing, that he may give an Oath, and take a Re-

cognizance, and (*quod mirum*) one of the Council may commit. I would not have the Students go away with the Notion of the Novelty of it: I take Secretaries of State to be great Officers; they are Centinels to watch for the Preservation of the King, and the common Peace of the Realm: And for Messengers, for any thing appears, he might be only carrying to Gaol; but yet I think they ought to be bailed, because it is not expressed in the Warrant, what the Species of Treason was for which Sir James Montgomery was committed.

J. Eyre. There may be a Difference between carrying to Prison, and a Commitment with a Charge upon them; and there may be a difference between specifying and not specifying Sir James's Treason. Upon the whole, I think they ought to be bailed.

J. Gregory was absent.

Accordingly they were bailed to appear the last Day of Term, to answer such Matters as should then be objected against them.



The Trial of PATRICK HURLY, of Moughna, in the County of Clare, Gent. at the King's-Bench in Ireland, upon Two (several) Indictments, the one for Perjury, and the other for Conspiring with Daniel Hicky, &c. to Cheat the Popish Inhabitants of the County of Clare, &c. May 31, 1701. Paschæ 13 Will. III.



HE Prisoner being brought from the Marshalsea to the Bar, and a Full Jury appearing, the Clerk of the Crown bid him look to his Challenges; and after some Challenged by him, the Jury Sworn were.

Edmund Perry,
James Mac Donnel,
John Brady,
Dennis Mac Mahone,
Richard Hen,
Thomas Brown,

John Drew,
Hugh Brady,
Edward Mealing,
Austin Bennis,
Joseph Cecil,
Patrick Connel,

Clerk of the Crown. Gentlemen of the Jury, you are to understand, That Patrick Hurly stands Indicted of Perjury; for Swearing before Neptune Blood, Dean of Killfenora, One of his Majesty's Justices of the Peace for the County of Clare, That he was Robbed of Three Hundred Pistoles in Gold, and several other things, by four Persons altogether unknown to him, but whom by the Tone of their Voice he believed to be Irishmen and Papists; whereas in Truth and

Fact, he well knew them by their Names and Persons, being set on by himself, and did not take any thing at all from him.

Mr. Attorn. General. Clerk of the Crown, You have another Indictment against the Prisoner at the Bar, pray charge him with it.

Cl. of the Crown. Gentlemen of the Jury, you shall likewise understand, that the same Patrick Hurly stands here Indicted, for that he did falsely and deceitfully Conspire with one Daniel Hicky and several other Malefactors, unjustly to oppress the Popish Inhabitants of the County of Clare, and cheat them of a great Sum of Money, by Colour of the Rapparee Act.

Mr. Attorn. Gen. May it please your Lordships, and you Gentlemen of the Jury, the Prisoner at the Bar, Patrick Hurly, is here indicted for Perjury, and the Perjury is this, That the Sixth of March 1699, he came before Dean Neptune Blood, one of his Majesty's Justices of the Peace for the County of Clare; and made Oath before him pursuant to the late Statute for suppressing Tories, Robbers and Rapparees, that being

being at his Father's House in the aforesaid County of *Clare*, several Persons with their Faces masked, came unto the said House in the Night time, and forced into his Chamber, made a shot at him, and tied him and another Man with Cords fast to a Bedsted; that by the Tone of their Speech they seemed to be *Irish-men*, and that he believed them to be *Papists*, that he knew not one of them either by their Names or Persons; that immediately they broke open several Trunks, and took out of one of them a Bag, wherein were 374 *Guineas*, and 345 *Pistoles*; a Gold Cross set with Diamonds, and several other Diamonds to a great Value; and a great Number of Holland Sheets and Holland Shirts, all to the Value of about 1300 Pounds; all which he swore they took away from him; and this he swore, in order that he might (according to the late Act called the *Rapparee Act*) make the Country re-imburse this 1300 Pound to him. Gentlemen, This was all false, and nothing at all in it but a Mock-Robbery, acted by Persons employed and set on by himself, whom he very well knew, and who took nothing at all from him, but it was only designed to cheat the Country; and in truth he was not Robbed at all, not of the Value of a Farthing. The Second Indictment is for a Cheat, in Conspiring with the Malefactors to wrong the said Country, and deceitfully and unjustly to raise Money upon the Country, under Colour of the Act of Parliament.

Mr. *Soll. Gen.* May it please your Lordship, and you Gentlemen of the Jury, Mr. Attorney General has given you an Account of the Indictments: The Second is the Consequence of the First. If Mr. *Hurley* was really and truly robbed, then he did not design to cheat the Country: But if he was not really and truly robbed, but that his Examinations be all false, then he was not only Perjured, but did likewise Conspire to Cheat the Country. We will begin with our Evidence of the Perjury, and the Force of our Evidence is this. Mr. *Hurly* pretends to be robbed of about Thirteen Hundred Pounds, in *March* 1699: We will shew you, that Mr. *Hurly*, instead of being a Man of so much Cash at that time, was the contrary to an extreme Degree; That to prevent Arrests, he had several Protections, and he told a Gentleman there could not be a readier Way to get Money, than by the Act of Parliament, if he could fix a Robbery on the Country; he could Tax what Sum he pleased. We shall shew you with whom he concerted this pretended Robbery, and by whom 'twas acted; and that Mr. *Hurly* himself contrived the whole Matter, and the several Goods that he pretended to lose, he had back again, and they were sent another Way afterwards by Mr. *Hurly*, and, that the Gold he pretended to lose, was but Counters. We will trace you the whole Drift and Contrivance of the Matter. My Lord, we shall first produce the Information of Mr. *Hurly* sworn before Dean *Blood*.

Dean *Neptune Blood* Sworn.

Court. Look on that Paper, was that Examination sworn before you, Sir?

D. *Blood*. Please your Lordship to give me leave to read it.

Court. Do so, Sir, take your own time — You have read that Paper?

D. *Blood*. Yes.

Court. Was that Examination taken before you upon Oath?

D. *Blood*. Yes, my Lord.

Court. Who was the Person that swore it?

D. *Blood*. *Patrick Hurly*.

Court. Is that the Man that stands there?

D. *Blood*. Yes, that is he.

Clerk Reads the Examination.

Com. *Clare*. The Information of *Patrick Hurly* of *Moughna*, in the said County, Gent. taken before *Neptune Blood*, Dean of *Killfenora*, one of his Majesty's Justices of the Peace for the said County.

' The said Informant being duly Sworn on the Holy Evangelists, and Examined, saith, ' That on *Sunday* the Third of *March*, One ' Thousand Six Hundred and Ninety Nine, ' about Eleven of the Clock at Night, being ' then at his Father's House at *Moughna* aforesaid, and in his Chamber, he saw three Men ' Armed burst in an Out-Door of the said ' House which opened into a Garden, threw ' down Mr. *Ronane*, who was near the said ' Door; in a rude manner, with Swords and ' Pistols in their Hands, entered into the said ' Chamber, dragging the said Mr. *Ronane* with ' them: Instantly there appeared a Fourth Person Armed, and with their Faces Masked; ' and making a Shot at the Informant, they immediately tied him and the said Mr. *Ronane* ' with Cords fast to a Bedsted; calling the Informant Rogue, Rascal, Son of a Whore, ' Treacherous Villain to his Country, and many absurd Words to that effect. The said Informant further saith, that the said Persons, by the Tone of their Speech, seemed to be *Irish-men*, and believes them to be *Papists*, but knows not any one of them, by their Names or Persons: That immediately they broke open Three large Trunks, and took out of one of the said Trunks a Bag, wherein were Three ' Hundred Seventy and Four *Guineas*, and Three ' Hundred Forty and Five *Pistoles*, amounting in all to the Sum of Eight Hundred, Forty and ' Eight Pounds, Nine Shillings sterl. or thereabouts; together with a Gold Cross set with ' Diamonds; and several other Diamonds to the Value of Two Hundred Twenty and Five ' Pounds sterl. And also the Number of Twenty Four large *Holland* Sheets, each of them containing Ten Yards or thereabouts; Price ' Seventy and Two Pounds sterl. and Thirty ' Five *Holland* Shirts, amounting to the Value of One Hundred Fifty and Seven Pounds ' Ten Shillings sterl. The said Informant further saith, He heard a great Bustle and Noise, and Shots made in the other Parts of the said ' House at the same time, which he understands was done by others of the said Robbers. And further saith, that the said Robbers took away all the aforesaid Gold, Diamonds, Sheets and Shirts, and left the said Informant and Mr. *Ronane* tied as aforesaid; and locked the said Door on the outside. He further saith, that he never got any of the ' said

* said Gold or Goods since the said Robbery :
 * And further saith, that when he perceived the
 * said Robbers were gone away, he this Inform-
 * mant sent some of his Servants out thro' a
 * Window about four of the Clock next Morn-
 * ing, to make a Hue and Cry, and to raise the
 * Country, to pursue after the Robbers. The
 * said Informant being asked whether the said
 * Robbery was committed by any Contrivance
 * of his own or any Friend of his, with Ex-
 * pectation to get Money raised on the Country,
 * or for any other Self-end? Declares that it was
 * not, nor does know of any such Contrivance
 * or Design, by any Person whatsoever, either
 * directly or indirectly. The said Informant fur-
 * ther saith, that two of the said Robbers which
 * came into his Chamber had Red Clothes, and
 * understands that they were in and about the
 * said House the Number of Seven more of the
 * said Robbers, besides the aforesaid Four that
 * entered into the said Chamber. He further
 * saith, that he cannot give any Description of
 * any of the said Persons, more than is herein
 * set forth. And being examined whether any
 * of his Servants or Family were from home a-
 * broad at the same time, when the said Rob-
 * bery was committed, he said that he sent one
 * Calaghan Carty, a Servant of his, that same Day,
 * to Mr. John Forster, at Rathorpa in the County
 * of Galway for a Suit of Mourning Clothes,
 * which the said Mr. Forster brought from Dublin
 * for the said Informant; and the said Calaghan
 * returned the next Day, being Monday the
 * Fourth of March Instant, with a Letter from
 * the said Mr. Forster, and that the said Infor-
 * mer's Wife and her Brother Mr. Edmond Tirrey,
 * and Mr. Ulick Bourk, who is married to her
 * Sister, were the same Night when the said Rob-
 * bery was committed at Capt. Christopher O-
 *'Brien's House at Imishriman in the said County
 * of Clare. The said Informant further saith,
 * that Moughna aforesaid, where the said Rob-
 * bery was committed, is in the Barony of Cor-
 * cumoroe and County aforesaid. He further saith,
 * that he had about four Hundred Pounds of the
 * aforesaid Gold from Alderman Walton in Dub-
 * lin, and had the rest some time before from
 * Mr. Christopher Fitz-Symonds Merchant in Dub-
 * lin. The said Informant further saith, that he
 * knows not who any of the aforesaid Seven
 * Persons were, that were in and about the said
 * House, nor yet any of the Four Persons as
 * aforesaid, nor from whence any of them came,
 * nor whither they went, and further saith not.

Jurat Coram me
 6^o Martii 1699.

Nep. Blood.

Vera Copia

Gulielmi Tisdal.

Court. Mr. Dean Blood, Is this the very Examination that Mr. Hurly gave in upon his Oath before you?

D. Blood. Yes, Sir.

K. Counsel. Did he swear it all?

D. Blood. Yes, he swore all the Contents of this Examination to be true.

Mr. Soll. Gen. My Lord, and you Gentlemen of the Jury, the Scope of the Evidence against the Gentlemen at the Bar is thus, we will shew you the great Necessity he was under and the pressing Occasions he had for Money; and that being in great streights, he was contriving how to stave off his Creditors and save his Reputation: We will produce the Persons that he had Discourse with about the probable Way of getting Money; and some of the very Persons that were to act in order to it; and that when Mr. Ronane was in the House, these Actors were to rush in, and to tye him and Mr. Patrick Hurly together; and then to look in such a Trunk, and there they should find something like Gold. That the Actors did lurk in an Out-house by Mr. Hurly's Appointment; and came into the Dwelling-house as was contrived between them, rushing in with the said Mr. Ronane, who went out into the Garden after Supper, as was contrived beforehand. When Mr. Hurly was giving in his Information, Mr. Blood ask'd him, what Witnesses he had besides himself? He said, a Servant of his, one Calaghan Carty. We will produce that same Calaghan Carty, who will give a full Relation of the Matter.

Calaghan Carty call'd.

Mr. Bernard. My Lord, one Word for the Tra-
 verser. My Lord, this Calaghan Carty and others
 were the Persons taken up for this Robbery, and
 actually in Gaol for it: they were the Persons
 that did actually rob us. My Lord, they were
 put into Irons, and threatned to be hang'd un-
 less they would swear it was a Sham-Robbery,
 and thereupon were discharged; and after came
 to this Town, and went before my Lord Chief
 Justice Pyne, and they swore that their Exa-
 mination was forced from them. It is here in
 Court.

Calaghan Carty Sworn.

Court. Do you know Patrick Hurly?

Carty. Yes, my Lord.

Court. How long have you been acquainted with him?

Carty. Since he came into this Kingdom from England.

Court. How long was he come before he was prosecuted?

Car. 'Twas about two Years.

K. Counsel. Will you give the Court and the Jury an Account what you know concerning this Robbery? Tell the whole Truth, and nothing but the Truth.

Carty. My Lord, I was one of his Servants.
 He came to me and called me out to his Stable,
 and drew out a Purse of Gold and shewed it me,
 and told me he was to pay one Mr. Arthur some
 Money, who was to come such a Day to Com-
 pound with him for the Money; and if he did
 give him that Money, he would be ruin'd for
 ever; but that if I would do as the rest would,
 I would do him a Kindness: And says, that
 when Mr. Arthur should hear the Money was
 Robbed, he would Compound with him: And
 he told me where the Money was to be, and the
 Trunk he would put it into.

Court. Did you according to his Desire take away the Gold and the Linen?

Car. Yes, my Lord.

Court. Was there any others to do it besides yourself?

Car. Yes, Four more, *Donagh O'Brien, Andrews Daniel Hicky, Daniel Carty, and Teigue Carty.*

Court. What did you do with the Linen?

Car. It was *Daniel Hicky* took it out, and he said he gave it all back again to his Master.

Court. Were you disguised?

Car. Yes, we had some of us Blue Coats, and some of us Red Coats and Vizards.

Court. Where had you the Coats?

Car. Mr. *Hurly's* Man threw them into the Barn to us.

Court. Had you any Arms?

Car. Yes, my Lord, we had Swords.

Court. Who gave the Arms to you?

Car. *Daniel Mac-Caie, Mr. Hurly's Footman.*

Court. Whose were the Swords?

Car. I was told they were brought from Dublin by Mr. *Hurly.*

Court. Was there any Fire-Arms?

Car. Yes, there was Fire-Arms left on a Table by the Door, and charged with Powder.

Court. Had you any Directions about them?

Car. Yes, my Lord, they were laid there on purpose for the Men.

Court. Who gave those Directions about the Fire-Arms?

Car. It was *Daniel Mac-Caie.*

Court. Were they charg'd?

Car. Yes, with Powder only.

Court. Was any of 'em fired off then?

Car. Yes, there was.

Mr. Soll. Gen. My Lord, tho they were fired off, there was no Ball in them: It was not to do harm, but only to frighten those who were not in the Street.

Court. Did you take the Gold in the Purse, or whatever it was?

Car. My Lord, we were directed by Mr. *Hurly* to pour it on the Table, that Mr. *Ronane* might see it.

Court. How long had Mr. *Ronane* been there?

Car. Two Nights.

Sir J. Mead. Was there any particular Time appointed when you was to do this Fact?

Car. There was, my Lord; when Mr. *Ronane* should come out of the Back-door.

Court. Had you any Directions in particular what to do with the Servants?

Car. Yes; we had Directions to tye Mr. *Hurly* and *Ronane* together, and there was a Bed-cord laid in the Room ready for the Purpose.

Mr. Recorder. Who gave you the Directions to tye them?

Car. Mr. *Hurly.*

Mr. Soll. Gen. Do you know one *Walter Neylar*?

Car. Yes.

Mr. Soll. Gen. Where was he?

Car. He was in Gaol at *Ennis*, for Mr. *Hurly's* Debt.

Mr. Soll. Gen. You were Mr. *Hurly's* Servant.—Pray, did he appear publicly about that Time? or, Was he on his Keeping?

Car. He was on his Keeping.

Court. Explain yourself — What was that Keeping?

Car. My Lord, he was on his Keeping, for fear of being taken upon Writs and Executions: He had Servants in his House, and he kept one watching constantly, for fear of being taken.

Court. At whose Suit?

Car. At Mr. *Arthur's* Suit.

Mr. Att. Gen. My Lord, I am told his House was a sort of a Garrison, and there were regular Works about it.

Court. You say, there were Scouts abroad, and some Wall; pray give an Account what Works there were about the House.

Car. Yes; there was a Brick-Wall about one Side of the House.

Court. Do you imagine it was to prevent his being arrested that he built that Wall?

Car. Yes, it was, my Lord.

Mr. Recorder. What sort of Money was there when you open'd the Bag? — What did appear to be?

Car. It was yellow Pieces, and Mr. *Hurly* gave his Seal, to seal the Bag up again.

Court. Was Mr. *Ronane* there at that Time?

Car. The Seal was given before, my Lord.

Mr. Sol. Gen. He says, It was not he that pour'd the Money out. — Did you judge the Money to be Gold or Counters?

Car. That, my Lord, I did not know.

Mr. Sol. Gen. My Lord, Mr. *Hurly* pretends that this Man gave an Examination contrary to this. Now we will shew you, That that was done by another Person, employ'd by Mr. *Hurly* to personate this Man. But, before that, please to ask him as to the Linen that was carried away, what became of it, and who dispos'd of it.

Court. You say, there was Linen taken away, — What Linen?

Car. There was *Holland* Sheets, and they were put into the Chest into the Barn; and we brought them in again.

Court. Who brought them in?

Car. *Daniel Hicky* and I myself.

Court. Who did you deliver them to?

Car. To Mr. *Hurly's* Wife.

Court. Was he privy to it?

Car. Yes, he was.

Court. Did you ever make Mr. *Hurly* acquainted that you had restor'd the Linen?

Car. Yes, my Lord.

Mr. Recorder. Pray, was there any Jewels or Diamonds taken away?

Car. My Lord, he said there was some in a little Bag, some Jewels and Diamonds; and he bid us not to open it, and we did not.

Court. Was that Bag in the same Drawer with the other Money?

Car. Yes, my Lord, it was.

Sir J. Mead. Pray, my Lord, I desire to know whether he was ever tamper'd with by any body, and who it was?

Court. Was you ever tamper'd with, to take off your Evidence?

Car. Yes, my Lord, I was — by *Daniel Carty*, and I refus'd it.

Court. Was you by Mr. *Hurly*?

Car. No, — but he sent his Brother to me.

Mr. Forster. Pray, my Lord, let us see that Examination: He, after that Examination, gave Evidence contrary to what he has now given.

Court.

Court. Do you admit that there was an Examination?

Mr. Sol. Gen. That there was an Examination sworn before my Lord Chief-Justice — But that this was not the Man.

Mr. Recorder. Was you sworn before my Lord Chief Justice Pyne?

Car. Never in my Life.

Court. Look on it; Is that your Hand?

Car. It's none of my Hand.

Mr. Recorder. Pray look upon it.

Car. It's none of my Hand.

Mr. Forster (produces another Paper) — Pray look on that Paper, and see if that be your Hand or not.

Car. I don't know whether it be or no; I believe it may.

Mr. Sol. Gen. Pray mind which he owns to be his Hand, and which not.

Recorder. We have to deal with a nimble Person.

Court. What will you have next?

Mr. Bernard. The next Thing is, What time of the Day or Night the Robbery was committed.

Car. My Lord, it was about Ten a-Clock at Night, before the People went to Bed.

Court. What Month?

Car. The Month of March.

Court. What Day of the Month?

Car. As I understand, the Third of March.

Court. What Day of the Week?

Car. Sunday.

Mr. Bernard. Where was you on Monday Morning?

Car. I was at Corrofin.

Mr. Bernard. How far is that from Mr. Hurly's?

Car. It is Five Miles.

Court. How long did you stay at Corrofin?

Car. I stay'd there till News came that the Robbery was committed; I stay'd till Night.

Mr. Bernard. Pray, was Mr. Ronane privy at all to this Robbery?

Car. I don't know; I believe he may, for I know no other Business he had there, nor I saw no other Business he did there.

Court. Mr. Bernard, he says this, — As Mr. Ronane was to go out of the Back-door, then at that very Time they came thro' the Garden.

Car. Yes, my Lord, Mr. Hurly's Man came to give us a Call.

Court. He says, Hurly's Man did give them Notice when Mr. Ronane did go abroad.

Mr. Bernard. Do you believe that Mr. Ronane went abroad?

Court. He says, it was usual for Mr. Ronane to go abroad.

Mr. Att. Gen. My Lord, the next Witness we shall produce is another Servant, that was in the House with Mr. Hurly the same time.

Margaret Conneene.

Mr. Sol. Gen. This Lady goes in the Family by the Name of Peggy Rabbet; Margaret is Peggy, and Conneene Rabbet.

[An Interpreter sworn, because she could not speak English, — Then she was sworn.]

Mr. Sol. Gen. Pray ask her whether she knew Patrick Hurly, and let her point at him.

Con. There he is.

VOL. V.

Mr. Sol. Gen. What does she know of this Robbery, this pretended Robbery?

Court. Pray ask her how long she has been acquainted with Mr. Hurly.

Interp. This Year and half.

Court. Was she a Servant, or no?

Interp. Yes, a Servant in the House for a Year and half.

Court. Does she know of any Robbery, or pretended Robbery, committed on Mr. Hurly?

Interp. She knows there was a Robbery.

Court. Was she a Servant in his House at that Time?

Interp. Yes, my Lord, she was.

Court. Let her tell what she knows of it from the Beginning to the End.

Mr. Record. The whole Story, the whole Intrigue.

Interp. She says, one Hicky, and Calaghan Carty, Donogh O'Brien Andrews, came into the House at Night, and Teigue Carty and Daniel Carty.

Court. Were they disfigur'd?

Interp. Yes, she says, they were.

Court. How did she know them?

Interp. As Calaghan Carty told her.

Court. When was that?

Interp. After he came out of Gaol.

Court. Did she know any of them when their Disguise was on?

Interp. No, she did not.

Court. Did she know of any Contrivance of a Robbery?

Interp. No, she did not.

Court. What Time of the Day or Night was this Robbery committed?

Interp. She says my Lord, about Ten of the Clock at Night.

Court. What Month? or, What Time of the Month?

Interp. She does not know; but it was about Ten of the Clock at Night, as she believes.

Court. Pray, in what Manner was it that they came into the House?

Interp. She says, my Lord, that about that Hour of the Night she came in before Mr. Ronane went out at the Back-door; and, That these Five Persons came in at that Time into the House.

Court. What Part of the House was she in then, when these Five Persons came in?

Interp. She was in the Kitchen.

Court. Ask her, How could she see these Persons, when they came into the House, from the Kitchen?

Interp. She says, she could not.

Court. How soon after they got in had she Notice the Robbers were got into the House?

Interp. She says, that as soon as they came in, one Mac Cae cry'd Murder, and said, his Master was kill'd.

Court. Where were the Robbers then?

Interp. In the Parlour, near her Master's Chamber.

Court. What Arms had they that Time there?

Interp. She says that they had Fire-Arms and a Sword; and, that they shot at them.

Court. Which of them had Arms?

Interp. She says, All that she saw had Arms.

Court. Was there any Body wounded? or, Was there any Opposition given by any Servants, that occasion'd them to fire?

Interp. There was no Body to oppose them.

Court. What made 'em fire off the Gun then?

Interp. She does not know, unless 'twas to keep them in, and frighten 'em.

Court. How far was this House where Mr. Hurly liv'd from any Neighbours?

Interp. She believes there were some Neighbours half a Mile off.

Court. Was she in the Parlour? or, Did she see any Arms in the House before the Robbers came in? or, Did they bring the Arms with 'em?

Interp. She says, there were Arms in the Parlour when they came in.

Court. Were these Arms she saw with them the same that she saw in the Parlour before they came in?

Interp. They were the same Arms.

Court. Did she see those Arms? — How long did she see 'em there before the Robbers came in?

Interp. She says, that the Arms lay there all the Evening before.

Court. Was it usual for the Arms to lie there before?

Interp. 'Twas so sometimes.

Mr. Sol. Gen. What was Mr. Hurly's Motive for keeping Arms always ready at the Door? What Occasion had he for them?

Interp. She does not know any other, than that her Master was in Debt, and apprehensive of Trouble and; that he kept those Arms for his Defense.

Court. Pray, does she know what was taken away from her Master at that Time?

Interp. She knows that they took twelve pair of Holland Sheets.

Court. Did she ever see any of that Linen that was taken away from her Master with him afterwards?

Interp. There were Sheets in the House after the Robbery, and she believes they were the same Sheets.

Mr. Butler. The Sheets in the Robbery were large Double-Holland Sheets. — Pray, what Sheets were they she saw afterwards in the House?

Interp. Large Holland Sheets.

Mr. Soll. Gen. How many Pair of Holland Sheets did she see in the House after the Robbery?

Interp. She saw Four or Five pair of Holland Sheets in the House after the Robbery.

Mr. Soll. Gen. Pray, how soon after the Robbery did she see those Sheets in the House?

Interp. After the Assizes.

Mr. Attor. Gen. Pray, ask her whether any Goods were sent out to any Neighbour's House, and what Neighbour's, and what Goods?

Interp. She believes 'twas usual, when William Haloway came to the House, that was a Person who prosecuted Mr. Hurly for Debt, to send away the Goods, to secure them.

Mr. Attor. Gen. As I understand this Woman, when these Robbers had come into the Parlour, Daniel Mac Caie ran into the Kitchen. and cry'd Murder, Murder. I would fain know, since Daniel Mac Caie was not ty'd, and that the Robbers did not tye her, why they did not go out to make Hue and Cry, and raise the Country.

Interp. She says, my Lord, that there was none of them ty'd, but they did not go out.

Court. Pray, how came it about, that after the Shots went off, no Neighbours came in?

Interp. She says, she believes they could not hear.

Mr. Attor. Gen. Pray, when they fired off the Fire-Arms, did they present them at her, or at Daniel Mac Caie? or, Did they find any Holes the Shots had made in the Cieling, or Marks of the Bullets in the Wall, or in any other place?

Interp. She says, they hurt no Body, and they saw no Holes or Marks of Shot or Bullets.

Mr. Attor. Gen. Ask her, whether the Arms that were in the Parlour did not usually hang on Racks or Hooks; and where were they a little before the Robbers came into the Parlour?

Interp. They were upon the Table, my Lord near the Door.

Court. Where did these Arms use to be at other times.

Interp. She says, at the same Place near the Door.

Mr. Forster. What number of Arms did Mr. Hurly use to have in the House; and, of what sort?

Interp. A couple of Fuzees, a Blunderbuss, a couple of Carbines, and Pistols.

Mr. Bernard. Pray how many Swords were there usually?

Interp. She did not know of any but her Master's Sword; she saw but two.

Mr. Bernard. How does she know that the Shots were made out of these Arms that were Mr. Hurly's?

Interp. She says, that she was shot at twice.

Mr. Bernard. And was it out of these Arms that used to be in the Parlour?

Interp. She was shot at with a Pistol.

Mr. Bernard. Was it with Mr. Hurly's Pistol?

Interp. She believes it was.

Court. Whether these Arms that were fired off were the Arms that lay on the Table?

Interp. She was told afterwards, by the Person that did it, that they were her Master's Arms.

Court. Who told her of it?

Interp. Calaghan Carty.

Mr. Bernard. She has no other Knowledge of this but as Calaghan Carty told her? — When was it he told you this?

Interp. After he came out of Gaol.

Mr. Bernard. How long was that after the Robbery?

Interp. They were long in Gaol — she does not know.

Mr. Bernard. Tho she was our Servant then, we shall shew whose Servant she is now, and how she has been promis'd to be Portion'd and Petticoated. — Does she know Teigue Carty?

Interp. Yes, she does.

Mr. Bernard. Does she know Daniel Hickey?

Interp. Yes, my Lord.

Mr. Bernard. Does she know Donog O-Bryen?

Interp. Yes, she does.

Mr. Bernard. Had she this Account from any of those Persons?

Interp. She did not ask them.

Sir John Mead. Whether the Arms Mr. Hurly had, were carried away by these Persons, or left there?

Interp. She says, they took 'em out, and lock'd the Door, and left 'em without the House.

Mr. Soll.

Mr. Sol. Gen. Upon my Word, a Man that had robb'd Thirteen hundred Pounds would hardly have parted with his Arms till he was safe lodg'd. — What became of the Arms? Who had 'em afterwards?

Interp. She saw the Arms in the House again.

Court. Were the Arms abused any way?

Interp. She heard they were stuff'd with Gravel, but she does not know whether it was so or no.

Court. Who did she hear say so?

Interp. She heard the Family say so.

Mr. Bernard. Pray, when did she see that *Calaghan Carty*? How long was it from the Time of the Robbery to the Time he told her this?

Interp. Next Day in the Evening she saw him after the Robbery.

Mr. Bernard. About what Time?

Interp. She does not know certainly what Time of the Day. — It was after Noon, pretty late, after the Cows were milk'd.

Mr. Hurly. She says, the next Day this Man came back. — The Man says, He was at *Corrofin* till Night.

Mr. Sol. Gen. He says, That after the Robbery was committed, he went that Night as far as *Corrofin*; and, that being weary himself, he sent his Father with the Letter to *Mr. Forster's*, and afterwards came back again in the same Evening.

Mr. Sol. Gen. My Lord, we are inform'd that this Woman can give direct Proof, that some of the Goods, and particularly the Linen, came back to the House; and that, being dirty, she wash'd them.

Court. What goods were taken away, does she know, the Night *Mr. Hurly* was robb'd?

Interp. She says, they took Twelve pair of Holland Sheets, and about Three and Thirty Shirts.

Mr. Sol. Gen. I desire to know, Did she afterwards wash any Linen, Sheets or Shirts, and how they were dirty'd with ordinary wearing as by going abroad?

Interp. She says, there was at least four or five pair of Holland Sheets that were soil'd.

Mr. Sol. Gen. Did she wash any Linen?

Interp. She was at the washing of 'em.

Mr. Sol. Gen. Did she observe after what manner they were dirtied, by People lying in them, or otherwise?

Interp. She does not know.

Mr. Butler. Does she know of any Holland Sheets sent to any Gentleman in the Country, from *Mr. Hurly*?

Interp. She knows that some of his Linen was sent to *Mr. O'Brien's*.

Mr. Dean. How came she to stay in the Room after Shots made at her? How came she to be so stout?

Interp. She says, she durst not stir. One had a Pistol in one Hand, and a Sword in the other, and she durst not stir.

Mr. Dean. How long before the Robbery did she see *Calaghan Carty*?

Interp. That Day the Robbery was committed, which was *Sunday*, he dined there.

Mr. Bernard. My Lord, I desire to know whether she did not see *Calaghan Carty* very often after the Time the Robbery was committed, and how often.

VOL. V.

Interp. My Lord, she says, that after the Robbery was committed, *Calaghan Carty* was in the House after his Return from his Errand: He continued in the House until such Time as he was taken.

Mr. Bernard. Pray, who took him?

Interp. One *Haloway*, she says, one *Buck*, and some Dragoons.

Mr. Bernard. Pray, did *Calaghan Carty* tell her any thing of this Robbery during the time he was in Prison?

Interp. She says, he did not.

Mr. Bernard. Whether she did not believe this to be a real Robbery, until he told her after he came out of Prison?

Interp. She did then believe it was a real Robbery.

Mr. Bernard. Does she believe now, in her Conscience, it was a real Robbery?

Interp. She does not.

Mr. Bernard. What is the Cause she does not believe it now?

Interp. She says, that she found it out since to be otherwise.

Mr. Sol. Gen. Ask her again, — What is the Reason that she does not believe it to be a real Robbery, as well now as at the Time it was committed?

Interp. She says, my Lord, the Reason for believing that it was not a real Robbery, is, that she found it out to be otherwise, not only by the Actors, but by the Servants and the Neighbours.

Mr. Sol. Gen. Pray ask her again.

Interp. She believes it was not, for she found it out, and they confess'd it: And a Portmanteau with some Linen that was sent away to *Mr. O'Brien's*, being afterwards come back from *Mr. O'Brien's*, when the Linen was taken out of it, she saw there the Table-Cloth that was taken away by the Robbers that Night.

Mr. Attor. Gen. Pray, was that Table-Cloth used, that night of the Robbery, at *Mr. Hurly's* Table?

Interp. She says it was.

Mr. Sol. Gen. She was ask'd whether or no she believes it was a real Robbery; and she says, it was not a real Robbery; and her Reason was, That in a Portmanteau that came from *Mr. O'Brien's* House, there came back a Table-Cloth that was used and taken away that very Night of the Robbery at *Mr. Hurly's* House.

Court. Ask her, whether she took Notice of any Table-Cloth that was in *Mr. Hurly's* House the Night of the Robbery, that afterwards came back from *Mr. O'Brien's*.

Interp. She says, they had that Table-Cloth in the House that Night of the Robbery.

Court. Was it taken away by the Robbers?

Interp. They did take it away that Night: It was upon the Table in the Parlour, and they took it away.

Court. She says, the Table-Cloth was in the Parlour, on the Table, the same Night the Robbery was committed: Pray ask her, Was it on the same Table where the Arms were?

Interp. It was upon a Side-board, my Lord.

Mr. Bernard. Pray, when did she leave *Mr. Hurly's* Service?

Interp. She says, that she left his Service and continued in his Father's House till about *Christmas*.

Mr. Bernard. Pray, whose Service did she go to afterwards?

Interp. She went to Service to one Mr. Wigan.

Mr. Bernard. Was she at Sir Donogh O'Brien's House after that Time? — Whether she was sent for by Sir Donogh O'Brien — and for what?

Interp. She was there after she left her Service.

Mr. Bernard. How long after she left her Service?

Interp. She believes, within two or three Days after.

Mr. Bernard. Did she go of her self, or was she sent for?

Interp. One Constance Davoir brought her there.

Mr. Bernard. Is he a Servant?

Interp. No.

Mr. Butler. He is a Man that keeps an Ale-house in Corresfin. — Did he tell her Sir Donogh O'Brien sent for her?

Interp. No, he did not.

Mr. Bernard. What Business had she there?

Interp. He did not tell her what Business.

Mr. Bernard. To what End or Purpose did she go there?

Interp. She said, that he was her Friend, and she went along with him.

Mr. Sol. Gen. What did she go thither for?

Interp. To give an Account of what she knew concerning this Robbery.

Mr. Bernard. Mr. Hurly was very severe on Sir Donogh O'Brien. — Did she see Sir Donogh O'Brien?

Interp. She did.

Mr. Bernard. Had he any Discourse with her?

Interp. She said nothing to Sir Donogh, nor Sir Donogh to her — but she was carried before a Justice of Peace.

Mr. Bernard. What Justice of Peace?

Interp. She does not know that.

Mr. Bernard. Whether Sir Donogh O'Brien was there. — Whether she did not hear the Country, and all the Neighbourhood, say, That if they did not make this no Robbery, Sir Donogh would be ruin'd.

Interp. She says, She heard no such Thing, but was desir'd to say nothing but Truth.

Mr. Bernard. Was there any Promise made you of a Portion?

Interp. No, there was not.

Mr. Bernard. Was she tamper'd with by any?

Interp. She says, No.

Mr. Sol. Gen. Don't ask her if she has been tamper'd with, for she does not understand it; but, whether she was offer'd any thing at all for swearing in this Cause.

Interp. She says, No; she was offer'd nothing at all.

Mr. Sol. Gen. Now we will call Walter Neylan, who will give an Account of this Matter out of Mr. Hurly's own Mouth.

[Walter Neylan sworn.]

Court. Give an Account to the Jury what you know in this Matter.

Mr. Sol. Gen. Let him tell if he was in Prison in Ennis Gaol, and on what Account, and what pass'd there between him and Hurly.

Neylan. My Lord, the same Time that Mr. Hurly was committed upon Suspicion of the Robbery, I was in Prison myself.

Court. On what Occasion was you there then?

Neylan. I was bound for Mr. Hurly, and was confined for his Debt. I was in Conversation with him during his Confinement.

Court. Was he confined in the same Gaol?

Neylan. Ay, and in the same Room.

Court. Who was in the Goal with you? Was there one Donogh O'Brien Andrews there?

Neylan. There were four Servants of Mr. Hurly's, Donogh O'Brien Andrews, Daniel Hicky, Calaghan Carty, and, I think, Daniel Carty.

Court. What pass'd between you and Mr. Hurly?

Neylan. My Lord, Three of them discover'd the Robbery, and the other held out for two or three Days. But, as I was coming out of the Room where I was confined, this Man Donogh O'Brien Andrews said to me, Do you know whether my Master is working any thing for my Liberty? No, says I, I do not. Pray, says he, tell him out of Charity, that he take Care for my Releasement, or else I must discover as well as the rest.

Jury. We do not hear him.

Court. He says, he was in Prison at the same Time with Mr. Hurly and four of his Men, at Ennis: That he was conversant with Hurly, being Chamber-fellows: That Three of the Persons that were thus confined confess'd the Robbery; but there was Donogh O'Brien Andrews, he stood out and disown'd it for some Time; and afterwards this Donogh O'Brien Andrews came and said to him, Pray, do you know whether my Master is doing any thing for my Releasement? and he said, No, he did not. Pray tell my Master out of Charity, that if he does not soon work out my Liberty, I must discover, as well as the rest of my Fellow-servants.

Neylan. My Lord, upon this I came to Mr. Hurly, and told him the whole Matter. Says Mr. Hurly, If that Man does own it, I am undone, for he is the Man that knows most of it; and call'd me aside, gave me a Piece of Money, and desir'd me to give it to him, that he might not discover, and to tell him, that he would send for Security, and get him discharg'd, tho it were from the County of Galway. I went down accordingly with the Piece of Money into the Gaol; and because I was unwilling to hold any Discourse with the said Donogh O'Brien Andrews alone, I gave the Piece of Money to Calaghan Carty to give him, and told him what Mr. Hurly said: Says Donogh O'Brien Andrews, This will not do, for I love Liberty better than my Life, and I will discover. At the Time of this Man's saying he would discover, Mr. Hickman, a Justice of Peace, came into the Gaol; whereupon Mr. Hurly desir'd me to speak to Mr. Hickman, and pray him to speak to the Gaoler, that this same Donogh O'Brien Andrews may have more Liberty than he had, and desir'd me to be Security for him, and, that he would give me Counter-Security. I told him, I would not speak to him: Says Mr. Hurly, You ought to do it, if not in point of Friendship, yet in point of Gratitude; for it's thro' your Means I was forc'd to take those Measures.

Court.

Court. Mr. Neylan, Pray, Sir, what did Mr. Hurly say to you when you came to him and told him what *Donogh O-Brien* said to you?

Neylan. He said, that was the first Man to whom he communicated the Contrivance of the Robbery; and, that it was most dangerous if he should discover it.

Mr. Sol. Gen. Who said so?

Neylan. Mr. Hurly said, that this Man was the first Man that he spake to of the Contrivance; and he said, he was the Principal of the four that contriv'd it.

Mr. Sol. Gen. Who did you give this Information to?

Neylan. I gave it to Mr. Butler, and there was present three or four Justices of Peace more.

Court. At the Time he was examin'd before the Justices of the Peace, he did not give the latter Part of the Evidence: I ask'd him why he did not; he says, because he did not recollect himself. The first Part he did not give, concerning the Piece of Money.

Mr. Forster. The Prisoner desires to know after what distance of Time he recollected himself.

Court. After he had given his Examination in to the Justices of Peace.

Neylan. A Month or six Weeks, I think, my Lord, — But I told several People of it before.

Mr. Forster. How came he to send for a Justice of Peace to take his Examination at first, and not to do so afterwards, when the latter Part of it came to his Memory?

Neylan. Because Mr. Hurly was in Goal at the first time, and I thought he might have come to a Trial; but after he was remov'd up here, I despair'd of his coming to a Trial, and so did not think it material.

Mr. Hurly. My Lord, this is a Man that was in Trouble for me, and bound to *Thomas Arthur* on my account: He had a Picque to me, and I to him; he lampoon'd me, and I him. I appeal to the Gentlemen of the Jury, whether I, that had my Wife and Sister with me, whether they don't think I should rather have trusted them with such a Thing. All that he here says is out of Picque and Malice, which the Gentlemen of the Country do know.

Court. Mr. Hurly, you are a Man of Parts, and you know what is us'd to be done in this kind; if you please, you may have Pen, Ink, and Paper to take Notes, and when it comes to your turn, you shall ask what Questions you please.

Mr. Hurly. My Lord, 'tis all Malice.

Neylan. My Lord, I did contrive to make him pay the Debt of two hundred Pounds (for which I was bound for him) but I suffer'd Damage above Threescore Pounds more — I did indeed get an Execution against his Goods.

Court. He says, he was mightily damnified by being bound for you; and that, having Counter Security, he did order Judgment to be enter'd up against you; knowing that you had valuable Goods in the Gaol, he order'd them to be taken.

Mr. Hurly. He says, my Lord, that he was so much damag'd; I'll prove, my Lord, that his Debt was satisfied, and over and over.

Mr. Attor. Gen. My Lord, we will produce a Witness that saw this Rapparee Act perus'd in

Mr. Hurly's House at *Moughna*; and we will shew you what pass'd at reading the Act.

Capt. Charles Mac-Donogh sworn.

Mr. Attor. Gen. My Lord, Captain *Mac Donogh* will give your Lordships and the Jury an Account of the Necessity the Prisoner was under; and, that the Rapparee Act being read on some certain Occasion at a certain Place, what happen'd thereupon.

Court. Pray, Sir, give an Account to the Jury what you know of Mr. Hurly, and his Circumstances.

Capt. Mac-Donogh. My Lord, I was very well acquainted with Mr. Hurly, since the Time he came out of *England*; I receiv'd Letters from him, and I was employ'd by him in negotiating several Affairs in the Country, and particularly against his Brother, that ow'd him some Money. I thought he was very severe against his Brother, and I charg'd him for being so unkind to him: He said, he was in want of Money, and so could not help it. And I was with him when he was reading the late Act of Parliament relating to the Article-men, and he said, he would pass his Adjudication according to the Articles of *Galway*. I said, I thought he was in *France*, and not in *Galway*: Said he, It's no matter, I will prove it. And he came after to *Dublin*, and pass'd his Adjudication. And after he came down again from *Dublin* I was with him; and he brought with him the Act of Parliament commonly call'd *The Rapparee Act*; and he said, That Rapparee Act was a clever Way to recover Money from the Country.

Court. When was this?

Capt. Mac Donogh. The latter end of *Christmas*, before the Robbery.

Court. Pray what Year?

Capt. Mac Donogh. My Lord, it was *Christmas* 1699.

Mr. Butler. Have you any of those Letters of Mr. Hurly, that shews he was in great want of Money?

Capt. Mac Donogh. Yes, I have.

Mr. Recorder. Pray, in what Circumstances was he at *Christmas* 1699?

Capt. Mac Donogh. He was poor and indigent; and he said, He was so great a Friend to his Brother, and lov'd him so well, that he would not have prosecuted him if he had not wanted Money.

Mr. Attor. Gen. Had you any Discourse with Mr. Hurly after the Robbery? Pray, what was it?

Capt. Mac-Donogh. My Lord, *Capt. O-Brien* writ me a Letter after he came to the Place, and was persuaded by him that it was a real Robbery, and desir'd me to come, that we might consult the Matter: And knowing that he had no such Money, I wrote him a Drolling Letter, That I believ'd it was some *Papists* robb'd him; and that he would recover his Money of the County. I came to *Ennis*, and he told me, He had lost all that he had in his House to pay his Debts; which I smil'd at, because I was before in his House when he came from *Dublin*; and I said to him, I hope you have brought Money, for otherwise the Country will be too hot for you now, because Mr. Neylan lies in Gaol for you; and this Sheriff is not your Friend. And he

he did not pretend that he had Money, but, said he, never matter that, for Sir Toby Butler and Colonel John Macnamarra will make my Interest good with the Sheriff. And so the Letter coming after from Capt. O'Brien to me, That Mr. Hurly had lost such a Sum of Money, I laugh'd at it, because I knew that he had no such Sum. And when he told me, at the Assizes at Ennis, how that he was robb'd, he said he would give me Two hundred Guineas if I manag'd the Business for him, to get the Money from the County.

Mr. Attor. Gen. You had several Letters from Mr. Hurly; pray, let us see 'em.

Shews a Letter.

Mr. Recorder. Did you receive this Letter from Mr. Hurly?

Capt. Mac Donogh. Yes, 'tis his Hand-writing. — There has pass'd many Letters between him and I.

Mr. Recorder. Did you ever discourse with him since you receiv'd this Letter about the Subject and Matter of it?

Capt. Mac Donogh. Yes I did.

Court. Did you ever answer it?

Capt. Mac Donogh. Yes, I did.

(The Letter read.)

Thursday August 17, 1699.

Dear Cousin,

JUST now I received the enclosed from our never failing little Agent. What we have hitherto done, is but very insignificant to the main Matter. If this be not duly executed, and without Loss of Time, there is no other Way on Earth to do it, but that we thought of and propos'd; that is, when the Colonel comes in Person, immediately after the Assizes to execute the Surplus of the Fier. Fac. The Gentleman will no doubt on't send to him (as he did before) to know if he has any against his Person; when he sends him Word he has not, he will come to him, and when they are together, you must get some Clever Fellow that will put it into his Hands. Spare no Cost to do this, my Dear Friend, you possess the Matter fully, and I have several convincing Proofs of the Sincerity of your Intentions towards me; therefore will say no more, but refer it wholly and solely to your Self, and desire once more you will spare no Cost to compass it. The great Friend is arrived in Dublin, and he expects our Cousin there Wednesday next. He goes away Saturday Night to Solomon his Brother-in-Law's House, where it would be a vast Comfort for him towards his Journey, and the carrying on the clever Touch, to receive a Box of Pills from you, which will be very much wanting. If not, and that you could get a Bill for't from Pierce Verrony who will be there to meet my Brother John, it shall be highly serviceable; make it payable to our Agent, at Mr. Thomas Hewlett's House in Smithfield, and she will pay it to Mr. Baldwin. Let not our generous Friend's good Nature be prevail'd upon to give any Time or Forbearance; for I do assure you, that and more must be laid out to carry on the clever Touch, which I have the greater Hope will not fail taking the good Effect, since you are so positive in it. I hope you have a Will, do your Business with Sir Theo — and send his Opinion about the Elegit: Our Cousin will write to you from Dublin, directed as you shall appoint in the Answer

to this. I will take leave begging the Favour you will remember me most thankfully to our worthy Friend, whose Services I shall find a Way to return as he deserves. The longer he stays after the Assizes, the worse 'twill be for us. Dispatch me back the Bearer as soon as you can, and pay an Express, if you do not come yourself of Saturday Night to Solomon's; our Cousin will go from thence on Sunday before Day. My Service to Mr. Conner, and know whether he delivered and seconded the Letter to my Lord C. J. Put this Letter and the enclosed into your Fob, lest you should drop it. As you have appeared all along a true Friend for me, my Dear Kinsman, go thro' with it, and assure yourself, your Pains shall not be ill bestowed. The executing this is the clever Touch indeed, and I am sure it will succeed since you undertake it. My most kind Service to my worthy Friend, I hope he hunted well.

Mr. Sol. Gen. Pray give me that Letter — My Lord I shall take leave to read it, and ask some Questions out of it — Sir by the Oath you have taken, pray what does he mean by our never-failing little Agent?

Capt. Mac Donogh. That was his Wife that was here in Dublin — There was a Fieri Facias against the Goods of his Brother John; but that would not do, so he desired his Wife to send an Execution against his Body.

Mr. Sol. Gen. Our great Friend is arrived at Dublin — Who does he mean by that?

Capt. Mac Donogh. Really Sir, by what I understand, it was the Attorney General.

Mr. Sol. Gen. Who was his Cousin here, Solomon?

Capt. Mac Donogh. He is one Donogh O-Dea married to his Sister, whom he thought an insignificant Man; and therefore he called him Solomon by way of Ridicule.

Mr. Sol. Gen. What was the clever Touch, and the Box of Pills?

Capt. Mac Donogh. The clever Touch was the Adjudication, and the Box of Pills was the Money to be sent to Dublin to pass the Adjudication.

Mr. Butler. Have you any other Letters?

Capt. Mac Donogh. Yes, I have.

Moughna, October the 5th, 1699.

I Have Advice from a very sure Hand, Dear Sir, that I am lik'd to be blocked up very soon, or rather regularly besieged by the formidable Capt. Thomas Bourk, and a select Party he brags to have hired of the Enniskillin Dragoons for that purpose. He received fifty Pounds Sterling for that generous Undertaking, and entred into Bonds of two Hundred Pounds Penalty, to have me in Salv. Custod. before the first Day of next Term. And as I am resolved to keep my Ground, and maintain this Post to the last Extremity, I have detached Corporal Malone, for Ammunition to put myself in a Condition to receive the Thrice worthy Captain; for this is no time of Day for me, (post varios Casus) to give my Head for the Washing. The Corporal is but very lately arrived into my Service, and consequently has but young Skill in Powder and Ball. Therefore must entreat you to choose and send me a Pound of the best Powder, and three dozen of Carbine Musket and Pistol Ball.

Poor Tom is very much in the right on't to revenge his Quarrel with a Party, since his Courage never inspired

spired him to do it single Hand. And his select Party (as he calls them) are resolved to follow the Col. General of the French Dragoons (Mareschal de Boufflers) Maxim. For he was of Opinion, no Man was fit for a Dragoon, that in Time of War out-liv'd two Campaigns, or in Peace did not once at least in every fifteen Days, seek Adventures for a broken Head. Pray dispatch me back the Corporal; and tho the Enemies Lines of Circumvallation should be perfect; nay, their very Batteries be rais'd and fix'd, if you let me know the Day precisely that you intend to call this Way, I will make a Sortie to facilitate your Entrance. I have not one Word from our Friend since I saw you. If your Leisure will permit it, pray let me know what Progress you have made in the last Affair that was communicated and recommended to you by, Dear Sir,

*Your affectionate Kinsman,
and very humble Servant,*

*For Capt. Charles Mac-
Donogh, at Ennis.*

Patrick Hurly.

Mr. Soll. Gen. You see that the Gentleman was very apprehensive of Debt, and guarding himself against it at this Time.

Mr. Attor. Gen. I desire to know in this first Letter, who it was that was his good Friend?

Capt. Mac Donogh. He told me, Sir, he look'd upon you to be his great Friend?

Court. Had you any Communication or Discourse with *Mr. Hurly* about this Robbery? Did he confess it?

Capt. Mac Donogh. I did not put it to him, but I told him he would be indicted of Perjury, and lose his Ears. He said twenty Pounds would save them.

Mr. Hurly. He said, I must not stay in the Country, if I did not pay *Mr. Arthur*. I desire to know, Whether I did not tell him I was to meet *Mr. Arthur*?

Capt. Mac Donogh. You told me you would make an end with *Mr. Arthur*: And you said at the same Time, that you had *Sir Toby Butler* and *Mr. Macnamarra* to make the Sheriff your Friend. And that did imply to me that you had no Money.

Mr. Hurly. I came to *Dublin* in *August*, and they arrested me. I went to perfect Bonds to *Mr. Arthur* for the Debt, which was 723 Pounds. He exacted upon me, and I was forced to consent to give him a Bond for the whole Demand. I sent for *Sir Toby Butler*, and we made up the Account: And *Mr. Arthur* made it up near 1000 Pounds, for which I gave him my Bond. *Mr. Butler* told me you will be reliev'd, by preferring a Bill in *Chancery* against *Arthur*. I did not serve him with a *Subpœna*, but he absconded, and so I got no Remedy to this Day. And the Reason why I paid him not, was to make him come to Terms, that I might retrench the extravagant Charge.

Court. Did he give that as a Cause why he would not pay *Arthur*, because he had exacted upon him?

Capt. Mac Donogh. He did not tell me so.

Court. Was this the reason as you apprehended, why *Mr. Hurly* absconded; that he was on his keeping for fear of *Arthur*?

Capt. Mac Donogh. For ought I know, it was for fear of others as well as *Mr. Arthur*. I remember the Night he came home from *Dublin*; some few Days before the Robbery, that he was barricading his Door, and telling me of making the Sheriff his Friend; whereby I concluded that he could not have that Money, that he afterwards pretended he had lost.

Court. How came you, *Mr. Hurly*, to barricade that House, when *Mr. Arthur* had promised not to disturb you at the Assizes of *Ennis*? He swears the very Night you came from *Dublin*, you were barricading that House.

Mr. Attor. Gen. I desire to know, whether he believes that he had Money in his House the Night he was robbed?

Capt. Mac Donogh. He did tell me so, but I did not believe him.

Court. Do you know any thing of those Counters?

Capt. Mac Donogh. My Lord, about *February* last, the Wife of *Daniel Hickey*, who was suspected to be in the Robbery, came to me and said that her Husband was like to be undone for passing some Counters. That if he could get his Liberty, he would go to *Dublin*, and swear the Cheat of the Robbery; and, says she, we have some of the Counters, that they said was Gold, in our keeping, and we will produce them.

Court. Did you see any of those Counters at any Time.

Capt. Mac-Donogh. Yes, I did, when the Constable took them out of *Hickey's* House.

Mr. Soll. Gen. It seems that *Daniel Hickey's* Wife told him, that she could produce the Counters. We shall shew you that there was Search for them accordingly. To whom did you make a Discovery of this of *Hickey's* Wife?

Capt. Mac Donogh. I told it to *Mr. Butler*, who is a Justice of the Peace in the County of *Clare*; and to *Capt. Bindon*. The Woman was taken and indicted for passing these Counters.

Mr. Forster. How came she to be discharged after she was taken?

Capt. Mac Donogh. She was bail'd at the Quarter-Sessions.

Mr. Soll. Gen. My Lord, we shall shew you where the Counters were found, and who found them.

Mr. Bernard. And we shew, that the Man that found them hid them.

The High Constable, *Walter Huonin*, sworn.

Court. Had you any Warrant, and from whom, to search for Counters or Counterfeit Money?

Huonin. Yes, my Lord, I had a Warrant from *Dean Blood*, to search for Goods that were pretended to be robb'd from *Patrick Hurly*. I came to the Town of *Moughna*, and brought with me five Men and a petty Constable; and I went to the House of *John Hurly*, *Patrick Hurly's* Father, who was Bed-ridden, and removed him out of his Bed. And I went to *Carty's* House, and dug there and found none; and I came to *Daniel Hickey's* and digged about; and there was a Bed of Dung by the side of the House, where they fodder their Cattle, and it was a Foot above the Floor of the House; and after searching the rest of the House, I ordered the Dung to be removed

moved out of the Place, and I bid the Fellows come and dig there, and they did; *Hicky's* Wife held the Candle herself; and one of the Men that was next the Wall hit a Stone in the Ground, and it was a Slate over a hole in the Floor, and the next of them threw it out, and along with it a Suggane and a Purse; and when I saw the Purse, I would not let him handle it. I opened it, and found it full of yellow Counters, and took an handful of them out, and called the People of the Town, and reckon'd them all before their Faces.

Court. What did you find in the Purse?

Huonin. My Lord, nothing but Counters.

Court. Have you them?

Huonin. Yes, I have all that was found—I came to the Assizes at *Emmis*, and my Lord Chief Justice *Haly* ordered me to keep them till I should appear at the Trial.

[*Shews the Suggane and Purse with the Counters, which was opened and were 121 in Number.*]

The reason why I was so careful to search there, was because *Hicky's* Wife was pressing for my not touching the Dung; and after they were found, when she saw the Counters, she dropt the Candle and went away. Says I, good Woman, you must go along with me. I brought the Woman to *Emmis*; and I was brought before my Lord Chief Justice, who desired me to keep the Counters against the Trial.

Mr. Hurly. Whether it be likely that this Woman that was Indicted for these Counters, would not have removed them, and thrown them into a by-hole; and if they were in the Ground, whether the Purse would not be rotten.

Court. He says, when it was taken up, the Suggane that was about it was mouldy and wet, it does appear now that it was so, for the Purse itself is damnified.

Mr. Soll. Gen. Pray what is the Name of the Village where the House stands?

Huonin. It is *Moughna*, where the Father of *Mr. Hurly* lives.

Mr. Bernard. How long after the Robbery was this found?

Huonin. It was a whole twelve Month.

Mr. Bernard. Was you directed to search that Dunghil before you went to the House?

Huonin. No, I was not; only a Fellow told me that he suspected that Place.

Mr. Recorder. Was it in the first Place or in the last Place you search'd, that you found these Counters?

Huonin. It was in the last Place.

Mr. Recorder. How near is this *Hicky's* House to *Mr. Hurly's*?

Huonin. About a quarter of a Mile, or less.

[*Alderman Walton Sworn.*]

Mr. Forster. Sir, *Mr. Hurly* calls you, to know what Money you paid him?

Ald. Walton. My Lord, I came over with *Mr. Hurly* in *October*, 1697. And some time after he was here, he came to me and told me, he had some Money to receive, and ask'd me if I would receive it for him. I told him it was *Mr. Burton's* business; but he said he was a Stranger to him, and so I let my Servant receive 400 Pounds from

Mr. Arthur, and 100 Pounds from *Mr. Fitz-Symons*.

Mr. Bernard. I desire *Ald. Walton* to tell when they came over in the War time, whether he saw any Jewels with *Mr. Hurly*.

Ald. Walton. We did see a Ship that we thought was a Privateer, but it prov'd a Friend. He then told me, he had some things of great Value, which he was going to secure, but I did not see them.

Sir John Mead. How long was the Money in your Hands?

Ald. Walton. It was all drawn out in three or four Months time.

Mr. Attor. Gen. Pray was it all drawn out of your Hands before 99?

Ald. Walton. Yes, yes.

Mr. Soll. Gen. The next thing that was drawn out was Writs and Proviso's, to force *Mr. Hurly* to pay back the Money to *Mr. Fisher*. My Lord, we will call two that were by when these Counters were found by the Constable.

[*Thomas Edwards Sworn.*]

Court. Do you know of any search made in any body's House concerning Gold or Money?

Edwards. My Lord, I was commanded by the High Constable *Walton Huonin*, to the House of *Daniel Hicky*; and when I came, I found a Youth on his Knees making up the Dung. I asked him what he was doing there; the Woman said, he was endeavouring to hide some Potatoes. I told her, there was no body would take them away. Now, my Lord, there was no Potatoes there; but we found the Counters under the Dung, about eight Inches deep in the Ground; they were in a Leather Wallet, whip'd about with a Thumb-Rope of Hay.

Court. How did the Woman behave her-self?

Edwards. When the High Constable told her you must go along with me, she said, now these are found, I believe I must.

Mr. Forster. Did you see the Counters when they were taken?

Edwards. Yes, I did.

Mr. Forster. Did they look fresh?

Edwards. Yes, they did.

Mr. Soll. Gen. My Lord, before we go any further, the Gentlemen that are Counsel for the Traverser, would fain insinuate, that the Counters were laid there, — that *They that hide can find*. Now therefore, to shew that to be impossible, we shall prove to you, that this Woman, the Wife of *Daniel Hicky*, did offer some of these Counters for a Cow, before this Discovery.

[*Mortogh Mac-Colloghy Sworn.*]
(*Per Interpreter*)

Mr. Attor. Gen. Does he know one *Daniel Hicky*?

Interp. He does.

Mr. Attor. Gen. Does he know his Wife?

Interp. Yes.

Mr. Attor. Gen. Had he any Dealing with any of them?

Interp. He says, he had a Cow, and it was stray'd, and he found her, and was hurrying her home by *Hicky's* House; — he rested there, being weary, and was taking a Pipe of Tobacco, and

and they ask'd him if he would sell the Cow ; he said, he would : And she went into a Back-room and brought two yellow Pieces,——he says, he has the two Pieces here to shew.

[*Produces the Pieces, being two yellow Counters, the same with those that Huonin produced in the Purse.*]

Court. Are those the Pieces *Hicky's* Wife offer'd him for this Cow ?

Interp. He says, they are. When he was receiving the two Pieces the Woman gave him, he ask'd her what they were ; she said, Two Guineas : He said, he believ'd they were some of *Patrick Hurly's* Gold.

Court. Why did he say so ?

Interp. Because he imagin'd he had some Gold Counters.

Court. Did he sell his Cow for the Money then ?

Interp. No.

Court. How came he to keep the Money then ?

Interp. He told her, he did not like the Coin, and he would not sell his Cow for them, because they were some of *Patrick Hurly's* Gold ; and he said, What will you take for 'em ? I have Three-pence Half-penny, and some Tobacco, and if you will take them, I'll give 'em you for the Pieces : Yes, said she, I will ; and I wish I had so much for every one I have.

Court. He says, he was after this examin'd by a Justice of Peace concerning these Things : How came he to be examin'd ?

Interp. He went himself and shew'd 'em to *Mr. Bindon*.

Court. Did he go of himself ? or, was he sent ?

Interp. He says, he told *Sir Donogh O'Brien* what had happen'd, and he directed him to go to the Justice.

Court. Pray, how long was it after he had these Counters ?

Interp. He says, Nine or Ten Days.

Court. Did he go to *Sir Donogh* of his own accord ? or, Did any one bid him go ?

Interp. He went freely of himself.

Court. When was it that he receiv'd those Counters he speaks of ?

Interp. About *Christmas* last.

Court. When was it he bought the Cow ?

Interp. He says, he bought her at *Clare Fair*, about *Allholland-tide* before.

Court. What Time was it that the Woman would have bought it of him ?

Interp. It was a good while after.

Court. Was it before or after *Christmas* he was selling the Cow to this Woman ?

Interp. After *Christmas*, my Lord.

Court. How long after ?

Interp. He does not exactly remember the Time.

Court. Now, pray Gentlemen, we must do Right to every body. —— When he comes to receive the Counters, he said, it was about *Christmas* ; ——and when he comes to tell you when he bought the Cow, it was all at the same Time.

Mr. Soll. Gen. No, no ; the Matter of the Counters was at the Time when she cheapen'd

the Cow ; but he bought the Cow at *All-Saints* before, and he was about selling her at *Christmas*.

Mr. Recorder. About nine Days after he was in possession of the Gold, he came to *Sir Donogh O'Brien*, of his own accord, and he bid him go to a Justice of Peace.

Mr. Bernard. Pray, why did he not go to *Sir Donogh O'Brien* sooner ? —— And, what made him go then ?

Interp. He waited for the Quarter-Sessions.

Mr. Bernard. Who is the nearest Justice of Peace living next to his House ?

Interp. *Mr. Bindon*.

Court. How came he not to go before *Mr. Bindon* immediately when he got the Counters ?

Interp. He says, he waited for the Quarter-Sessions.

Court. Pray, how came he not to go immediately to *Mr. Bindon*, being the next Justice of Peace, rather than to *Sir Donogh O'Brien* ?

Interp. He expected all the Justices would be together at the Quarter-Sessions.

Mr. Forster. *Mr. Hurly* desires to ask that Man some Questions. —— How came the Cow to go out of the Barony after he had bought her ? How came the Cow there ?

Interp. The Man that sold him the Cow in *Clare Fair* liv'd there, and she stray'd back again.

Mr. Hurly. How came the Cow to go astray ?

Mr. Soll. Gen. We cannot tell you, you may examine the Cow, the Cow knows best.

Mr. Attor. Gen. We will now shew, that when *Hurly* came from *Dublin* he lodg'd at *Capt. John Lynch's* House, and he pull'd out of his Portmanteau a large Bag, that look'd as if it were full of Gold ; and *Capt. Lynch* handling of it, and finding it light, he open'd it, and found it to be Counters. This *Capt. Lynch* is Landlord of *Moughna*, and they were intimate together.

[*Capt. Lynch sworn.*]

Mr. Attor. Gen. Pray, do you know *Mr. Patrick Hurly*, now at the Bar ?

Capt. Lynch. I have known him these Thirty Years.

Court. Have you intimate acquaintance with him ?

Capt. Lynch. He cannot deny but I have.

Mr. Attor. Gen. Pray give an Account of his coming to your House.

Capt. Lynch. I met *Mr. Hurly* at *Loughrea*, at one *Harry Barger's* House, in the Year 1699, either a little before or after *Christmas*.

Court. Where was he going ?

Capt. Lynch. He was going to the County of *Clare*, from *Dublin* ; and as we were drinking a Bottle of Wine,——he went to a Portmanteau that lay on a Table, and taking out Linen, he pull'd out a Bag that held about a Quart ; said I, *Mr. Hurly*, you are well stock'd with Money coming from *Dublin*. —— And I clapp'd my Hand into the Bag, took out an handful, and they were Counters, my Lord, of several sizes, like single and double *Louis d'Ors*.

Mr. Soll. Gen. Shew him some of the Counters.

[*He looks on them.*]

Capt. Lynch. This is like them.

Hurly. When was it?

Capt. Lynch. It was a little before *Christmas*, or soon after. — I wonder, *Mr. Hurly*, that you should deny it.

Mr. Sol. Gen. Upon the Oath you have taken, had you any Discourse at this meeting about any Acts of Parliament?

Capt. Lynch. I'll tell you, my Lord: He ask'd how *Mr. Banks's* Money went. *Mr. Banks* was one that was robb'd of the Value of Two hundred and fifty Pounds, and the Grand Jury, at the Assizes, allow'd him the Money when he petition'd for it. A while after, in our Journey, says he, Cousin, I have a great deal of Confidence in you, and if you'll assist me to get Money — I told him, in any just Way I would, but not otherwise.

Mr. Attor. Gen. Had you any Discourse about the Rapparee Act?

Capt. Lynch. He told me plainly, that if I would but assist him, — and then brought down the Statute, and ask'd me again how *Mr. Banks's* Money went in our County: I told him, he recover'd his Money from the County. Says he, Cousin, I really want Money, and if you'll assist me in such a Matter, and come to me, I will deliver you your Lease. I told him, I would assist him in any just Way, but no further.

Mr. Recorder. You said just now, that he spoke of the Act.

Capt. Lynch. He told me, That the Act was a very good Way for a Man to get Money that wanted it.

Mr. Attor. Gen. Are you a Relation to *Mr. Hurly*?

Capt. Lynch. I have a Friendship for him, and if I had known I was to be summon'd, I would not have been within forty Miles of this Place this Day.

Court. Pray, what Relation are you to him?

Capt. Lynch. His Brother was married to my Sister, and he and his Father were Tenants to me and my Father these forty Years.

Court. Had you any Linen sent to your House? And by whom?

Capt. Lynch. My Lord, I cannot tell was it Linen or no, but there came a Trunk, and I had a Letter beforehand (it was in *April* or *May* 1700) informing me, that the Trunk would be with me that Night, and desiring me that I would not let the Men that brought it see it afterwards.

Court. Did the Trunk come?

Capt. Lynch. Yes.

Court. Was it weighty?

Capt. Lynch. It was as much as any Two could carry. — The Servants told me, they were coming all Night, that they did not sleep.

Court. How far is your House from *Mr. Hurly's*?

Capt. Lynch. Seventeen Miles.

Court. Had you any Discourse with him in the Gaol of *Ennis*?

Capt. Lynch. Yes; I went to see him at the Gaol of *Ennis*, and *Mr. Butler* met me: I told him, I was going to see *Hurly*. And as we were taking a Bottle of Wine together, I said, Cousin, it is not fit for any Gentlemen to visit you, for the Pranks you play'd in *France*, and now this Robbery. — He said, Sir *Donogh O'Brien* was the greatest Enemy he had against him, —

but he would lose his Blood, or he should lose his.

Court. Did the Servants that brought the Trunk tell you what was in the Trunk?

Capt. Lynch. They told me, that it was really full of Linen. — And *Ulick Bourk* came, and expected *Mrs. Hurly* that Night. — My Wife was like to die. — The Servants that brought me the Trunk brought me a private Token, not to let any Body have it, — not *Capt. Bourk* himself. — But I suspected there was no good in it, and I let them take it away; so the Trunk was taken away from my House that Night, and brought to a Neighbour's about a Mile off.

Mr. Sol. Gen. What Relation is *Ulick Bourk* to *Mr. Hurly*?

Capt. Lynch. They are married to two Sisters.

Mr. Bernard. My Lord, this Gentleman hath sworn very materially, and I desire he may fix a Time, and tell us within a Fortnight: Was it before or after *Christmas*?

Capt. Lynch. I am not positive, but it was in the Year 1699.

Mr. Attor. Gen. What House was it at *Loughrea*?

Capt. Lynch. It was at *Harry Barger's* House.

Mr. Hurly. What Time was it?

Capt. Lynch. I cannot be positive to Time, but it was before the Robbery.

Court. Pray recollect, as near as you can, what Time it was you were together at *Loughrea*.

Capt. Lynch. I can't be positive.

Mr. Bernard. Was it in the Time of *Lent*, or not? It is strange!

Capt. Lynch. If I did know to a Day, I would tell it.

Mr. Recorder. You say, it is strange; he says, that *Mr. Hurly's* Denial to him is more strange: He is particular as to the Time of the Trunk, and yet he can't be so as to the other Time.

Court. *Mr. Hurly*, you shall make the best Use of it you can; when the Man tells you on his Oath, that he cannot tell; and we can't make a Man swear more than he can swear: He says, it was in 99, and before the Robbery. Was it in Winter, or Summer?

Capt. Lynch. In the Winter, as I do really remember it.

Mr. Hurly. My Lord, I humbly offer this: This Gentleman says, he met me at *Harry Barger's* House in *Loughrea*; and, that I open'd my Portmanteau for him to take out a Bag.

Court. No, he says you open'd that Portmanteau to take out some Linen, and you took out a Bag, and you look'd into it.

Mr. Hurly. Was this half a Year before the Robbery?

Capt. Lynch. I do not know.

Mr. Hurly. My Lord, I will prove I was not there, at *Loughrea*, the last time I went home. And, my Lord, my Father held some Land from him: There came some Difference, and he told his Brother, that if I did not give up the Land, he would give me a Lift.

Mr. Bernard. Was there any one in the Room then with you?

Capt. Lynch. No body but *Mr. Hurly* and I.

Mr. Hurly. Pray, Sir, what sort of Portmanteau was it?

Capt. Lynch. It was a Cloth Waller, blue and red.

Mr. Attor.

Mr. *Attor. Gen.* The next Evidence we produce is, one *Charles Cassidy*; he was thought a fit Man for the Service, and was solicited to be Commander in chief of this Robbery.

[*Charles Cassidy sworn.*]

Court. Give an Account what you know of any Robbery of Mr. *Hurly*.

Cassidy. My Lord, I was a Practitioner in Surgery; and Mr. *Hurly's* Father fell sick, and I was sent for to attend him three Weeks or a Month; and then one Dr. *Brady*, a Relation of Mr. *Hurly's*, was sent for. And as we were going up to see other Patients, the said Dr. *Brady* and I, says the Doctor, If you will take upon you a Business, you shall have Twenty Guineas. What is it to do, says I? It is to head a Party, says he, to rob *Hurly*, and then he will raise Money on the County. And after this, when he came back, the Doctor told him what he had offer'd me. *Hurly* said, I will give him Forty Guineas; and said, he would get People himself: And he said, I have four Persons that I will trust with you, &c. but I went away, and never came near him since.

Court. When was this?

Cassidy. It was thirteen or fourteen Months before he was robb'd. — I serv'd in the House from before *Christmas* to *Easter*.

Court. Mr. *Hurly*, he swears thus; That he was employ'd to attend your Father, that was sick at that time; and, that after some Attendance you took Occasion to send for Dr. *Brady*, a Relation of yours: And going with the Doctor abroad to visit other Patients, he told him, You get little Fees from Mr. *Hurly*, but, says he, if you will head a Party for a pretended Robbery on Mr. *Hurly*, he will get Money of the County, and you shall have Twenty Guineas. He said, he did not care to meddle with it, for his Relations would suffer by it; but he said, It would be but little that every one would pay: Then, said he, I don't care if I do. And when he came home, the Doctor told before your Face what he had done: You said, What! give him Twenty Guineas! I'll give him Forty Guineas. And after, when he went home, he thought not fit to do it; for he told you, his Face was very remarkable and known in the County, and that he should be discover'd. Oh! Sir, said you, I'll help you to another Face. You told him, he should have one *Donogh O'Brien*, *Daniel Hicky*, and *Calaghan Carty* to assist him.

Mr. *Soll. Gen.* Has not *Donogh O'Brien* another Name?

Cassidy. I know, my Lord, it is *Donogh O'Brien Andrews's* Son.

Court. You have been acquainted since *Christmas* was two Years, When was it that this was said to you by Dr. *Brady*?

Cassidy. It was the *February* after.

Mr. *Robbins.* How long after this Discourse of Dr. *Brady* and Mr. *Hurly* did you speak of it?

Cassidy. My Lord, I did not speak of it, and the Night it was to be transacted I ran away from my own House, for fear of being suspected.

Mr. *Robbins.* Did you go before a Justice of Peace voluntarily? or, Were you call'd to give that Examination?

VOL. V.

Cassidy. I kept it to myself till last *Sunday*; being at Church, and after dining at Mr. *Hickman's*, they were talking of *Hurly's* Business. I said, There is a Man in this Country that can do Mr. *Hurly* more Mischief, in relation to this Robbery, than any other. Who is that? said he. I, being afraid to bring myself into Trouble, said no more. Says the Minister, You ought to be punish'd if you don't do your best for to save your Country from Ruin. And, upon this, after I came home I recollected myself, and I went to a Justice of Peace and swore it; and after I had given my Testimony, he bound me over to prosecute.

Mr. *Soll. Gen.* He has done like an honest Man.

Mr. *Forster.* How came you to conceal it for Two Years past? Did you ever tell it to any Man before?

Cassidy. But to one young Man, that I thought would join with me.

Court. What young Man is that?

Cassidy. 'Tis one *Conner*. When I was at Mr. *Hurly's* House, I often play'd a Game at Tables with him: When he had not then Money to send for a Bottle of Wine, he got me to send my Note for twelve Bottles of Wine at *Ennis*.

Mr. *Attor. Gen.* The Persons concern'd in the Robbery had Vizards: We shall shew you, that when Mr. *Hurly* was in *Dublin* last, what Shop he was at, and what sort of Commodities he bought. There was a Masque to be acted.

[*Daniel Kiefe sworn.*]

Mr. *Attor. Gen.* Pray, where do you live?

Kiefe. In Town my Lord, with Counsellor *Turner*.

Mr. *Attor. Gen.* If your Lordships please to ask him, Whether he knows Mr. *Hurly*?

Kiefe. I knew Mr. *Hurly* these many Years.

Mr. *Attor. Gen.* Pray give an Account what you observed when Mr. *Hurly* was going into the County; what Shops you met him in, and what Commodities he was buying.

Kiefe. In *February* 1699, he came into Mr. *Bently's* Shop, and asked for Masques to wear at a Masquerade: He told him he sold none, but there were some in *Christ's* Church-Yard; and he went in at the Gate towards the Yard, and when he was gone, I said, Mr. *Bently*, I wonder what he designs to do with them, I fear 'tis for no good Design.

Mr. *Attor. Gen.* Pray where did he go when Mr. *Bently* told him they were to be had in *Christ's* Church-Yard?

Kiefe. He went straight into the Yard.

Mr. *Attor. Gen.* What Time was it?

Kiefe. It was in *February* 99, the latter end of the Term.

Joseph Bently Sworn.

Mr. *Attor. Gen.* Pray my Lord, that Mr. *Bently* may give an Account whether he knows *Hurly*.

Bently. Yes my Lord, I do — And I remember he came into our Shop to ask for Masquering Masques or Vizards — And I think it was about *January* or *February* — I told him we had

none. Pray, says he, can you tell me where I can get any?—I said I cannot tell, unless you get them in the Yard: And he went thro' the Shop into the Yard.

Mr. Att. Gen. When was this?

Bently. It was January or February, 99.

Mr. Forster. Did you ever see him before that Time?

Bently. Yes, several Times—— He bought several Things in our Shop.

Mr. Forster. But no Masques?

Bently. No, but asked for Masquerading Masques or Vizards.

Mr. Att. Gen. My Lord, the Reason why we have been the more particular in this, is, that it has made a great Rumour and Noise, that it would be of great Disadvantage to Mr. Hurly, and therefore we go to these Particulars, that no Man may pretend but the Matter is made plain against him. We shall produce some few Evidences more.

Mr. Recorder. Hurly has lately published a Libel against the Gentlemen of the County.

Mr. Geary sworn.

Mr. Butler. Had you any Discourse with Mr. Hurly? And what?

Mr. Att. Gen. Pray give the Court and Jury an Account, Whether you know Mr. Hurly, and his Circumstances, and any great quantity of Money that he had?

Mr. Geary. Mr. Hurly, in February last was Twelve-month, told me his Protection was out; and he desired me to get a Lodging for him: I desired him to come to my own Lodging in Capel-street. When he went out of Town I went with him as far as Island-Bridge; he said, he had no Money: And a Day or two after he writ me a Letter, and desired me to raise his Wife some Money on a Bond of Capt. Mac-Donnel's: I sent to Mr. Conner, and got him to endorse a Bill to Mr. Lum, and the Money was supplied: And after he came to Town again, I went to his Lodging to Mr. Rasgow's in Capel-street; there were two Soldiers that would not let me in; I spoke to the Sheriff, Mr. Cusack, so I went in to him, and told him, I was sorry for him. He said it was for prosecuting Sir Donagh O'Brien. Says he, you know Sir Richard Nagle's Hand and Sir Donagh O'Brien's; there are Letters to King James; and, said he, you and I must live, and we may get Money by it.

Mr. Sol. Gen. Now, my Lord, we call this Gentleman to shew, that at the Time of his sending this Money, Mr. Hurly was in an indigent Condition. When was it?

Mr. Geary. It was in Michaelmas Term, 1699.

Mr. Hurly. By Virtue of your Oath, have you no Gratification for coming here?

Mr. Geary. No, by Virtue of my Oath, I have not.

Thomas Connor sworn.

Mr. Sol. Gen. What do you know of Mr. Hurly, about Money?

Tho. Connor. That Gentleman, Mr. Geary, came to me, and told me, it would be an Obligation on him to get twenty Pounds for Mr. Hurly's Lady; upon that I drew a Bill of Ex-

change, so they had the Money; but what they did with it, I do not know.

Mr. Hurly. Was not the Money paid again?

Connor. Yes, it was paid.

Mr. Hurly. Then did I want Money, when you drew the Bill, and the Money was paid?

Mr. Att. Gen. My Lord, Mr. Hurly was not able to pay this Bill, and we shall give you an account who paid it.

Capt. Mac-Donnel sworn.

Mr. Butler. You heard the Evidence of Mr. Geary?

Capt. Mac Donnel. Yes.

Mr. Butler. What do you know of the Matter?

Capt. Mac Donnel. I did owe some Money by Bond to Mr. Hurly, and he writ to me to pay thirty Pounds: I don't know what the Sum was, that Mr. Geary had advanced; but I writ him Word, I would not pay him any such Sum, but I bid him send my Bond to Capt. Gardiner's in Limerick, and the Money should be paid there; and it was sent accordingly, and the Money was paid: It was something less than 50 l.

Mr. Att. Gen. Pray, when this Robbery was talked of, did any body apply to you to take you off that you should not oppose the Presentment, but suffer it to go on.

Capt. Mac Donnel. Mr. Hurly spoke to me to be his Friend. I was always his Friend: And Capt. Bourke spoke to me to speak to a Gentleman of the Grand-Jury, that lay with me, (that was much against him) to desire him, that he would not appear against him; and that he and his Tenants should be freed from paying any Part of the Money.

Mr. Bernard. My Lord, I am Counsel for the Traverser: The Question is, Whether he be Guilty of Perjury in an Information, sworn before Mr. Blood.—If your Lordships will hear the Proofs, we shall turn the Table; and prove Mr. Hurly was a Man that came with a good Fund of Money into this Kingdom, and left a good Fund in France, and that he drew Bills of Exchange upon his Correspondent in France; that his Correspondent gave him an Account, that Mr. Arthur discovered where all his Effects lay, and all was seized; and the Bills came back protested. Then he comes and advises with Sir William Hardcock, who advised to an Accommodation with Mr. Arthur: And so we did, and agreed to give him what he demanded, and accordingly we gave him Bonds. And in 1699, we brought a Bill in Chancery. We met Mr. Arthur's Brother in Dublin, he said we should not be disturbed at the Assizes at Ennis: We went down accordingly, and carried our Money along with us, and we did go another Way, and not by Loughrea. And we shall shew your Lordships further, that there was a Quarrel between Mr. Hurly and Sir Donagh O'Brien: Sir Donagh had such great Interest in the Country, prevailed with the Jury for some Reasons, that the Presentment was not found for us at the Assizes; but four Men were taken up for the Robbery, and laid in Irons, and they were told there was a Commission of Oyer and Terminer coming down, and that they should be Arraigned——here is Life or Death proposed, if you confess the Mat-

ter, and place it upon *Hurly*, you shall have your Lives, but if you do not, as soon as the Commission comes down you shall stretch for it. The Persons were sensible that those who threatened them could effect it; and they were kept close from all others but these Persons, and they solicited them until they got them to give these Examinations against Mr. *Hurly*. But they sent afterwards to Mr. *Hurly* and told him, it was the Threats and Dangers they were in, made them do what they had done, and that they were troubled for it. And after that, they went before my Lord Chief-Justice *Pyne*, and they swore all. After this the Contrivance of the Counters that must be managed, and a Bag of Counters is brought down to *Hicky's* Wife, and she must hide it where it may be found by this *Huonin*. My Lord, we shall shew your Lordship all these Matters. I apprehend they are Men of Credit that will swear the Matters in my Brief, that Mr. *Hurly* was really and truly Robb'd, and that these Prosecutions have been carried on by Bribery, and such like Practices in the Country.

Mr. *Forster*. We'll shew you that Mr. *Hurly* had 2000 *l.* and that he carried a Part of it into the Country to pay off *Arthur*. We shall shew where we had the Money, and that he brought it down.

(Charles Fitz-Symmons, Merchant, called, did not appear.)

John Hurly sworn.

Mr. *Forster*. Pray give an Account to the Court and the Jury, whether you were employ'd to receive Money for Mr. *Hurly*, and of whom?

John Hurly. I was employed in 1696, and I received of Mr. *Jeremiah Donovan*, 200 *l.* and Col. *Lovet* paid me 490 *l.* for 500 *Lewis d'Ors*.

Court. In what Year did you receive it from Col. *Lovet*?

John Hurly. It was in 96 or 97.

Mr. *Forster*. And how much more?

John Hurly. From Mr. *Fitz-Symmons*, 306 *l.* 10 *s.* in 1697.— And I received a Bill in *Limerick*, of 200 *l.*

Mr. *Forster*. What did he bid you do with the Money?

John Hurly. He sent me this Money out of *Holland*, and bid me secure it for him.

Mr. *Forster*. Did your Brother lay out any Money for a Mortgage.

John Hurly. Not any at all.

Mr. *Hurly*. I appeal to the Gentlemen of the Country, whether I did purchase any Thing.

Mr. *Recorder*. You are not accused for a Purchaser, Sir.

Court. Did you pay him that Money again?

John Hurly. Yes, my Lord.

Court. Was it before he was robb'd?

John Hurly. Yes it was.

Court. Pray what Discourse had your Brother with you concerning any Money he had by him?

John Hurly. He told me all along that he could pay *Arthur*, and that he had a Fund to pay it. And I tell you, Sir, before this Robbery, I came to his House, and his Wife told me, my Brother will do very well, for that he has brought

Money to pay off *Arthur*.— How do you know that, said I?— Says she, I saw a Bag of Gold with him.

Court. Were you there after the Robbery?

John Hurly. I came next Morning, and I found the Trunks broken open, and all the House in Disorder.

Mr. *Forster*. Do you know Capt. *Lynch*?

John Hurly. Yes.

Court. Do you take this *Lynch* to be a fair honest Man?

John Hurly. I well tell you what I know. About *Christmas* last, I came to the County of *Galloway* to Mr. *Lynch*.— There were some Land that my Father held from him. And he set the Reversion of the Land. I told him that it was ill done, that we should not have the Preference of the Land, and I told him my Brother would keep him out two Years.— The Servant that was with me, told me, that he proffer'd him twenty Pounds to swear the Robbery upon my Brother.— When he came back, I asked him about it, and he said, he feared he would prove him not to be within the Articles of *Galloway*; and said he, if he will give me quiet Possession of my Land, 'tis well; if not, I'll give him a Lift.

Mr. *Forster*. Do you know of any Jewels that belong to Mr. *Hurly*, beside the Money.

John Hurly. He gave me a Diamond Ring for my Wife, and shewed me a Ring he said was worth 100 *l.*

Mr. *Forster*. Do you know of any Rewards proffer'd to swear against *Hurly*?

John Hurly. One *Hicky* shewed me a Note under Mr. *Hickman's* Hand, and Mr. *Cusack's* Hand, That *Hickman* and *Cusack* promised to intercede with the Government for Pardon for him and others, if they proved the Robbery on *Patrick Hurly*.— And that they should be sound with good Meat, Drink, Washing and Lodging, and discharged without Fees.— He shewed me this Note within a Week or some short Time after he was discharged.

Court. You say, that this Note was no more than that Mr. *Hickman* and Mr. *Cusack* promised they would intercede to the Government, if so be he would tell the Truth?

John Hurly. Yes.— In proving a Robbery upon *Patrick Hurly*.

Mr. *Forster*. Were you at *Ennis*?

John Hurly. Yes, I was.

Mr. *Forster*. Who was there examined on Oath to prove this Robbery?

John Hurly. There was *Dorothy Kemp*, and *Jane Hurly*, and this *Margaret Comeene*, and she was examined at Home.

Mr. *Forster*. Was Mr. *Ronane* examined?

John Hurly. Yes, and his Man too.

Mr. *Sol. Gen.* Now, Sir, I'll ask the Witness a Question.— Pray what Credit did the Jury give to it? Was you desired by your Brother before the Robbery, or at the Time of the Robbery, to join with one *Cassey*, to be bound with him for the Money?

John Hurly. I was desired to join with *Cassey*. My Brother pretended I owed him Money. I told him it was an unreasonable Thing, for I had my Rent to pay.

Mr. *Sol. Gen.* Did you pass a Bond to *Cassey*, Mr. *Hurly*?

John

John Hurly. I did, Sir; I told you before.

Mr. Sol. Gen. Who was bound in that Bond?

John Hurly. None but myself.

Mr. Sol. Gen. Who did you give the Bond to?

John Hurly. I gave it to *Cassey*.

Mr. Sol. Gen. My Lord, about *Christmas* last was Twelve-month, he comes to this Gentleman his Brother, and desired he would get him fifty Pounds, and he told him, he craved not the Money if he would pass his Bond for it to one *Cassey*, which he accordingly did; this Bond comes into *Patrick Hurly's* Hand, and he enters up the Judgment and an Execution upon it against his Brother's Goods, for his own Use. Sir, had you any Money from *Cassey*?

John Hurly. No, I had none.

Mr. Sol. Gen. Who took the Execution out, and who took your Goods upon that Execution?

John Hurly. *Charles Mac-Donogh* did it, I paid him the Money.

Mr. Sol. Gen. Who had the Money for *Charles Mac-Donogh*?

John Hurly. I had it, Sir. — I will unriddle this Matter. — I was very unwilling to go to Law. — I came to *Cassey*, and desired him to pretend to lend me 50 *l.* and my Brother would give him his Bond for it. — He will pay you, said I, but will not pay it me.

Court. Did you owe your Brother 50 *l.*

John Hurly. I did owe him near it, only he took some Cattle of mine.

Mr. Att. Gen. Pray, Sir, are you in Custody of the *Marshalsea*, at your Brother's Suit?

John Hurly. Yes, I am; and likewise at *Mr. O'Brien's* and *Mr. Fitz-Simon's* Suit. The Money that I receiv'd from *Mr. Fitz-Simon's*, and paid my Brother the same Day, I am now in Custody for it since *April* last.

Mr. Recorder. You say that you received several Sums of Money for your Brother, and you said there was a Balance between you and your Brother. How much was that Balance? And what became of it? How much Money had your Brother in 97, 98, and 99?

John Hurly. When my Brother went into the Country, I discounted with him.

Mr. Att. Gen. You say you received several Sums; that you paid 200 *l.* to *Mr. Gardner*, and some other Sums. How much did you pay back in Specie to your Brother?

John Hurly. The Money *Mr. Fitz-Simon's* gave me, I came to my Brother's Lodging and paid it him.

Court. This is a Matter that has been transacted within the compass of three or four Years; and this cannot slip out of your Memory. You say all the Money you received of *Fitz-Simon's* you paid your Brother again. — What more did you pay him?

Hurly. I paid him the 200 *l.* in *Limerick*. — I paid him 190, or thereabouts more.

Court. When was that?

Hurly. I paid it him in the Year 1697, in the beginning of 98.

Mr. Sol. Gen. You say you paid *Mr. Burton* 200 *l.* — Did you pay any others?

Hurly. I paid him no more but what I paid him for the Farm — I gave him Bullocks; 20 old Bullocks, at 46 *s.* a-piece, and the rest came to 30 *l.* more.

Mr. Sol. Gen. There was a Sum of 200 *l.* paid, and the rest drawn out in small Sums from Time

to Time, as he had Occasion to call for't. How much was *Brien's* Money?

Hurly. It was about 40 *l.* and I gave him a Bond of *Capt. Lynch's* of about 6. *l.* 10 *s.* and I gave him a Bond on a Brother-in-Law of mine, and a Bond on *Lynch*.

Mr. Att. Gen. How much of the Money that you received for *Patrick Hurly*, did you lend out, and to whom? — Did it amount to 200 *l.*

Hurly. Yes, it did.

Mr. Att. Gen. Did it amount to 300 *l.*

Hurly. No, it did not.

Mr. Att. Gen. Was this Money paid back again to *Mr. Fitz-Simon's*?

Hurly. I have a Bill in *Chancery* against him.

Mr. Recorder. I desire to know whether *Mr. Fitz-Simon's* had the 300 *l.* back again?

Hurly. My Brother told me he paid him every Farthing, and said he had a Discharge from him.

Mr. Recorder. Pray how much of this Money had *Mr. Arthur*?

Hurly. I don't know of any Dealing with *Mr. Arthur*.

Mr. Att. Gen. I did hear, that he assigned a Bond of *Capt. Christopher O'Brien's* to him?

Hurly. That 300 *l.* my Brother owed me, and the Bond my Brother gave for it, I gave *Mr. Fitz-Simon's* the Bond and he arrested him on it.

Mr. Att. Gen. Pray, Sir, did you send any *Holland Sheets*, after this pretended Robbery to any Place?

Hurly. Yes, I did, to *Capt. O'Brien's*.

Mr. Att. Gen. Where did you find them?

Hurly. I will tell you, My Lord. — We were told that one *Halloway* was coming to my Father's, at the Suit of one *Neylan* to take all away. — My Father sent for me, and desired me to come to him, for *Halloway* was coming to ransack the House.

Mr. Att. Gen. How long was this after the Robbery?

Hurly. It was a Month afterwards. — I came there, and one of the Maids told me there was a Portmanteau in the Turf-stack. — I took it home that Night, and I was order'd by her to deliver it to *Capt. Christopher O'Brien*. I sent for him to a Friend's House and opened it before *Capt. O'Brien*, and took an Inventory of what was in it. — There were five or six Pair of *Holland Sheets*. — This was a Month or two after the Robbery.

Mr. Recorder. Another Man swore, it was the beginning of *May*, or the latter end of *April*.

Mr. Forster. We had this Money, and will shew you how we lost this Money, and shall prove the Robbery.

Dorothy Kemp sworn.

Mr. Forster. Pray *Mrs. Kemp*, where did you dwell in 99?

Mrs. Kemp. I dwelt in *Moughna* in the County of *Clare*, within a quarter of a Mile where *Mr. Hurly* lived.

Court. Where did you live at the Time that he was Robbed? Were you in the House when the Robbery was committed?

Mrs. Kemp. Yes, I was.

Court. Pray give an Account what you know of that Robbery.

Mrs.

Mrs. Kemp. My Lord, There was Counsellor *Ronane* three Days waiting for Mr. *Arthur* to pay him some Money. My Mistress went out of Town upon *Saturday* before, and took some Gold out of her Chest, and shew'd some of it, and put it in again; and she did not come Home till *Monday* Morning after the Robbery was committed. I went to the Trunk to get some Table-Linen, and I laid my Hand on the Bag where the Gold was. My Master came in the mean time and said, What do you do there? I said, I wanted some Table-Linen, and my Master took away the Bag, and put it into the Closet.

Court. And so you concluded that was the Bag of Gold.

Mrs. Kemp. Yes, I did.

Court. Did you know of any of the People that were at the Robbery?

Mrs. Kemp. No, my Lord, I did not.

Court. How many Robbers were there?

Mrs. Kemp. As I understand, there were seven of them.

Court. Did you see them all?

Mrs. Kemp. Just after Supper, Counsellor *Ronane* got up to go to Bed, and went out of the Door, and then the Robbers got in. We went up to lay down the Bed, and my Master's Man came running and crying, my Master is murdered; so we got open the Door, and there was five came up with Swords and Pistols.

Court. Had they any Masques or Vizards?

Mrs. Kemp. I cannot tell. They commanded us into the Room, where my Master's Father lay Bed-ridden these three Years past.

Court. How many did you see there at that Time?

Mrs. Kemp. I saw five come up, and there was two more in the Parlour.

Court. Pray Mistress, by Virtue of your Oath, what Arms was there?

Mrs. Kemp. My Lord, we kept Arms just by the Door, a Carbine and Fuzee, because he was something in Debt.

Court. Were those the same Arms your Master had before?

Mrs. Kemp. I cannot tell, but they took his Pistols, and put Gravel into them.

Mr. *Attor. Gen.* Who put the Gravel into the Pistols?

Mrs. Kemp. The Tories.

Mr. *Bernard.* Was there any Offers made to her to put Counters into *Hicky's* House?

Mrs. Kemp. My Lord, I was promis'd Ten Pounds to put Counters into my Master's House.

Court. She says she was desired by one *Murrough O-Brien*, to lay Counters in her Master's House, or *Hicky's* House; a Bribe of Ten Pounds was offered her, and she refused it. But that he sent to *Daniel Hicky's* Wife Twenty times; and she has some of the Letters he writ.

Court. By whom were these Letters written?

Mrs. Kemp. By *Murrough O-Brien*, for his Man brought them.

Court. Pray when was this that you were offered Ten Pounds to hide Counters in your Master's House or *Hicky's*?

Mrs. Kemp. It was before the Affizes a pretty while.

Mr. *Sol. Gen.* My Lord, here is *Donogh O-Brien*.

Court. Where was it he offered you this Money.

Mrs. Kemp. It was at *Shenoge*, a quarter of a Mile from where he lives.

Mr. *Recorder.* And he was to give you Ten Pounds to bury Counters in *Hicky's* House.

Mr. *Butler.* When the Rogues came in, how did they use your Master?

Mrs. Kemp. They ty'd him, and Counsellor *Ronane*.

Mr. *Forster.* You know *Murrough O-Brien*, Pray how often did you see him with Mrs. *Hicky*?

Mrs. Kemp. I saw him often with her. Said he, Mrs. *Hicky*, Mr. *Hicky* is cast down, and he is not worth a Farthing, he is ty'd Neck and Heels.

Court. Did you hear this?

Mrs. Kemp. She told me so.

Mr. *Forster.* We only offer it as far as it will go.

Mr. *Att. Gen.* It will not go at all.

Mr. *Sol. Gen.* I am told that *Murrough O-Brien* is in Court; she speaks of some Words and Letters between her and him, and Mrs. *Hicky*.

Mr. *Forster.* What Linen was taken away by the Robbers?

Mrs. Kemp. My Lord, I partly can swear that I wash'd twenty pair of *Holland* Sheets; there was thirty Pair, I wash'd twenty Pair myself.

Court. How many was left?

Mrs. Kemp. There was but five Pair.

Court. How came they to leave them behind?

Mrs. Kemp. They did not stay to take them away.

Murrough O-Brien sworn.

Court. Pray had you any Discourse with this Woman concerning Counters?

O-Brien. By Virtue of the Oath I have taken, I never had.

Court. Did you never offer her 10*l.* to lay Counters in Mrs. *Hicky's* House?

O-Brien. By Virtue of my Oath, I did not.

Mrs. Kemp. By Virtue of my Oath, you did.

Court. Did you send any Letters to *Hicky* or his Wife?

O-Brien. Yes, I did write to *Hicky*, and to his Wife.

Court. Upon what Occasion did you write?

O-Brien. *Hicky's* Wife came to me, and told me, that if I could get a Protection for her Husband, from Sir *Donogh O'Brien*, he would make it plain that this was a Sham-Robbery: And *Hicky's* Wife said, she could produce those very Counters. *Charles Mac-Donogh* was by when she said, if we would procure a Pardon for her Husband, they would produce the Counters, and make the Matter plain.

Mr. *Sol. Gen.* This Woman says that *Murrough O-Brien* came to *Hicky's* Wife, and said so and so, and writ Letters to *Hicky's* Wife; *Murrough O-Brien* comes now and says, that *Hicky's* Wife came to him, and told him, that her Husband could make out the Sham-Robbery, if he could get a Protection for him. Mr. *O-Brien*, this Woman says, that you did send to *Hicky's* Wife, and that you did tamper with her.

O-Brien. It's a very improbable Thing, if I had a Mind to tamper with her, that I would tamper with *Hurly's* Whore — My Lord, if I wou'd have come on such a Business, would any one

one believe that I should employ this Woman that has had a Bastard or two by Mr. Hurly.

Murrough O-Brien's Letter to Hicky, read.

Mr. Hicky,

' I pray do me the Favour to come hither as soon as possible: for I have some Business to talk with you, which chiefly concerns yourself: and lest you may apprehend any evil Design against you, I do here promise you, that you shall be as safe as your Heart can wish, whilst you are in the Company of,

Murrough O-Brien.

A Second Letter read.

Mrs. Hicky,

' When I sent for you on Saturday was Seven-night, I thought I should see you at Mass, but I missed that Opportunity: I desire you will step hither to morrow, and meet me in some convenient Place where we may talk without Censure or Suspicion: I have no other Design, but to serve you and your Husband. Be sure you don't fail to come to me, if you ever expect any Friendship from,

Mac-B.

[*Daniel Mac-Cay Sworn.*]

Mr. Forster. Where did you live in March, 99?

Mac-Cay. I lived with Patrick Hurly

Court. Where were you the Time of the Robbery?

Mac-Cay. I was in his House, my Lord; I was there on Sunday the 3d of March, and there was John Ronane and himself, and they were just going to Bed, and John Ronane was going out of the Door, and there came five Persons with naked Swords and rushed in; they were disguised and disfigured: My Lord, when they came in, they fell'd him down on his Face, and gave him some Strokes; and I was there, and they pursued me and Gillian Hurly and we ran up, and they locked the Door after us; they made a Shot below, then I was assured it was some Bailiffs that came to take my Master; some of the Family was in Bed and some up.

Mr. Recorder. Your Master was upon his keeping then?

Mac-Cay. And when we heard the Noise below, we got some Sticks, and broke open the Door, and perceived two Fellows at the Door; they made a couple of Shots at us, but did us no Harm; and then came three or four, and one of them pursued me, and made a Shot after me, but did me no Harm: We did not go out till these Fellows went out, and then we broke open the Door, and we found my Master tyed fast to his own Bed-side, and Counsellor Ronane; and all the Trunks were broke: My Master bid me go to the next Village and raise the Neighbourhood, so I did.

Court. Pray Friend, How many did you see of the Robbers?

Mac-Cay. I saw five my Lord, and two without at the Window.

Court. The Woman said there were five in her Master's Parlour, and two at the Door. Sir, did you know any of the Parties that Robbed him,

upon your Oath? What Disguises had they? Were they black, or had they Vizards?

Mac-Cay. I cannot tell my Lord.

Court. Did you take any Notice of any of the Arms, whether those Arms belonged to your Master? Take Care upon your Oath, you speak nothing but Truth.

Mac-Cay. My Lord, we had Arms of my Master, which they seized on, and we found them abroad next Morning.

Court. Did the Bullets hit any Part of the House?

Mac-Cay. No, my Lord, I did not observe that.

Court. Pray Friend, was there any more than one Shot made?

Mac-Cay. There was, my Lord.

Court. Was there any Mark of any Bullet to be seen.

Mac-Cay. I did not see any.

Mr. Forster. You say they came in with Fire-Arms and Swords, had your Master any Swords?

Mac-Cay. There was none but one; and they had five naked Swords.

Mr. Forster. They had no Fire-Arms but your Master's?

Mac-Cay. We found them abroad next Morning in the Street.

Mr. Forster. What Road did your Master Hurly travel when he went from this Town, the last Time he was in Dublin, before the Robbery?

Mac-Cay. He went thro' the County of Galway, thro' Mount-Talbot.

Mr. Forster. Do you know Capt. Lynch?

Mac-Cay. Yes, he lives in Capperquin.

Mr. Forster. Were you with your Master all the Way home?

Mac-Cay. Yes, I was.

Court. Mr. Lynch said, (I must do him Right) that he did not remember what Company was with him, but that he drank a Bottle of Wine with him at Loughbrea, and there saw the Counters; and it is much about the Time this Man swears.

Mr. Recorder. Exactly, my Lord.

Mr. Forster. Were you with your Master when he was in Dublin? Did you see any Quantity of Money with him?

Mac-Cay. Yes, I did.

Court. Pray did you see any Counters with him?

Mac-Cay. No, my Lord: I was offer'd to have my Fortune raised for ever if I would swear, that he bought the Counters, and brought them to the County of Clare.

Court. You saw Money with your Master Where was it he receiv'd the Money?

Mac-Cay. I do not know; but he shew'd it me, and said, It was a sad Thing to pay away so much Money: And he put his Hand in his Pocket and pull'd out some Gold, some Broad-peices and a Gold Cob; and he said, he would keep the Purse, and not take any Thing out until he got home to pay Mr. Arthur off.

Carty. Was it in the Portmanteau?

Mac-Cay. Yes, it was.

Mr. Recorder. Was this the Time that your Master was in Loughbrea?

Mac-Cay. No, this was in February, and it was before Christmas he was at Loughbrea.

Court. Upon what Occasion was it that your Master shew'd you the Gold?

Mac.

Mac-Cay. He told me, at his own Lodging in *Warbur-street*, Is it not a sad Thing to pay so much Money to that Rogue *Arthur*, that had serv'd him such Trick?

Court. Did you take notice of it yourself?

Mac-Cay. Yes: It was not Counters; no, I know Gold from Counters.

Court. Were they Guineas or Louis d'Ors?

Mac-Cay. They were Louis d'Ors.

Mr. Butler. Pray when you went the last time with your Master from *Dublin*, what way did you go to *Mount Talbot*? At what Place did you cross the *Shannon*?

Mac-Cay. I do not know the Place; I do not know the name of the Place at all.

Mr. Butler. Did you swim over, or go over a Bridge?

Mac-Cay. I think we went over a Bridge.

Mr. Butler. What Bridge?

Mac-Cay. I do not know the Name of it.

Court. Did you go thro' *Athlone*?

Mac-Cay. Yes, we went thro' *Athlone*.

Court. If I had said *Lanesborough*, he would have said so too.

Mr. Butler. You are positive, that in the last Journey before the Robbery, you nor your Master were not at *Loughrea*?

Mac-Cay. I am positive.

Mr. Butler. Where did your Master lie the Night before you came to *Tiaquin*?

Mac-Cay. It was at *Balliboy*.

Mr. Butler. Pray, Sir, what Way did you go from *Athlone* to *Eyres-Court* or *Balliboy*?

Mac-Cay. I do not know the Names of the Towns.

Mr. Butler. Pray how far is it from *Tiaquin* to *Eyres-Court*?

Mac-Cay. I do not know.

Mr. Butler. What Way did you come to *Balliboy* back again, for that is on this side the *Shannon*, and many Miles on this Side of *Athlone*?

Mac-Cay. My Master had his Brother-in-Law, *Mr. Terry*, along with him, and when he came to *Balliboy* he would see his Sister, and so he went to *Tiaquin*.

Court. How could you go from *Athlone* to *Balliboy*? Did you lie at *Athlone* that Night?

Mac-Cay. No, my Lord, we did lie beyond it, at a Place where there is a Bridge.

Court. Where is that Bridge?

Mac-Cay. It is on the *Shannon*, on this Side *Aghrim*.

Mr. Butler. If you please, Sir, did you carry the Portmanteau to *Tiaquin*?

Mac-Cay. Yes, I did.

Mr. Butler. And was it not left at any other Place behind you?

Mac-Cay. No it was not.

Mr. Butler. You are positive you carried it to *Tiaquin*?

Mac-Cay. Yes, I did carry it to *Tiaquin*.

Mr. Butler. Was it left at *Gort Inshigory* before you went to *Tiaquin*, or after?

Mac-Cay. My Master hired a Horse, and he was lame; and he desir'd me to go on *Saturday*, before he came himself, or *Capt. Bourk*, and his Father-in-Law kept him.

Mr. Butler. Was the Gold in the Portmanteau at that time?

Mac-Cay. Yes, it was.

Court. And you carried the Portmanteau to *Gort* from *Tiaquin*?

Vol. V.

Mac-Cay. Yes; I came from my Master from *Tiaquin* to *Gort*; he sent me on *Saturday*, and he came on *Sunday Night*.

Mr. Butler. My Lord, I will make it appear, by three or four Men of undoubted Credit, that *Mr. Hurly* did swear, at the Assizes of *Ennis*, that he was at *Loughrea* before he went to *Tiaquin*, and that he left the Portmanteau there, and did not carry it to *Tiaquin*.

Mr. Butler. Did your Master pay for the Horse he hired? or, Did you hear he gave a Bond for it?

Mac-Cay. I don't know.

Court. Do you know of any Bond given by *Mr. Hurly*, to pay the Hire of the Horse?

Mac-Cay. I do not know indeed, my Lord.

Mr. Recorder. He said, his Master shew'd him the Money in Town, and said it was a Shame to pay it to *Arthur*. Now, did your Master pay the Money?

Mac-Cay. He told me, that *Arthur* promis'd to come to his House in the County of *Clare*; and, that he would make him take it on easier Terms than if he should pay it in *Dublin*.

Court. If he had the Money, why did he not pay it him?

Mac-Cay. He said, he hoped to compound with *Arthur* easier than to give him all that he demanded.

Mr. Bernard. My Client tells me, that this *Mac-Cay* is a material Witness, as to *Calaghan Carty*: Do you know *Calaghan Carty*?

Mac-Cay. Yes, very well.

Court. How long have you known him?

Mac-Cay. These two Years.

Court. Were you with him before my Lord Chief Justice *Pyne*?

Mac-Cay. Yes, I was; he made an Affidavit, and swore before my Lord Chief Justice *Pyne*.

Court. What was the Substance of it?

Mac-Cay. That he knew nothing of the Robbery; and, that he was much concern'd he had sworn against *Mr. Hurly*. They lodg'd at the *Black Bull* in *Church-street*.

Court. Are you confident that this *Calaghan Carty* swore before my Lord Chief Justice *Pyne*?

Mac-Cay. Yes, he did.

Mr. Butler. Where did you lie the Night before you went thro' *Athlone*?

Mac-Cay. I am not sure of the Name of any Place where we did lie since we left *Dublin*.

Mr. Butler. You are positive you did lie in a Place that had a Bridge upon a River?

Mac-Cay. Yes, I am.

Court. Pray, one Question more: You say, You have gone with *Mr. Hurly* several times to the Country; How often did he go *Conaught Way*?

Mac-Cay. He went always *Conaught Way*.

Court. How often has he gone, that you can recollect yourself?

Mac-Cay. We came from the County of *Clare* the Summer after I came to him, to *Loughrea*, and *Eyres-Court*, and over *Banagher-bridge*, and so to *Munster-Evin*.

Court. Which is the Way you used always to go?

Mac-Cay. That Way; but that Time he went to *Athlone*.

[Christopher O-Brien sworn.]

Mr. Butler. Pray, Sir, by virtue of your Oath, did you offer any Money to that Man?

O-Brien. No, upon my Oath.

Mr. Butler. Did you offer him Money, or promise to raise his Fortune, if he would give Evidence about Counters?

O-Brien. Never, my Lord. He came to me and told me, there was some came to his Master, and would swear, that ——— were come from France.

Court. Did you ever make him any Promise, or any Offer at all?

O'Brien. Never in my Life, my Lord.

Mac-Cay. Did not you, at the Swan Tavern, when I carried a Letter to Capt. Bourk?

Court. How long ago was this?

Mac-Cay. Before the Term, I think.

Court. Was it before Christmas?

Mac-Cay. No, my Lord, it was after Christmas.

Court. Mr. Hurly, you know the contrary to this yourself: If you'll have me, I'll send for the Examination sworn by yourself concerning this Matter.

Patr. Hurly. He speaks to him more than once.

Mr. Recorder. Had you any Discourse with Mr. O'Brien about the Counters?

Mac-Cay. Yes, once or twice.

Mr. Recorder. Had you any Discourse about them more than once?

Mac-Cay. He never spoke to me about the Counters, but once at the Swan Tavern.

Court. That of Mr. O'Brien's tampering with this Man; Mr. Hurly, you are complain'd of before Christmas last. He said, he was once with a Letter at the Swan Tavern; and, that Mr. O'Brien did there talk to him about tampering with other Witnesses; but it was before that, that you said Mr. O'Brien tamper'd with himself about the Counters.

Court. Where was it?

Mac-Cay. At the Tavern.

Court. At what Tavern?

Mac-Cay. The Swan.

Court. When was this?

Mac-Cay. Before Christmas, or a little before the last Term.

Court. He says, it was the Time of his delivering of a Letter.

Mac-Cay. My Lord, I deliver'd a Letter to Capt. Bourk, at the Swan Tavern, and I think it was before Christmas.

Court. So that you deliver'd more Letters than one?

Mac-Cay. I deliver'd several to him.

Court. It must be left to the Jury. This Gentleman is accus'd by this Mac-Cay, and how far what will weigh with any Man.

Mr. Butler. This Mr. Mac-Cay was very positive, that the Portmanteau was carried to Tiaquin, and, that it was not left behind. I am ready to prove, by two or three credible Evidences, that Mr. Hurly did swear at the Assizes, that it was left behind at Loughrea, and, that it was not carried to Tiaquin.

Mr. Bernard. My Lord, I desire we may first produce another Witness to the Subornation; John Crips, a Person suborn'd to swear against my Client.

[John Crips sworn.]
(Per Interpreter.)

Court. Where does he live? and, With whom?

Interp. He lives at Moughna, in the County of Clare.

Court. Ask him what he can say of any tampering with him to swear against Mr. Hurly?

Interp. He says, one Holloway and Walter Neylan tamper'd with him; That Holloway sent for him three Weeks after Mr. Hurly was taken to Ennis, and he ran into a Rabbit-hole, for he was afraid of him, and sent his Wife to know what he would have of him.

Interp. And, my Lord, he is telling a long Story of this Holloway being a troublesome Man; and, that the whole Country would joyn with him, to give an ill Character of him, if it were not for the Persons he appears against. — And he says, he was always inclin'd to do Evil, and every body was afraid of him.

Court. Ask him, Was there any Offer made to him?

Interp. He says, That Neylan and Holloway offer'd him Fifty Pounds to swear against Mr. Hurly, That he contriv'd the Robbery against himself.

Court. Were they both together? or, Did they speak to him severally?

Interp. They spoke to him severally.

Court. Ask him, Where was it that Holloway propos'd this to him?

Interp. About three Weeks after Mr. Hurly was put into Gaol: He says, Holloway first spoke to him.

Court. Did Holloway speak to him any more than once?

Interp. He says, He desir'd him to go with him before Mr. O'Brien, and he offer'd him Six Guineas to go and prove the Matter, and, that he would give him the rest afterwards.

Court. Was any body by?

Interp. He says, No body.

Court. Where was it that Neylan offer'd him the Money?

Interp. He says, my Lord, that Holloway used several threatening Words, if he did not comply with what he desir'd him to do; and, that he would send him to Gaol at Ennis, where he should not see the Light any more.

Court. Can he remember the Day that this was?

Interp. About Six Weeks after Hurly was taken.

Court. Where was it that Neylan proffer'd him any Reward, and what it was he offer'd him?

[At this the Fellow splutter'd, and made a terrible Noise in Irish.]

Interp. My Lord, he will not answer to the direct Question. He says, my Lord, that Holloway threaten'd him, and broke open his Doors, and came there with Arms, and brought a disbanded Soldier, and took him by the Hair of the Head, and threaten'd him, because he did not come to him at the Time appointed.

Court. Did he complain to any Justice?

Interp. He says, he complain'd to Mr. Fitzgerald.

Court. Pray ask him what Neylan said to him?

Interp. He says, he offer'd him the grazing of Collops free, and an House and Garden during his Life, to swear against Patrick Hurly.

Mr. Butler. What Time was it that Neylan made him this Offer? and, in what Place?

Interp.

Interp. My Lord, the Answer he made to that is, That *Halloway*, after he had taken him out of his Bed, and dragg'd him by the Hair of the Head, that then they and *Neylan* met.

Court. Where was it he met *Neylan*?

Interp. At *Bally Ryan*, in a House there.

Court. What Time?

Interp. About a Month before *Michaelmas* last.

Court. Pray, ask him where it was that *Mr. Neylan* did tell him he would give him the Six Collops grazing, to swear against *Patrick Hurly*?

Interp. He says, he will recollect it: He says, last Summer.

Mr. Recorder. I am inform'd, my Lord, that while this Man was ask'd the Question, *Hurly* said, last *Michaelmas*. ——— *Mr. Hurly*, I never saw any Man, so far presum'd to be a Criminal, behave himself with so much Impudence before.

Court. *Mr. Hurly*, if you don't give over throwing out Words to your Witnesses, we must put you into the Dock. Ask him, Interpreter, Does he know *Calaghan Carty*, that was Witness here to day?

Interp. He has known him since he was a little Boy, and his Father, Mother, and Family.

Court. What does he know of that *Carty's* Swearing before my Lord Chief Justice *Pyne*?

Interp. He says, my Lord, that he did swear before my Lord Chief Justice *Pyne*, and there was a great Lady and a young Man by.

Mr. Bernard. Now, as to *Mr. Lynch*, whether he made any Proposal or Offer, or had any Discourse with him on *May-day* last?

Interp. He says, he saw him the Day before *May-day*; and, that he was very civil to him: There was some controversy between him and *Mr. Hurly*, about the Land of *Moughna*; and he said to me, now *Patrick Hurly* is gone to Gaol, and so is *John* too, and they are both in Irons, and they will never retrieve it, and you had best come and live with me in *Conaught*. He told him, that neither his Wife, nor his Mother-in-Law, would consent to go to *Conaught*. Says he, I have set the Lands from the *Hurlys* to the *Bloods*, and *Hurly* shall never have any thing to say to it more.

Court. Did he ever persuade him to take a false Oath against *Mr. Hurly*?

Interp. He said, That in his Agreement with the *Bloods* he reserv'd the grazing of four Collops, which he should have, if he would swear that he was one of the Robbers himself, and prove the Robbery upon *Hurly*. And he made answer to *Lynch*, Why should I do that, that will hang me? And then *Lynch* seem'd sorry that he had propos'd it to him.

Mr. Recorder. Ask him, Who was with him when *Calaghan Carty* swore an Examination before my Lord Chief Justice *Pyne*?

Interp. *Daniel Hicky*, *Daniel Mac-Cay*, *Donogh O-Brien Andrews*, and himself.

Mr. Recorder. How came he to go a-long with these Persons?

Interp. He says, That he came there to prevent being persuaded to take a false Oath.

Mr. Recorder. Does he know what *Calaghan Carty* swore?

Interp. He does not know.

VOL. V.

Mr. Recorder. Who writ the Examination of *Calaghan Carty*?

Interp. He does not know.

Mr. Butler. Was it written at my Lord Chief Justice *Pyne's*? or, Had he it written before?

Interp. He brought it written to my Lord Chief Justice *Pyne*.

Mr. Butler. My Lord, this Man does not seem to be a Man of any Credit: *Neylan* and *Lynch* are sworn, pray let them attend.

Court. If two Witnesses speak directly contrary one to the other, must not it be left to the Jury which they will believe? What does the Witness *Crips* say?

Interp. He desires a Guard, for the Safety of his Person.

[*Mr. Lynch stands up again.*]

Court. *Mr. Lynch*, had you ever any Discourse with this Man concerning *Mr. Patrick Hurly* and *Mr. John Hurly's* being in Gaol?

Lynch. Yes, I had, my Lord: I said to him, that I heard he has been lately in *Dublin*, and, that he has been an Evidence for *Hurly*. No really, says he, I was not; I am weary of him, and if I could get these People that you set the Land to, to let me be here a Year, I would not live any longer with him.

Court. Did you offer him the grazing of four Collops?

Lynch. I never did, my Lord.

Mr. Butler. The Credit of this Gentleman, and of that Fellow, is left to the Jury.

Mr. Lynch. This Discourse was about this time Twelvemonth, at the Fair of *Moughna*, and *Richard Hurly*, *Patrick's* Uncle, declar'd to me, that it was a sham-Robbery.

[*Walter Neylan stands up again.*]

Court. *Mr. Neylan*, had you any Discourse with this Man about *Mr. Hurly*?

Neylan. I never had any Discourse with him, or saw the Man, till this Day, never since he was born.

Court. What Time was it he says that he had this Discourse with *Neylan*?

Mr. Butler. In the Place where he says he had the Discourse with *Neylan* in a House, there never was a House, nor so much as a Hut there.

Neylan. No, my Lord, there never was a House there in my Memory.

Court. *Mr. Neylan*, how far is this *Moughna* from you?

Neylan. Three Miles.

Mr. Bernard. And you not know this Man!

[*Mr. Wakeham, my Lord Chief Justice Pyne's Clerk, sworn.*]

Court. *Mr. Wakeham*, Sir, pray do you know any Person that came to swear Examinations before my Lord Chief Justice *Pyne*, concerning the Robbery of *Mr. Hurly* in the County of *Clare*?

Mr. Wakeham. My Lord, there came four Men; but I was busy, the Gentleman read the Examinations.

Court. Do you know the Persons?

4 M 2

Mr.

Mr. Wakeham. I do not know 'em ; they were ordinarily clad ; there was a Gentleman, one Mr. Terry, that brought 'em.

[Daniel Hicky sworn.]

Mr. Bernard. Pray give my Lord an Account of any Offers that were made you, or Threats used to you, to make you swear against Mr. Hurly ?

Daniel Hickey. I told it twice before my Lord in August last. My Lord, I was taken by William Holloway and Thomas Bourk, they took me to Gaol, and they bolted me ; and there was Mr. Neylan in the Gaol, and he spoke to me about the Robbery that was committed on Mr. Hurly. I said, I knew nothing of it at all : And he told me, I would be hang'd, for it was sworn against me : And I was brought before Mr. Hickman and Cusack, and they told me, That there was one Carty had sworn that I was at the robbing of Mr. Hurly, by his own Consent ; and, that if I did not declare it, I should be hang'd ; and said, that Mr. Hurly will hang us if we say we robb'd him. Never heed him, said they, it will be no Harm to any Man that swears against him.

Court. How long did you remain in Gaol ?

Hicky. I was kept in Gaol till August, from the 26th of March.

Court. Was any body with you ?

Hicky. Calaghan Carty and Daniel Carty.

Court. What had you a Day ?

Hicky. We had twelve Pence a Day ; and Mr. Neylan brought red Coats, and would have us swear we had those Coats on when we robb'd Mr. Hurly. And they carried us before Mr. Butler, and we would not swear ; and then we got but nine Pence a Day.

Court. Did you swear that Mr. Hurly was not robb'd ?

Hicky. I did swear that I was not at the robbing of him myself.

Court. But you were examin'd about this Robbery before Mr. Hickman and Mr. Cusack ?

Hicky. They desir'd me to swear that I was at the robbing of Mr. Hurly with Daniel Carty ; and they told me, I should be hang'd if I did not swear it.

Court. Did you swear it ?

Hicky. Yes, I did.

Mr. Bernard. After you satisfied these Gentlemen's Importunity, how long was it before you were discharg'd out of Prison ?

Hicky. I was kept in Prison till after the Assizes.

Court. Who did you swear was with you at the Robbery ?

Hicky. Calaghan Carty, Donogh O'Brien, and Daniel Carty.

Court. Has he any other Name but Donogh O'Brien ?

Hicky. Yes, he generally goes by the Name of Donogh O'Brien Andrews ; some call him so : His Name is Donogh O'Brien.

Court. How came you to get your Discharge out of Prison ?

Hicky. My Lord, when my Lord Chief Justice Pyne came, we were carried to the Bar. When I was at the Bar, I was told I must take the Affidavit against Mr. Hurly, and if I would not, I should return to Gaol again. — The Gaoler

would let no body come near the Bar ; for we said, We will tell the Truth, and would not tell a Lye against Mr. Hurly. And he went out and came in again, and took us back to the Gaol.

Mr. Bernard. How long after this were you discharg'd ?

Hicky. We petition'd my Lord Chief Justice, and sent after him to Limerick, but got no Answer ; and then they sent a *Mittimus* to keep us in Gaol. They said, if we got Bail, they would enlarge us : So Donogh O'Brien's Friends were bound for him, and I got a Friend to be bound for me ; and I was bound for another of the Prisoners.

Court. Did you ever make an Affidavit before my Lord Chief Justice ?

Hicky. Yes, we came to Town and made an Affidavit before him.

Court. Who was with you ?

Hicky. Calaghan Carty, Donogh O'Brien, Daniel Carty, and Crips.

Mr. Forster. After you gave in that Affidavit, and went home, what did you do then ?

Hicky. We went home then, and we heard that they had a Warrant against us.

Court. You say, you swore before the Lord Chief Justice, and, that Calaghan Carty, Crips, and Donogh O'Brien were there. And you are very sure that Calaghan Carty was one ?

Hicky. Yes, he knows me, and I know him ; he is my Relation.

Court. Mr. Neylan, you are upon your Oath, Did you see this Person in the Gaol at Ennis ? Pray give an Account of what pass'd there, and what Fine was put upon him to make him discover ?

Neylan. My Lord, when he came to Gaol, he sought for me, and I told him that one had discover'd : And he ask'd me what I would advise him to do ; and I said, I'd advise him to discharge a good Conscience.

Mr. Justice Coote. I am not a Judge of the Fact, but the Jury is : Hicky, you were brought before me, and when I examin'd you, you went backward and forward, and I committed you that Night to the Gaoler's Care ; and when you were brought into the Court you said, You would stand by the Examination you swore before my Lord Chief Justice Pyne.

Mr. Soll. Gen. What did Mr. Hickman persuade you to do when he tamper'd with you ?

Hicky. When Walter Neylan went from me, I was brought to Mr. Hickman and Cusack, and they told me, there was an Examination of Mr. Daniel Carty. It is in vain for you, said they, to deny the Fact, but you must say what we will have you to say, or else you shall be hang'd ; for Carty has sworn, that you and he were at the robbing of Hurly : That you left all the Gold and Linen in his Barn for him.

Mr. Attor. Gen. And did Mr. Cusack say so too ?

Hicky. Yes, he did say so.

Mr. Soll. Gen. What should be the Seducement of Mr. Hickman, or Cusack, to have you forswear yourself ?

Hicky. There was a Contrivance between Holloway, Hickman, and Carty to swear.

Mr. Soll. Gen. But why should Mr. Hickman do this ? What End could he have in it ?

Hicky.

Hicky. I cannot tell.

Mr. Attor. Gen. You *Hicky*, is *Mr. Hickman* a Papist, or *Mr. Cusack*?

Hicky. No, Sir.

Mr. Attor. Gen. For what Purpose should they come to you, to have you forswear yourself?

Hicky. They did do it.

M. Dean. What became of that Note *Mr. Hickman* and *Cusack* gave you?

Hicky. *Calaghan* had it, and brought it to Town.

Mr. Butler. *Hicky*, you were examin'd at this Bar before: Did not you swear the same Thing against *Mr. Cusack*? And after, when he came into Court, and you saw him, did not you retract in open Court what you swore before? Did you, or did you not?

Hicky. I cannot tell what I did. I told him that he gave me the Note.

Mr. Justice Coote. Then I'll tell you what you did. *Mr. Cusack*, to the best of my remembrance, came to the Side Bar there. *Mr. Hurly*, you were there; and after *Mr. Cusack* came in, this Person was asked the Question, whether that *Mr. Cusack* tamper'd with him; And he said no, that he only desired him to swear nothing but the Truth.

Mr. Huish sworn.

Mr. Justice Coote. I'll ask *Mr. Huish* a Question, or two; for such a Fellow as this is not to be endured. *Mr. Huish* was not you present when this Man was brought before me?

Mr. Huish. I was, my Lord.

Court. I only ask what happened in my House, as to the Behaviour of this Man?

Mr. Huish. When I came first, the Book was put into his Hand, and he was Sworn. But on Examination he seemed to be sullen, and would not answer. But he owned that the Examination he give in the Gaol was false, and the Examination he gave before my Lord Chief Justice was true. And when you sat down to reduce what he said into Writing, he began to retract. When it was written that he said, that before my Lord Chief Justice was true, and the other false; he began to fall off and falter, and said, Did I say so? You examined him alone that time, and gave him Encouragement to speak the Truth. And after it was asked, had you rather be examined before the Judge alone, or before all the People here? Then he was for being examined before the Judge alone. So I went out and left him and this *Daniel Hicky* together, for near three quarters of an Hour. Then your Lordship called us in, and said, this Fellow is sullen; and will not give any Account.

Mr. Justice Coote. I did press this Man to tell the Truth; Did *Hickman* or any of those People intice him to swear any false Oath, and one time he said they did not, and another time he said they did.

Mr. Forster. Did he at any Time desire that his Examination shou'd be defer'd, until he came to Court the next Day.

Mr. Huish. Truly I don't remember that Particular.

Mr. Forster. *Hicky*, What was the Meaning that when you were examined before *Mr. Justice*

Coote, that you said, Did I say it, or did I not say it?

Hicky. I was afraid some of them would swear against me. They were following me all Day — *Mr. O'Brien's* Man was after me. And *Mr. Huonin* came and told me I should be hang'd if I did it not.

Donogh O'Brien Andrews Sworn.

Mr. Forster. My Lord, if it please your Lordship, I desire he may give an Account of this Matter.

O'Brien. — My Lord, I was then Prisoner by *Thomas Bourk*, and they would shew no Warrant, till they had ty'd me with a Cord, carried me to *Ennis*, and bolted me; and afterwards brought me before *Mr. Hickman* — And they told me, that *Daniel Carty* had given an Examination against me, that I was one of the Persons employed to rob *Hurly*; and that if I did swear as *Carty* did, I should have the same Reward *Carty* had: And that it was not for me to pretend to live in the County of *Clare*, if I did not swear as *Carty* did.

Court. And did you swear then?

O'Brien. If your Lordship pleases, I'll declare the Matter — *Tom Hickman* and *John Cusack* told me that I had Reason to curse the Time that I did not swear as *Daniel Carty* did.

Mr. Attor. Gen. How long is it since *Mr. Hickman* and you were so familiar, that you call him *Tom*?

O'Brien. They said, I should be hang'd for it, if there were no more Men in the Kingdom; and I was accordingly sent into the Dungeon, and hand-cuff'd, and they came and ty'd me, and told me, that *Calaghan Carty* and *Daniel Carty* had Sworn; and they would put a Lump of Gold in my Wife's Lap, if I would swear I was employed to rob *Mr. Hurly*: And *Halloway* came to me, and said, declare the Truth of the Matter, and swear as the rest did; and I'll go and speak to the Gaoler, and get you eased as well as *Carty*. Every Day *Halloway* came to me and said, I should want for nothing, if I would swear as they did. So on Sunday Morning a Yoke was brought to me, and they were going to Yoke me, but they did not do it; and after Service that Sunday, *Tom Buck* came to me, and told me, they came from *Tom Hickman*, and if I did not say as the rest had said, I should be hanged; but I was weary of the Bolt and Hand-cuff, and I had not my Friends to come near me, nor my Wife, so I resolved I would do any thing, rather than lie in the Condition I was in, and I said, I would swear what they pleased.

Court. And did you swear?

O'Brien. My Lord, upon this Answer my Bolts were taken off, and the Hand-cuff; and I was carried abroad to *William Butler*, and he asked me, when I came before him, why I was so obstinate against the County, as I had been; but if you resolve to do it now, says he, it will do as well, and if you swear as the rest did, you shall have as good a Reward as *Daniel Carty*, and twelve Pence a Day, during the Time you was confined.

Court. Did you not repeat the Words he had then written down — Did not you speak the Words he had written?

O'Brien.

O-Brien. No, I did not.

Court. But you swore to them afterwards—
Did he read the Examination to you?

O-Brien. Yes, he did.

Court. Did you swear to it?

O-Brien. Yes, I did it to ease myself.

Mr. Recorder. Is the Examination true, at this Day?

O-Brien. No, it is not.

Mr. Soll. Gen. I desire that Examination may be read, and he may tell us, what part of it is true, and what not.

O-Brien. My Lord, I after went to Gaol, and received the Allowance *Mr. Butler* ordered me, twelve Pence a Day — And my Lord, some time in Summer before the Assizes, *Walter Neylan* that was now in Court, brought down one of *Mr. Hurly's* Coats, and asked us whether we knew these Coats that we wore in the Robbery — He told us, *Mr. Butler* desired us to swear to the Coats; but we refus'd to do it, and then we were turned into the Gaol, and 6 d. of the 1 s. taken from us.

Mr. Robbins. Were you sworn last August, and before whom?

O-Brien. Before the Lord Chief Justice *Pyne*.

Mr. Robbins. Did *Calaghan Carty* make an Affidavit at the same Time.

O-Brien. Yes, he did.

Mr. Soll. Gen. Who writ your Examination?

O-Brien. I writ it myself.

Mr. Soll. Gen. Who writ *Calaghan Carty's* Examination?

O-Brien. I do not know; I was by at the swearing of it.

Mr. Soll. Gen. Who writ *Hicky's* Examination?

O-Brien. He writ it himself.

Mr. Soll. Gen. How long were you in Town before you gave in your Examination?

O-Brien. It was not passing three or four Days?

Mr. Soll. Gen. Who came into your Company?

O-Brien. No body, until I came to *Kiltartan*, and that Night *Madam Hurly* came into the House, and lay in the House that Night, she and her Brother; — She ask'd me where I was going? I told her, I was coming to Town to declare the Truth.

Mr. Soll. Gen. And did you come to Town in their Company?

O-Brien. Yes, I did.

Mr. Soll. Gen. And what other Company came along with you and *Mrs. Hurly*?

O-Brien. There was no body but *Terry* and *Crips*.

Mr. Soll. Gen. And within three or four Days after you came, you swore the Examination?

O-Brien. Yes, I did.

Mr. Soll. Gen. How long after you came to Town, did you see *Calaghan Carty*?

O-Brien. I saw him at *Kilcock*, before I came to Town.

Mr. Soll. Gen. And where did you meet *Daniel Hicky*?

O-Brien. Coming towards *Kilcock*.

Mr. Soll. Gen. It was remarkable, that he should accidentally meet *Mrs. Hurly* and her Brother at *Kiltartan*, and *Calaghan Carty*, and *Hicky*, and he, should meet on the Road and Way together, to clear their Consciences—Did *Hicky, Carty*, and you lie in one Lodging?

O-Brien. I lay in *Church-Street*.

Mr. Soll. Gen. And *Calaghan Carty*, and *Hicky* lay there too?

O-Brien. Yes, they did.

Mr. Soll. Gen. Were you examin'd in Irons?

O-Brien. No, I was not: I had them taken off me, and was carry'd abroad; and I was told, that if I did not swear as the rest did, I should be hang'd in eight Days Time.

Mr. Recorder. Would *Mr. Butler* make you forswear yourself?

O-Brien. He would make me swear as the rest did.

Mr. Soll. Gen. What distance from the Gaol was you examin'd?

O-Brien. Near the Gaol.

Mr. Soll. Gen. Had you any Hand-cuffs, or Irons, when examined?

O-Brien. No, I had not.

Mr. Soll. Gen. My Lord, I must ask this Man, whether his Father be in Town, and whether he had any Discourse with his Father—Do you know your Father?

O-Brien. I know my reputed Father.

Mr. Attor. Gen. By Virtue of your Oath, Did you see your Father, since you came to Town?

O-Brien. No, I did not.

Mr. Attor. Gen. Had you any Discourse with your Father concerning this pretended Robbery—And did you say any thing to him about it, and what was't?

O-Brien. I saw him at Home; I never acknowledged to him, I was concern'd in this Robbery.

Mr. Recorder. Pray, My Lord, did he declare to his Father, that he was concern'd in this Sham-Robbery?

O-Brien. No, I did not.

Mr. Recorder. Did you tell your Father any thing of the Contrivance; or would your Father have prevail'd with you to own you were in the Robbery?

O-Brien. Yes, he would.

Mr. Recorder. Did you ever tell your Father, that you used *Mr. Hurly's* own Arms in the Robbery?

O-Brien. No, I did not.

Mr. Recorder. Well, now we'll call your Father.

Donogh O-Brien Andrews Sen. Sworn.

Mr. Soll. Gen. Pray, upon the Oath you have taken, give an Account of what Discourse passed between your Son and you, about this Robbery?

Donogh O-Brien Andrews Sen. My Lord, This will be look'd upon to be very strange, and very unnatural, for a Father to appear against his Son; yet I must have Regard to my Oath, and shall not be backward to declare the Truth—When this Robbery happened, some time pass'd before the Contrivance of it was fully discovered; and when my Son was taken and carry'd to Gaol about it, I did not go near him for three Weeks. When I went to him, I was passionately concern'd for him; and I ask'd him, What should make him so wicked, as to be concern'd in such a Fact, as he and the other Rogues were accused of? and I asked him with Vehemence, Did you do it? He said, yes, I did do it; and he never deny'd it, nor no one doubted of it until

until such time as he went afterwards to *Dublin*. The Particulars I was not curious in asking him, because I had an account of them from others, and all Men allowed them to be true, because they own'd it themselves. After the Assizes, and that they came out of Gaol, I took Opportunity to discourse my Son, but found by him, that he had no mind to discourse me — But then, my Lord, I asked him one Day, whose Arms he had; were they *Patrick Hurly's*? Says he, Where else should I get Arms?

Court. Had you all this Discourse with your Son *Donogh O-Brien*, that young Man there?

Old Donogh. Yes, I had.

Young Donogh O-Brien. When he taxed me with this, I was indifferent in the Matter, and when he asked me about the Arms, whether they were *Patrick Hurly's* Arms? What else said I.

Mr. Sol. Gen. Is the rest that your Father said true or not? You have heard what your Father said, that you confessed to him you were concern'd in the Robbery?

Y. Donogh. I said what I told you of the Arms; but as to the other part, I do not remember that ever I said it to him.

Mr. Soll. Gen. Old Man, Do you remember?

O. Donogh. Aye very well, too well to my Sor-row.

Mr. Recorder. Young Man, Do you believe that he is relating Truth or not?

Y. Donogh. I don't know whether he is or no.

Mr. Soll. Gen. Are you a married Man?

Y. Donogh. Yes, I am.

Mr. Attor. Gen. Pray who are you married to? What Relation is your Wife to *Mr. Hurly*?

Y. Donogh. *Mr. Hurly* is her Uncle.

Mr. Forster. Old Man, What Relation are you to Sir *Donogh O-Brien*?

O. Donogh. I know no Consanguinity between Sir *Donogh O-Brien* and me. But Sir *Donogh* purchased the Reversion of my Farm, and I live in it, paying him Rent.

Patrick Hurly. Pray whose Horse, and whose Expence brought him here?

O. Donogh. The Horse belongs to one *Mr. Everhing*.

Patrick Hurly. At whose Charge?

O. Donogh. At the County's Charge, who prosecuted you for Perjury.

Court. Do you expect any Abatement of your Rent?

O. Donogh. I am so far from it, that I am raised 50 *l.* this Year more than ever.

Court. By whom?

O. Donogh. By my Landlord, Sir *Donogh O-Brien*.

Court. Are you to have an Abatement from Sir *Donogh O-Brien*, after this Year?

O. Donogh. I am not to have any. I have not any Trick or Quillet in any way. I do not expect any thing of that sort.

Mr. Soll. Gen. There is another Part of this Young *O-Brien Andrews's* Evidence, that relates to the Justice of the Peace, *Mr. Butler*, and he is here in Court.

Mr. Attorn. Gen. Your Lordship, has heard the Evidence of this young *Donogh O-Brien Andrews*, wherein he has been flinging against a whole Court and County.

Court. It was never otherwise; tho a Justice of Peace be in the just Execution of his Office; yet when Criminals come to be charged, they'll recriminate those that appear against them.

William Butler Sworn.

William Butler. My Lord, I had an Account that this Sham-Robbery, that *Mr. Hurly* set up, as I do believe, was discovered by *Carty*, and I had an Account that *Donogh O-Brien*, that young Man, was in Gaol, and was willing to make an ample Discovery too; and I rid to *Ennis*, and went to my Quarters where I generally lodge; and sent to the Gaoler for him who brought him to me: and then I told him, my Business to Town was to examine him, if he were willing to give a true Account of the Matter. He went then about proposing to make Bargains with me, but I told him I had no more to say; but if he would give a true Account of the Robbery of *Mr. Hurly*, any Kindness I cou'd do for him, it should be done. He said he was afraid of the Gallows; and sitting down gave me that Examination which he has given me, and I have writ it down faithfully as distinctly and truly, as if it was for Life and Death; and I promised him nothing, nor threatened him. He seemed to be so penitent for being concerned in the Action, and was so much troubled that it was discovered against *Mr. Hurly*, that he wept a great deal in my Company, and did declare, that if others had not discovered against *Mr. Hurly*, he never would. And I parted with him, and bid the Gaoler be civil to him.

Mr. Sol. Gen. *Mr. Butler*, Did you tell him, that he should be hanged, if he did not swear?

Butler. By Virtue of my Oath, I did not.

Y. Donogh. Did not you tell me, the Quarter-Sessions was adjourned for a Week longer, on account of this Commission of Oyer and Terminer?

Butler. No, by Virtue of my Oath, I did not — I sent for *Mr. Hickman*, and he was with me by the time I went midway thro' this his Examination; and when I had finish'd it, it was read to him distinctly, and he swore to it.

Mr. Att. Gen. Now, my Lord, if your Lordship be pleased, the Examination that was taken by *Mr. Butler*, I desire it may be read Paragraph by Paragraph.

Mr. Sol. Gen. Was this Information written by *Mr. Butler* out of his own Head, or did you give him that Account as it is down there, or is it a Sory framed by him?

Y. Donogh. *Mr. Butler* writ it. I told him several Things, but he framed them as he pleased himself.

Mr. Sol. Gen. What Information did you give then to *Mr. Butler*?

Y. Donogh. I don't remember.

Mr. Sol. Gen. 'Tis impossible for any Man to frame such a Thing out of his own Head.

Mr. Forster. Whether there was not a Report that there was a Commission to come down of Oyer and Terminer?

Mr. Butler. They did talk so, but I had no Discourse of it; I used him mildly, and only desired him to tell the Truth.

The Examination Read.

Mr. Recorder. Did you lie at Daniel O-Keans's House that Night after the Robbery?

Y. Donogh. Yes, I did.

Mr. Recorder. Who told Mr. Butler that?

Y. Donogh. I told him it.

Donogh O-Brien's Second Examination, taken before Lord Chief Justice Pyne read, where he answers what he swore in the former.

Mr. Forster. I desire, my Lord, the Examination before Baron Ecklin may be read.

[Clerk reads Calaghan Carty's Examination before Baron Ecklin.]

Mr. Sol. Gen. My Lord, I desire the same Method may be observ'd in this as in other Cases, for Hands may be alike, and not the same.

Mr. Robbins. Here has been two Examinations of Calaghan Carty: one he owns, the other he denies. Now, my Lord, we have produc'd three or four Witnesses, that he was before my Lord Chief-Justice, and there swore that what he had formerly swore in the Country was false; that Patrick Hurly did contrive a Robbery against himself.

Mr. Recorder. Mr. Robbins (with submission, my Lord) is mightily mistaken; they said, there was an Examination taken before my Lord Chief-Justice, but not that this was it.

Mr. Butler. You cannot here read an Affidavit sworn before a Baron of the Exchequer, there is no Colour for it.

Court. Calaghan Carty, pray were you examin'd before any of the Judges as to that Matter?

Carty. No, my Lord never in my Life.

Mr. Sol. Gen. Never in his Life. — There is no proving it but by my Lord Chief-Justice, and to prove that this is the Man; for a Man may come in the Name of another Person and swear, and the Man he personates know nothing of the Matter. — Who drew your Examination, Donogh O-Brien?

Y. Donogh. I did it myself.

Mr. Sol. Gen. And who drew Hicky's?

Y. Donogh. Himself.

Mr. Sol. Gen. And who drew Calaghan Carty's? — I can't tell.

Court. I never knew an Examination, but where the Person was examin'd whether it was true or not; otherwise it goes for nothing: and if the Person does not own it now, it must be prov'd upon him.

Mr. Forster. My Lord, an Examination given in before the Court, and upon Record, we come and desire it may be read, to confront an Evidence, for this Man is forsworn.

Court. I had the Curiosity myself, for the Satisfaction of Justice, to send for my Lord Chief Justice's Clerk, Mr. Wakeham, and examin'd him here in open Court: Being examin'd, I remember, said he, there did come such four Men, and they were sworn before my Lord Chief Justice; but, that this is one of the Men I cannot swear.

Mr. Sol. Gen. I have no such Examination at all. If you please, read the Affidavit before Baron Ecklin.

Mr. Recorder. [comparing the Affidavits.] These are both the same, Word for Word, drawn both by Mr. Terry: They are both his Hand-writing.

Mr. Butler. I desire Mr. William Butler may give an Account, he is sworn, about the Portmanteau. Whether Mr. Hurly did not swear that he left the Portmanteau at Loughrea, at Bargery's House, whilst he went to see his Brother at Tiaquin?

Christopher O-Brien. My Lord, I ask'd Patrick Hurly what Care he took of his Money at his coming to the Country; he said, he left it at Loughrea, and would not carry it to Tiaquin, for that was a loose Family. — This he told at his own House, after he had sworn it in the Court.

[Mr. Taylor sworn.]

Mr. Butler. Mr. Taylor, declare what you know of Mr. Hurly's Swearing at the Assizes about the Portmanteau.

Mr. Taylor. I was at the Assizes at Ennis, and Mr. Hurly swore that he left his Portmanteau at Loughrea when he went to Tiaquin; and, that he told Mr. Bargery there was Matters of great Consequence in the Portmanteau, and desir'd him to take care of it; and that Bargery did so, and deliver'd it safe to him at his Return.

Mr. Hurly. Mr. Butler knows the County of Galway: I desire to know whether it is likely for me, going to the County of Clare, that I should leave my Portmanteau at Loughrea, and come back again.

Mr. Butler. I don't know that, but you did swear it.

Mr. Recorder. And his Man swore he carried it with him to Tiaquin. So 'tis — Trim Tram, like Master like Man, both forsworn.

Mr. Sol. Gen. My Lord, the Persons produc'd by Mr. Hurly are Men, by their own Confession, who at some Time or other were forsworn; and they are such Men as have nothing between them and the Gallows but this Shifting: They are sensible no Jury can believe them.

Mr. Robbins. My Lord we are charg'd but with one Indictment, there is but one Venire, I think.

Mr. Butler. There are two.

Mr. Attor. Gen. Mr. Robbins, if your Client be guilty of the Perjury, clear him of the Cheat if you can.

Court. The constant Practice of this Court is, that if there goes a Venire between the King and a Party indicted, and that there be several Indictments against the same Party, the Court will charge the Jury with 'em all, unless he comes in by Counsel, and shews some good Cause why you cannot go on with some of 'em.

Mr. Attor. Gen. My Lord, I think that the Contrivance is made out so fully to the Satisfaction of every Man present, that there never was stronger Evidence than of both these Villanies, the Perjury, and Conspiracy to Cheat. When a Man has liv'd extravagantly, and then goes about all manner of Ways to retrieve himself, if Perjury goes unpunish'd, it shall lie at the Door of those Gentlemen that have heard this Matter so fully prov'd

prov'd to-day: And this poor Country must suffer by Perjury, if Care be not taken to suppress it. 'Tis now growing late, and I will not take up more Time in summing up this long Evidence to the Jury, but leave it to the Court.

Mr. Justice *Cooté*. Gentlemen of the Jury, you have heard a very long Evidence, and I will repeat the Heads of it to you as well as I can, that you may discharge yourselves with Honour and Conscience. You have taken an Oath, and I hope you will not be led to the preventing of Justice, one Way or the other. Mr. *Hurly* stands indicted here of Perjury, for making a false corrupt Oath before a Justice of Peace, Mr. *Blood*; before whom he swore, in an Examination that was read in Evidence, That he was robb'd of so many Guineas, Pistoles, and other Goods, at his Father's House in *Moughna*, in the County of *Clare*: That he was robb'd by four Persons, whose Names he knows not, but by their Tone they seem'd to be *Irishmen*; and, that the same was not done by any Contrivance of his: After which, he did exhibit a Petition to the Judges of Assize, and did endeavour to recover from the County the Value of what he was so robbed of.

Gentlemen, Mr. Dean *Blood* prov'd to you, that the Prisoner at the Bar did take his Oath, that the Contents of the said Examination was true, and that he sign'd it in his presence.

Gentlemen, the first Witness that was produced unto you to prove the Perjury and that Mr. *Hurly* was not robb'd, but had sworn falsely in that Information, was one *Calaghan Carty*. And he being sworn, tells you, That at the Time that this Robbery was committed he was in Mr. *Hurly's* Service; and, that Mr. *Hurly* came to him, and made Moan to him, that he did owe Money; and, that he could pay his Debts if this same *Calaghan Carty* would observe his directions, and do what he would have him to do; and, that thereupon this *Calaghan Carty* did tell him, he would; and the Direction was, That he should joyn other Persons he nam'd, and put on a Disguise, and take an Opportunity when Mr. *Ronane* was at the House, and personate themselves to be Robbers, and take away the Goods and Money out of the House, and when they should have so done, to return them again. And this *Calaghan Carty* was to go to one Mr. *Forster's* for a Suit of Black Clothes, and he was to come back again. These were the Orders he receiv'd, by the Direction of Mr. *Hurly*. He tells you, That he did accordingly joyn the rest; that they had Coats, Disguises, and Swords left for 'em in the Barn, which they took and put on; that they did actually bolt into the House at Mr. *Ronane's* coming out of the Door, and took those Fire-Arms that were laid for 'em; and, that they had their Intelligence from Mr. *Hurly*, the better to personate their being Robbers. And he tells you, that Part of them went up to Mr. *Hurly's* Chamber, and there took the Bag; and, that they were directed by Mr. *Hurly* to pour it out before Mr. *Ronane* (the better to make the Pretence out against the County) and likewise when they should get in, tie Mr. *Hurly* and Mr. *Ronane*; and, that a Bed-cord was laid in the Window for that Purpose: And he tells you, that they had fir'd off the Fire-Arms, and, that there was

nothing in them but Powder. And, Gentlemen, you will see anon how far this Man swears the Truth, out of the Mouths of Mr. *Hurly's* own Evidence.

Mr. *Hurly*, to lessen this Man's Credit, has produc'd to you several Witnesses, who swear, that he swore an Examination before my Lord Chief-Justice *Pyne*, or Baron *Ecklin*; wherein he pretends that this *Calaghan Carty* swears directly contrary to what he swore in his Information before a Justice of the Peace in the County, and to what he pleads now. To this *Calaghan Carty* says, He never swore any Examination before any Judge; and if any was sworn in his Name, it was done by some other that did personate him. That Examination was produc'd here, but there was no Evidence that this *Calaghan Carty* was the Person that swore it, and he deny'd that the Name to it was his Hand-writing: And he seems to be too ignorant a Person to contrive such an Examination. Now, whether you credited him, or those Persons that swore against him, is left to you.

The next Witness in behalf of the King is *Margaret Connéene*; she tells you, That she was a Servant in the House, and, that these Persons did come into the House, and she hearing Murder cry'd out by Mr. *Hurly's* Servant, she came out of the Kitchen: She tells you, that they made several Shots, particularly at her, and, that there was no Hurt done, nor any Marks of the Shot or Bullets in the Wall. She tells you, That at first she was of Opinion that it was a real Robbery; but afterwards discoursing with *Calaghan Carty*, he told her how it was: And besides, that she was of another Opinion upon the account of a Table-cloth taken away at the Time of the Robbery, which she saw afterwards come back in a Trunk or Portmanteau that was sent to Mr. *O'Brien* after the Robbery.

Walter Neylan was likewise sworn, who gives you an Account, that he was in Prison at *Ennis* for *Hurly's* Debt, being bound for him to one *Thomas Arthur*, and, that he was in the Prison when *Hurly* was brought thither; that they were Chamber-fellows: That Mr. *Hurly* did go so far in the Confession of this Fact to him, that when *Daniel Carty* became a Discoverer, and began to accuse Mr. *Hurly* of this matter, *Donogh O'Brien Andrews* junior, who was then likewise in the same Gaol, did desire to know of him what Method Mr. *Hurly* would take to get him discharg'd, and, that if he could not do it soon, that he must be forc'd to confess the whole Truth: And he swears, that he did acquaint *Hurly* therewith, who said, that he should be undone if the said *O'Brien Andrews* should confess it; and gave him a Piece of Money to give to the said *O'Brien*, and bid him tell him, that he would soon get him discharg'd. *Neylan* was so cautious of this, that he would not do it himself, but one *Daniel Carty* being present, he gave him the Money, and he gave it to *O'Brien*. That *O'Brien* said, This will not do, I must and will tell the Truth. He says Mr. *Hurly* went so far, that he told him he would give any Gratification in the world to prevent *Donogh O'Brien's* coming in against him; for, if he did, he should be ruin'd entirely. Against this, Mr. *Hurly* says, that *Neylan* was exasperated for being in Prison thro' his Means, so

that he tamper'd with Witnesses, and became his inveterate Enemy; and not only swore falsely himself, but tamper'd with others to swear falsely too; of which he has offer'd such Evidence as I shall observe to you hereafter.

The next Evidence, Gentlemen, that was produc'd to you was one *Charles Mac-Donogh*. He tells you, That he was employ'd as Solicitor to Mr. Hurly, and, that he was intimately acquainted with Mr. Hurly, and knew a great deal of his Concerns; and, that one Night, being come back from *Dublin*, the very Time before he was robbed, he talk'd with him, and said, He was a strange Man to come to the Country without Money, and, that it would be too hot for him; that the present Sheriff was Mr. Arthur's Friend; and says, that Hurly did even then fortify his House, because he look'd upon himself to be in no Condition to pay his Debts; that he was extremely poor, that he durst not appear. He tells you, that Mr. Hurly did tell him that he brought down Money; and tho he did tell him so, that yet he did not believe it, because when he told him of the Sheriff, Hurly said, that Sir *Toby Butler* and Colonel *Macnamarra* had a great Influence upon the Sheriff, and would make Interest with him, so that he will do me no Harm.

He tells you, That much about this time Mr. Hurly employ'd himself in reading Acts of Parliament, and one of 'em was the Act relating to the Articles of *Limerick* and *Galway*; and, that he had some Discourse of being comprehended within the Articles of *Galway*. That Mr. *Mac-Donogh* told him, he thought he was then in *France*, and that he was not there; and he said, He would prove that he was then in *Galway*: And reading the Rapparee Act, he said, That it was a very pretty Way for Persons to recover Money from the County. He tells you, Gentlemen, that after this he left Mr. Hurly, and Capt. *O'Brien* writ him word that he was robb'd, and desir'd that he would come and sollicite at the Assizes of *Ennis* on his behalf: But he was so far from believing that he was robb'd, or yielding to that Design, that he writ back a Drolling Letter, as he calls it himself, and he did not think it proper to be concern'd for him. He further tells you, That there were some Persons that gave an Account to him of certain Counters, one *Hicky's* Wife, and, that if her Husband might be produced, he and she might make great Discoveries relating to these Counters.

This took Wind, and the Justices of the Peace gave a Warrant to the High Constable *Walter Huonin*, to search for those Counters: they came to the Place where this Hurly liv'd; the first time he mis'd, but the second time he sent one before, to take care that nothing might be remov'd. And when he came there, he observ'd there was a Dunghil, and, by the Behaviour of *Hicky's* Wife, he had reason to suspect that place. He tells you, That the Woman held the Candle, and in digging the place where the Dunghil lay, at length the Spade hit upon a Slate where the Counters lay: That he took up a Bag wrapp'd about with Hay, he call'd it a Suggane; and, that there those Counters, which he has here produced, were taken up. He told you, That the Woman was under so much Consternation that she dropt the Candle; and when she was told she must go

along with him, she said, Now that was found, she believ'd she must.

The next Person examin'd was *Thomas Edwards*. He swears, He was employ'd to go along with *Walter Huonin*; That he saw a Youth on his Knees by the Dunghil; he ask'd him what he was doing, he said, He was hiding his Potatoes; but he saw no Potatoes, which made him suspect that Dunghil; and, that digging there, they found the Counters, as *Huonin* has given an Account.

The next Man that was sworn was *Mortagh Mac Carty*. He tells you, He had bought a Cow, and, that she had stray'd away from him, and finding of her, and bringing her home, he call'd at this Place, where *Hicky's* Wife was, and she agreed to buy his Cow, and she brought out two Pieces of Gold which she call'd Guineas: Says he, These are not Guineas, I believe this is some of *Patrick Hurly's* Gold: He ask'd her what she would take for them; and he said, I have Three Pence Half-penny, and a Quartern of Tobacco, which I'll give you for them; and she took it, and wish'd that the rest were sold so too. He says, He acquainted Sir *Donogh O'Brien* of this, and he directed him to Mr. *Bindon*, a Justice of the Peace, where he gave in the Examination. He produced to you these two Pieces, which you have here compar'd with the rest of the Counters.

Gentlemen, the next Person that was sworn was one *Joseph Lynch*. He tells you, That he was very well acquainted with Mr. *Patrick Hurly*, and, that *John Hurly* was married to his Sister: and, that Mr. Hurly, before or about Christmas, came to *Loughrea*; and, that at one Mr. *Henry Barger's* House they were both together a drinking; and, that Mr. Hurly taking out some Linen out of his Portmanteau, he saw a Bag that held about a Quart, and taking it to be Money, he look'd into it, and found in it all Counters: and he ask'd him what he did with them; he said, he intended to make use of them for his Diversion. He tells you after this, that he walk'd with Mr. Hurly part of the Way, and, that Hurly discours'd him about Mr. *Banks's* Robbery. Mr. Lynch told him, that the Country had found for *Banks*, and, that he propos'd something in relation to his own Robbery, if Mr. Lynch would assist him; what a pretty Way it was to get Money! Lynch told him, in what was honest and just he would assist him, but in nothing else. Mr. Hurly then fell into Discourse with him about his Farm, and said, he would give up his Farm too, if he would come into the Design he had to get Money. Mr. Lynch answer'd as before, If it be honest and just, I will: if not, I will not; and for the Farm, said he, I'll force you to do that without it.

He tells you, that Mr. Hurly sent a Trunk of Linen to his House after the Robbery was committed; and, that Mr. Hurly did desire no body should see the Trunk with him; that he heard his Brother *Bourk* say, That it was Linen, but he did not mind it, his Wife being then sick; and says, they took away the Trunk that same Night after Mr. Hurly was in Gaol. He tells you, he had the Curiosity to go and see him in the Gaol of *Ennis*, and after discoursing with him, he said, He had done something very irregular in *France*, and now to

to come into the Country and charge it with a Robbery, was very ill.

The next Evidence is *Charles Cassidy* Chirurgeon, and he gives an Account, that this *Hurly's* Father being sick, his Sister sent for him to come there; and after he came, they sent for one *Dr. Brodin*, a Relation of *Mr. Hurly's*; and that this *Brodin* and he, some Time after, went to visit some other Patients, and being abroad, *Brodin* propos'd to him, says he, *Mr. Hurly* gives you small Fees, I can put you in a Way to get 20 Guineas; and told him of the Design, and how he might be a Party concern'd in the pretended Robbery; and he answer'd, He was a Man too well known; but he persuaded him to accept of the Employ. When they came home to *Hurly*, the Doctor told him, he had offer'd him 20 Guineas, and *Hurly* was so far from denying it, that he chid *Dr. Brodin*, and said, he would give him 40 Guineas; and then *Cassidy* said, he was afraid of being known; hereupon *Hurly* told him he had provided Vizards, to prevent his being known; and after going home, his Heart fail'd him and he would not be concern'd. He told you, he heard of this Robbery, but this thing was not discover'd by him till last Sunday, when being at Church, he went with *Mr. Fitz-Gerald* to Dinner; and *Fitz-Gerald* talking of this Business of *Hurly*, *Cassidy* said, he knew a Person in the County that could do him more Harm than any Man living: Says a Clergyman there present, You ought to do the County that Right as to find out that Person, that the County may not be so oppress'd, but Justice done to the Criminal. And, that he went home, and considering it, he went and gave in his Examination to a Justice of the Peace, who bound him over to prosecute, and accordingly he attended here.

The next witness is *Daniel Kiese*; he tells you, That he was very well acquainted with *Mr. Hurly*, and, that *Mr. Hurly*, some time before this Robbery was committed, came to *Mr. Bentley's* Shop and enquir'd there for Masks, or Vizards, such as they use for Masquerades, and *Bentley* made answer, That they had none, but they might be had in *Christ-Church-Yard*. He tells you, that thereupon *Hurly* went into the Yard. He tells you that at that time, hearing *Hurly* enquire for Masques, he was apprehensive that he had some evil Design in hand, and told *Bentley* so; and *Bentley* agrees in what *Kiese* swears, that he did enquire for Masques, and went into *Christ-Church-Yard* for them.

Mr. Gray (the next) tells you of the Poverty of *Mr. Hurly*; and that he could not have any such Sum of Money; that he desired him to raise some Money for him, and for better Security he lodg'd in his Hand a Bond of *Capt. Mac-Donnel's*; and accordingly that he got *Mr. Conner* to indorse a Bill to *Mr. Lumm*; and *Mr. Hurly* afterwards paid the Money.

The next that was produced for the King was *Capt. Mac-Donnel*; and he tells you that he had given such a Bond to *Mr. Hurly*, upon account of a Farm they had purchased jointly, and that he ordered him to pay this fifty Pound that was borrowed. That he would not be concerned in paying part unless he paid it all; that the Money was paid.

Mr. Attor. Gen. Cassidy tells you, that he had used to play at Tables with *Hurly* at his House, and

that *Hurly* got him to send for a dozen of Bottles of Wine to *Ennis* to drink with *Hurly*, because *Hurly* had no Money.

Mr. J. Coote. I will give you an Account now as faithfully as I can, of what was sworn for the Traverfer.

But I should have told you first, that *Capt. Mac-Donogh* gave you an account of the greatest Severity used by *Patrick Hurly* towards his Brother *John*, which he said himself, he would not have done, but that he was forced to do it, by reason of his own necessitous Condition.

Now *Mr. John Hurly* he tells you of considerable Sums of Money, he received from *Holland*, viz. 490 l. from *Col. Lovet*, and 200 l. from *Jeremiah Donavon*; and in 97 from *Mr. Fitz-Symons* 300 l. 10 s. and 200 l. more in *Limerick*. He tells you that of those Sums received, he paid again in Cash to *Mr. Hurly*, all but a little that is received from *Mr. Fitz-Symons*. He paid him in Cash but a little; and he had forty Bullocks, and some Sheep, towards the Balance of what remained unpaid. That there was some Money paid to *Mr. Arthur*, and some to *Mr. Burton*, and more laid out other ways. He tells you that he saw with *Daniel Hicky* a Note that was given by *Mr. Hickman*, a Justice of Peace of the County, and by *Mr. Cusack* then Sheriff, whereby they promised, that if he would make a true Discovery of the Robbery of *Hurly*, that they would intercede to the Government for a Pardon for him. This is the Substance of what *John Hurly* has sworn.

The next Witness for the Traverfer was *Dorothy Kemp*; who was a Servant, she tells you, to *Mr. Hurly*, when this Robbery was committed. She tells you that seven Persons came into the House, that five of them went up into her Master's Chamber, and two staid in the Parlour. That there were several Shots made, and that there was no Harm done, nor no Marks or Prints of Bullets or Shot in the Wall or Ceiling. That there were two men without at the Window, and being called Rapparees they thrust their Swords thro' the Window. And that *Mr. Ronane* was going out, when they rushed in, and that they threw him down, and that they tyed *Ronane* and *Hurly*; and to shew you there was Money, she tells you that the Wife of *Mr. Hurly* took out of a Trunk a great Bag of Gold, and shewed it to her; and then took part of it, and put it into her Pocket: And after that, this *Dorothy Kemp* going to the Trunk for Linen, she was strangely surprised to find the Bag there. That *Mr. Hurly* came in at the Time, and was inquisitive to know what she did there; she told him she was looking for Linen. That then he took the Bag out himself, and convey'd it to his Closet.

She tells you likewise, that there was one *Murrough O-Brien* did endeavour to tamper with her, to persuade her to swear about the Counters, that were to be lodged with her, or with *Daniel Hicky's* Wife; and this *Murrough* promised her a great Reward, if she would let this Trick be put upon her Master; but she would not. She tells you that this *Murrough O-Brien*, not only tamper'd with her, but also with *Hicky's* Wife; and that he sent Letters by his Servant to *Hicky's* Wife, and that they were delivered; and that the Contents of the Letters was, desiring her that she would suffer those Counters to be lodged in *Hicky's* House.

Houfe. She tells you, that Mr. Hurly had a considerable Quantity of Linen taken away from him. That she had washed twenty Pair of Sheets herself, and that there was ten Pair more, and that all was taken away, except five Pair; which is the Substance of what she swore.

But Murrrough O-Brien was sworn, and he deposed that he was so far from tampering with Dorothy Kemp, that he did not think it safe to converse with her, because she was kind and civil to Mr. Hurly, and bore a Child or two by him; and to the contrary he swore he had no Communication at all with her. But as for Hicky's Wife, he says, she told him she would discover all, if he would bring her Husband home again; and in pursuance of that he writ Letters to Hicky, and that the Purport of them was only to satisfy him, that he might come with safety and treat with him. The Letters being read, they import no more.

Gentlemen, the next Witness, Daniel Mac-Cay, says, that he was a Servant to Mr. Hurly a considerable time; that he was in the House when the Robbery was committed; and that there was only five of the Robbers that he saw; that some of them put the Family in Terror, and others made it their Business to fall on the Master: He at first thought they were only Bailiffs come to arrest his Master; but when he came and broke open the Door that they had lock'd upon his Master, he found they were Tories. That there were several Shots made. I asked him, was there any Hurt made by the Shots? and he said no. Was there any Marks of the Bullets? he said no. He said there was some at the Window, that did thrust in their Swords: He tells you there was one Christopher O-Brien, who did endeavour to tamper with him to take off the Evidence, to whom he went with a Letter to the Swan Tavern, and that Mr. O-Brien discoursed with him about the Counters.

He tells you that his Master had a great deal of Money, and that when he was to go down into the Country with his Master, they were so great together, that his Master acquainted him with a great Sum of Money he had, and that he told him he intended to pay Mr. Arthur with it: But that Arthur did exact a great Sum for Exchange, and therefore he did not pay the Money in Town, but expected to get easy Terms from him in the Country: And it was because he offered to be robbed, that he did shew his Servant a great Sum of Money he had to carry down into the Country: and then he was examined by Mr. Butler, as Counsel for the King, by what Road they went at that time to the Country, and at what Place they went over the Shannon? he said it was over a Bridge, but he did not know what Bridge. And being asked whether they went through Athlone, it being a casual Question, he said they did go through Athlone: And being asked where he lay that Night, he said at Balliboy or Eyres Court; And being urged to be exact, he said, he thought it was Balliboy; and then he said they laid at Killighy.

Gentlemen, you know the Country, and that Balliboy and Killighy are near the King's County on that side the Shannon; and Eyres-Court on the other side in the County of Gallway.

Now, Gentlemen, because Mr. Patrick Hurly, in the Course of the King's Evidence, denied

positively that he was at any time about Christmas at Loughrea; I asked this Mac-Cay if his Master went down any other time; he said he did a little before Christmas; and then I asked if he was at Mr. Bargery's House in Loughrea; he said he was, but he could not tell whether Mr. Joseph Lynch was there or not; and being asked whether he carried his Master's Portmanteau to Tiaquin, he said he did; and that his Master hired a Horse at Tiaquin, and sent him before him to Gore. I asked him whether he were sure the Money his Master produced to him in Dublin was Gold, or no? He said he was sure it was Gold, it was Louis d'Ors, tho by Mr. Hurly's Information there was more Guineas than Louis d'Ors. He tells you likewise Gentlemen that this Calaghan Carty had discovered upon his Oath, before my Lord Chief Justice, what he had formerly sworn before a Justice of the Peace concerning this Robbery: And being asked who were present, he said my my Lord Chief Justice's Clerk was there, which gave Occasion to the Court to send for the Clerk.

The next Man examined was one Crips. He says that one Halloway did beat him, and take him by the Hair of the Head, because he would not swear against Patrick Hurly, and that Neylan offered him Six Collops grazing, if he would swear that Hurly contrived this Robbery himself, and that he was by when Calaghan Carty was sworn before my Lord Chief Justice Pyne; but he cannot tell what it was he swore, and he does not seem to be capable of knowing it; for he does not speak English. And then he says, Mr. Lynch offered him considerably to come and swear against Hurly; and bid him come to Connaught and live with him, for John and Patrick Hurly were both ruined. Mr. Lynch has been examined, and he swears he had no other Discourse with this Man, but about the Farm at Moughna, that the Hurlys held from him; that they were in ill Circumstances, and that he would be rid of the whole Family. Neylan tells you, that to his knowledge he never saw this Man till this Day. Crips said upon his Oath that it was at a House in such a Place that Neylan tampered with him. And Neylan tells you upon his Oath, that there was not any House at all within his Memory in that Place, and that he never had any Communication with this Crips directly or indirectly. So when Persons swear directly one against another, You, Gentlemen of the Jury, must weigh the Evidence, and the Arguments they offer to induce your Belief.

The next Witness is Daniel Hicky, who tells you he was sent to Gaol and bolted there, and after he was told that one Daniel Carty confessed the whole Matter, he was forced before a Justice of Peace, and there was forced to swear by the Management of Mr. Hickman and Mr. Cusack, who told him, that if he did not swear he must be hanged. And that thro' Fear he was compelled to give that Information wherein he proves the Robbery was contrived by Mr. Hurly, and that he was one of the Actors in it; and when he was told that he should be called before my Lord Chief Justice Pyne, and he was brought into the Bar, he said he would swear nothing but Truth before my Lord Chief Justice; that hereupon the Gaoler carried him back, and he never after could get Opportunity of giving my Lord Chief Justice an Account of the Matter, tho he sent Petitions after

ter him: He says that before he discovered, he was treated barbarously; but afterwards, he was treated very well, and had twelve Pence a Day; but that after they were in the Court, and said they would say nothing but the Truth before my Lord Chief Justice, they were allowed but nine Pence, and there was a *Mittimus* sent to confine them closer. He says, *Daniel Carty*, procured Bail, and he was bail'd by some Friend of Mr. *Hurly's*. He tells you he came to Town, and that he went to the Lord Chief Justice *Pyne*, and there swore an Examination contrary to what he swore before, and says that he was so conscious of the Injury he had done Mr. *Hurly*, that he writ his sole Examination himself; and says he had been tampered with, and nothing would do. That he was afterwards brought into this Court, and there did own his Examination before my Lord Chief Justice to be Truth; but after he charged Mr. *Cusack* the Sheriff with having tampered with him, when Mr. *Cusack* appeared here and confronted him, he went back from what he said.

The next is *Donogh O'Brien Andrews Junior*. He tells you he was manacled and fettered in the Gaol, till such time as by the Persuasion of Mr. *Neylan*, and the Threats of the Gaoler and of Mr. *Cusack*, that if he did not swear he should be severely neck-yoked, he went before a Justice of the Peace, Mr. *Butler*, who used several Insinuations to him, as he says, to procure him to swear the Robbery was contrived by *Hurly*, which thro' Fear he consented to, and says, that Mr. *Butler* put his Information into Writing: Part, says he, I told him, and Part, he says, Mr. *Butler* put down as he pleased. I did swear to it, says he, but it was against my Conscience, for I was forc'd to it: He says that Mr. *Neylan* brought Coats to him in the Gaol, and they would have him swear they were the Coats they robbed in, but he would not swear by any Means; he says that after they were discharged, he was so conscious to himself of the Injury done Mr. *Hurly*, that he came towards *Dublin*, that he lay in the same House with Mrs. *Hurly*, and her Brother at *Kiltartan*: and that coming nearer to Town about *Kilcock*, he met with *Crips* and *Carty*, that they lodged together in one House, and being asked whether he spoke any thing to his Father about this Robbery, he said he never did.

The Father is there produced, and he tells you tho it would reflect upon his Son, yet he would perform Truth being upon his Oath, and so swears, that hearing how his Son had been concerned in the Contrivance of this Robbery, after he had been three Weeks in Gaol he went to see him, and when he came to him, check'd him, and his Son told him, as he understood him, that the Robbery was only a Contrivance of Mr. *Hurly's*. That after he was out of Gaol, he spoke to him concerning the Arms, where they had them, and whether they were *Patrick Hurly's* Arms, to which he answered, where else should he get Arms? And this *Donogh O'Brien Andrews Junior*, being asked again whether it was so as his Father deposed, he said it was not so. Now the Father and the Son swearing one against the other, in this Matter you must be Judges who has sworn true.

The next is Mr. *Butler*, who tells you that in
V o l. V.

taking the Examination, he was so far from using any Threats to this *Donogh O'Brien Andrews Junior*, that as soon as he came to *Emm's* hearing he was willing to make a Discovery of the Matter, he sent for him to his Lodging. That he caus'd him to sit down, and that he writ every Word as he spoke it, and that there was not a Word but what came from his own Mouth. And the Examination was here read, and if you observe it, there are several Things in the Examination that the Party owns came from himself, and several Things which could not possibly come within the Knowledge of Mr. *Butler*; so that it is impossible to be contrived by Mr. *Butler*, because they were things wholly in the Informer's own Cognizance.

There is one Thing offered in the close of the Evidence in behalf of the King, which does not only relate to *Mac-Cay*, but to all the rest. Mr. *Butler* and Mr. *Forster* upon their Oath tell you, that Mr. *Hurly*, when he preferred his Petition concerning this Robbery before the Judges of the Assizes, and he did also swear that when he went to *Tiaquin*, he left his Portmanteau with Mr. *Bargery* at *Loughrea*, with a strict Charge to take special Care of it, for that there was something of great Consequence in it; and *Christopher O'Brien* swears that Mr. *Hurly* told him likewise, that he left the Portmanteau at Mr. *Bargery's*, when he went to *Tiaquin*, and said he would not carry it to *Tiaquin*, because that was a loose Family; so that Mr. *Hurly* swore fully against what *Mac-Cay* swears now.

Hurly swore he was robbed but by four Persons, and that agrees with what *Calaghan Carty* swears. One Woman swears there was seven, another swears nine; so that out of the Mouth of Mr. *Hurly* himself his own Witnesses are contradicted. But Mr. *Hurly* would take off the Probability of his saying thus, (for he denies the saying of it.) Is it likely, says he, that I should come back from *Tiaquin* to *Loughrea*, and so go on again to *Gortnashigory*? But *Mac-Cay* his Boy tells you, that his Master hired a Horse for him to carry the Portmanteau before him to *Gortnashigory* on *Saturday*, and that his Master followed him on *Sunday*; now if the Portmanteau had been at *Tiaquin*, why should he send it by *Mac-Cay* before-hand to *Gort* on *Saturday*, that he was following thither on *Sunday*: And when Mr. *Hurly* was going down to the Country, what can be imagined why he should make a Boy acquainted with his carrying so much Money with him? And that Mr. *Hurly* should leave the Key of the Trunk with Mrs. *Kemp* to take out Linen, and so great a Sum of Money there. I do but lay the Facts before you as they stand upon the Evidence, as well for as against the Prisoner; and I hope you will do Justice both to the Prisoner and to the King. Gentlemen, if you are satisfied upon the whole Matter, that Mr. *Hurly* is Guilty of the Perjury, you will find him Guilty; if not, you will acquit him.

If you think him Guilty of the Contrivance to cheat the County, you will find him Guilty; if not, you will acquit him.

The Jury went out, and returned in half an Hour; and brought in their Verdict, Guilty on both Indictments.

Mr. Attor. Gen. May it please your Lordship, *Patrick Hurly* has been indicted for Perjury and a Cheat, and is found Guilty of both Indictments, I humbly pray your Lordship's Judgment.

Court. How have you laid your Indictment?

Mr. Sol. Gen. At Common Law.

Court. In what Circumstance is *Mr. Hurly*?

Mr. Butler. I hope, my Lord, if it is only a Fine, it can't be less than the Sum he designed to get from the County by the Perjury.

Court. As to the Perjury, the Judgment of the Court upon that Conviction is, that *Mr. Hurly*

be Fined for the Perjury 100 *l.* and be Imprisoned till he pay it to the King.

Mr. Attor. Gen. We will move the Court next Monday for your Judgment upon the other Indictment.

Mr. Butler. My Lord, we insist upon it, that the Pillory is the Punishment for the Cheat.

Court. We know, if *Mr. Hurly* be not able to pay the Fine, he ought to suffer Corporal Punishment.



*The Lord Haverſham's SPEECH in the Houſe of Lords, on the firſt Article of the Impeachment of Dr. Henry Sacheverell **

My LORDS,

WHEN I conſider where this Impeachment firſt began, I cannot but think the Deſign of it was very good; but whatever it was, in its firſt Intendment, it is very evident, it has already produced very miſchievous Effects; it has created great Diſturbances in private Families, and Tumults amongſt the People; and raiſed a Ferment in the Nation, that will not be laid by your Lordſhips Judgment, let that be what it will. It has been a two-edged Miſchief; giving the Church on the one ſide, and the Diſſenter on the other, too juſt Apprehenſion, that they are both in danger. Nor can this be wondered at, when your Lordſhips have been told, by ſome of the Managers, of a pretended Divine Right of the Church; and when it has been more than hinted by the Managers of the Houſe of Commons, That the Clergy ought to be directed by the Civil Power, what Doctrines they ſhould teach: Nay, when they have authoritatively taken upon them to interpret Scripture, and charged it as a Crime upon a Miniſter, that he had wreſted ſeveral Places of it to his own wicked Intentions.

My Lords, After ſo noble a Deſenſe made for the Doctor by his Counſel, and ſo great and moving an Apology by himſelf, I ſhould not trouble your Lordſhips upon this Occaſion, were it not more in Juſtification of myſelf, for the Judgment I ſhall give, than for the ſake of the Doctor, whoſe Cauſe, I think, now ſtands in very little need of it.

I was, My Lords, a Sufferer in the late Reigns, as well as others; I was in the Convention-Parliament, and in the Vote of Abdication; and am, at this day, of the ſame Principle I was then; and yet, notwithſtanding this, I am not aſhamed to ſay to your Lordſhips, that I think myſelf obliged, in Juſtice, to acquit the Doctor from the Charge brought againſt him in this Article. And tho' this may ſeem ſtrange to ſome of your Lordſhips, yet, I hope, it will not appear ſo very ſtrange as to ſee Biſhops vote againſt their own Doctrines, and Diſſenters in the miſt of a Mob, that are pulling down Meeting-Houſes; eſpecially, after the Reaſons I ſhall offer to your Lordſhips for the Support of my Opinion.

I ſhall not trouble your Lordſhips about the Original of Government, or the divers Forms of it; your Lordſhips heard that learnedly diſcourſed on by one of the Managers of the Houſe of Commons below: But there is one thing, My Lords, that if my Memory ſerves me right, that Gentleman omitted, and it is a Matter too that I take to be of the greateſt Conſequence to any Government whatſoever: I mean, the Divine Appointment, or Inſtitution of Government itſelf; from which Appointment it is, that Men are obliged to Obedience to the Magiſtrate, not only for Wrath, or Fear of him, but for Conſcience-ſake, for Dread of a future Punishment, which is the greateſt Security the Magiſtrate has. And I the rather mention this, becauſe of No-

tions that ſome People have of late advanced of their own, (and have found their Advantage too in ſo doing) of a diſcretionary Obedience only; that is, in my Opinion, whiſt the Government is for them, they will be for it; and think themſelves bound to obey no longer. It is not neceſſary, to the Proof of this Divine Authority, to fix the juſt Time and Place, when, and where, and how the Knowledge of it was firſt communicated to Mankind: It is enough, that we have it as expreſſly, as plainly, and as clearly declared, as can be put into Words, that it is ſo.

There is another thing, My Lords, that in general, I would mention to your Lordſhips, before I come to the Article itſelf, which may otherwiſe be the Occaſion of ſome Miſtake in this Debate; we are not now judging according to our own Notions of Politicks, or determining how far Reſiſtance or Non-Reſiſtance is lawful. It would be a ſtrange Rule of Judgment, to find any Man guilty for the ſake of one's own private Opinion, and for the eſtabliſhing a Doctrine which he likes, and his Neighbour does not. But the only Queſtion before your Lordſhips is, whether, and how far, the Houſe of Commons have made good their Charge againſt the Doctor. And, I take Liberty to ſay plainly to your Lordſhips, that, in my Opinion, they have been very far from making good their Charge againſt him in this Article.

My Lords, to prevent the leaſt Miſtake, I ſhall read the Words of the Article to your Lordſhips, as they ſtand in the Impeachment.

“ He, the ſaid Henry Sacheverell, in his ſaid Sermon preach'd at St. Paul's, doth ſuggeſt “ and maintain, That the neceſſary Means us'd “ to bring about the ſaid happy Revolution, “ were odious and unjuſtifiable: That his late “ Maſteſty, in his Declaration, diſclaim'd the “ leaſt Imputation of Reſiſtance, and that to im- “ pute Reſiſtance to the ſaid Revolution, is to “ caſt black and odious Colours upon his late “ Maſteſty and the ſaid Revolution.”

The Doctor in this Article is charg'd with having maintain'd, That the neceſſary Means uſed to bring about the late happy Revolution, were odious and unjuſtifiable. To ſupport this, the Commons ſay, That having aſſerted the general Propoſition of the Unlawfulneſs of Reſiſting the Supreme Power, and not having excepted the particular Caſe of Reſiſtance that was made uſe of as a Means to bring about the late happy Revolution; he does thereby reſlect both upon the Means, and upon the ſaid Revolution. In Answer to this, there have been two things inſiſted upon to your Lordſhips, in behalf of the Doctor, by his Counſel: Firſt, That in Caſes of ſuch a Nature as this, the Exception is always imply'd in the general Rule; and there was a very unanſwerable Inſtance brought in Proof of this, at leaſt to moſt of your Lordſhips; it was the Oath of Allegiance to King James. All thoſe that took that Oath, took it in general Words, and yet ſuch an extraordinary Caſe as

* The following Speeches having been omitted in the Firſt Edition of this Work, 'twas thought fit to inſert them in this Supplemental Volume.

the Revolution was excepted, tho not express'd by those that took that Oath. The next was, the Doctor, say they, would have been justly more blam'd, had he mention'd all the Cases of Exception, which extraordinary Cases ought to answer for themselves, whenever they fall out.

And tho, *My Lords*, these two be a full Answer, yet there are two things more, I think with Submission, may be added to it, which have not as yet been taken notice of.

The first is, *My Lords*, That the Proof against the Doctor is drawn by Consequences of the Commons own making, which he himself disowns; and I appeal to that Reverend and Learned Bench, who are great Masters of Controversy, whether it is not an establish'd Rule amongst all learned Men that have the least Spark of Ingenuity, That no Man ought to be charg'd with Consequences, let them appear to his Adversary never so clearly and undeniably to follow from his Assertion, when he himself denies those Consequences. This is so known a Maxim, in all Disputes between Protestants and Papists, and between Protestants themselves, that it cannot be deny'd. Now, the Doctor himself denying, as he does, that he had the least Thought of including the Revolution under his general Assertion, or that he apply'd his Doctrine of Non-Resistance to that Case, cannot, without the highest Injustice, be charg'd with Consequences which he himself utterly denies.

In the next place, it is impossible, in my Opinion, to prove that Resistance was made use of as a Means to bring about the late happy Revolution; and, consequently, is not within the Doctor's general Maxim.

Means, *My Lords*, is a relative Term, and refers to some End; and the End and Design of the Prince of *Orange* in his coming hither, and of those that join'd him when he was here, being to have the Nation and Rightful Succession secur'd by a Free Parliament, it follows, that whatever Force was at that Time made use of, could not be made use of as a Means to bring about an End which was never intended.

Far be it from me, *My Lords*, to lessen the great Undertaking to deliver us from Popery and arbitrary Power; and tho the Glory of that Enterprize is wholly attributed to King *William*, 'tis certain, her present Majesty had her Share in it, however that is forgotten: For, give me leave to say, that had not her Majesty countenanc'd the Undertaking of the Prince of *Orange* with her Assistance, in my Opinion, the Success had been very dubious.

Now, is it possible, *My Lords*, to imagine, that it was ever the Design of her Majesty, or those that join'd the Prince of *Orange*, to take the Crown off of King *James's*, and put it upon King *William's* Head?

No, *My Lords*, the avowed great Design was quite otherwise, as appears by the Declaration itself, which was read below: It was to restore and secure our Laws from the Invasions that had been made upon them by Arbitrary Power: It was to secure that Right which all the World knows the Princess had to the Succession of the Crown, and to have every thing settled by a Free Parliament, and not to make a Revolution by dethroning King *James*. This the Prince himself owns, when he says in his Declaration, *he had no other Design in coming hither, but a Free Parliament.*

My Lords, I take it to be of most dangerous Consequence, to judge any Man by Suggestions and Innuendos: Let what will be said to justify it, it shall never be the Rule of my Judgment.

Groundless Suggestions, *My Lords*, have, within my Memory, been the Pretence of Power, to cover illegal Oppression with the Shew of Reason, to the Publick. I will give your Lordships but one Instance of it: It was the Case of a Reverend Prelate, now in the House; I mean the Archbishop of *York*; his Grace was then Dr. *Sharpe* only. It was in the Year Eighty Six; there was an Order, directed by way of Letter to the Protestant Bishops, to discharge all the inferior Clergy from preaching upon controverted Points in Divinity. They thought it served the Designs of Popery, then, to direct Ministers how they should preach; which was, in effect, to forbid them to defend their Religion. This Precedent was taken from an Order in Queen *Mary's* Time, says the printed Account; when at the same time, it was attack'd by the *Romish* Priests with all the Vigour they were capable of, whilst the Popish Sermons and Discourses were printed by Authority. Notwithstanding this Order, the Doctor took occasion, in some of his Sermons, to vindicate the Church of *England*, in opposition to the Frauds and Corruptions of Popery. But this, by the Court Emisaries, was interpreted much the same way as the Doctor's Sermon is now, to be endeavouring to beget in the Minds of his Hearers, an ill Opinion of the King and his Government, by insinuating Fears and Jealousies, to dispose them to Discontent, and to lead them into Schism, Disobedience and Rebellion.

My Lords, When the Homilies and Articles, when so many Archbishops and Bishops, and the University, and most of the Foreign Divines too, especially the *Lutherans*, have asserted the same Doctrine of Non-Resistance to the Supreme Power, as Dr. *Sacheverell* has; I think it the hardest Case in the World, that this unfortunate Gentleman should thus be singled out and made a Criminal, and a kind of Martyr, enduring the Trial of cruel Mockings, yea, moreover, of Bonds and Imprisonment, for asserting the same Doctrine. 'Tis true, *Beza* and *Pareus*, and some others of the *Calvinists*, are of another Opinion; but 'tis known, that *Pareus's* Commentary on the 13th of the *Romans* was burnt at *Oxford*, by the Order of King *James I.* for asserting that Doctrine.

But there is one thing, *My Lords*, so astonishing in this Prosecution, that I cannot but take notice of it: Those who were at Man's Estate, at the Revolution, know how industrious, on the one side, all that were Friends to King *James* were, to put his leaving the Nation then upon the Foot of Force and Resistance, as thinking this the strongest and best Argument to justify his Withdrawing himself from his People. They rack'd their Brains to find out Arguments to convince Men, that his Life was manifestly in Danger, by staying here; and that it was for the sake of that, and his Liberty, that he was forc'd to withdraw; and that his Withdrawing was just, being an Act of Necessity, and not of Choice.

On the other side, those that were Friends to the Revolution, made it their Business to persuade the World, that all this was but a Colour and Pretence, and that the Fact was quite otherwise;

wife; that the Sense and Conviction King *James* had of what he had done, prevail'd upon him rather to throw off the Government, than concur with a Free-Parliament.

That this was the only Foot they then put it upon; and that it was not then put upon the Foot of forfeiting the Government by Male-Administration; if any Man denies, I appeal to the Papers that were then writ, and are now in Print, on this Subject.

This being so, it is very strange to see so great an Alteration in Mens Notions of Things; and that now, after our Constitution has maintain'd itself upon this Foot, against all Designs and Attempts that have been made upon it, for above twenty Years, those very Men, and that Party, who endeavour'd to place the Revolution then, upon King *James's* voluntary Desertion, which they call'd *Abdication*, should now, without any Reason given, be for changing that Foundation, and do all they can, to put it upon King *James's* Foot of Force and Resistance. What, *My Lords*, are we endeavouring, after twenty Years, to make King *James's* Title better now than any of his Friends could make it then, and not only finding out Arguments they never thought of, but impeaching any that dare so much as question the Truth and Force of them? This, *My Lords*, seems very strange.

My Lords, I cannot but take notice to your Lordships, of what was said by that noble Lord, who spoke last, because, to me it appears to be

a Matter of the last Consequence, to the Honour of her present Majesty. He told your Lordships, that the best Title her Majesty had to the Crown, was her Parliamentary Title. I must take liberty to affirm the quite contrary; and that, in my opinion, the best Title her Majesty has, is her Hereditary Title; tho I deny not, but that the Act of Parliament is a Strengthening and Confirmation of that Title: But I deny a Parliamentary-Title to be the only, or the best Title that the Queen has to the Crown she wears. And in saying this, I do not fear the malicious Reflexions of having a squinting Regard to the Title of any Person on the other side the Water; for in affirming (as I now do to your Lordships) that her Majesty is my Rightful and Lawful Queen, by Right of Inheritance; and as she is Daughter to King *James* the Second, I do in so many Words affirm also, that there is no other Person, the Rightful and Lawful Heir to King *James*, but herself. And if the present Impeachment of Dr. *Sacheverell* shall have this Effect (as I hope it will) to convince the Nation of the undoubted Truth of her Majesty's Right of Inheritance to the Crown, (a Matter now so industriously oppos'd) the Security this will bring to her Majesty's Person and Crown, and to the Succession in the Protestant Line, and illustrious House of *Hanover* afterwards, shall prevail with me easily to pardon any warm and unguarded Expressions, that the Doctor may here and there have dropt, and made use of in any of his Discourses.

The Bishop of Salisbury's Speech in the House of Lords, on the first Article of the Impeachment of Dr. Henry Sacheverell.

THE Counsel for the Prisoner did so plainly and fully yield all that any Loyal Subject has ever pretended to, that in Cases of extreme Necessity, Self-defence and Resistance were lawful, and that this was the Case at the Revolution; that it may not be necessary to say any thing further on this head, if it had not been that the Evidence they brought seemed to carry this Matter much further, and that the Prisoner himself allow'd of no Exception in Cases of Necessity. And since it is grown to be a vulgar Opinion, That by the Doctrine of the Church of *England*, all Resistance in any Case whatsoever, without Exception, is condemn'd; I think it is incumbent on me, who have examin'd this Matter long and carefully, to give you such a clear Account of this Point, as may as fully satisfy you as it did myself.

I served in the Revolution, and promoted it all I could. I served as Chaplain to the late King: I had no Command, and carried no Arms, but I was so far engag'd in it, that if I could see that I had gone out of the way in that (and the many Up-and-Downs we have gone thro' since, has given much occasion to reflect on that Transaction) I should hold myself unworthy to appear longer, either in this Habit, or in this Great Assembly; but should think myself bound to pass away the rest of my Life in Retirement or Sorrow. There is nothing more certain in Religion, than that we ought to repent of every Sin we have committed; and that we cannot truly repent, unless we repair or restore, as far as it is in our Power.

I go now to give you the Account of the Doc-

trine of our Church in this Particular. In the Times of Popery it was a Tenet, built upon Bishops setting the Crown on the Heads of Princes, and anointing them, that they held their Crowns of the Church, and at the Pope's Mercy; who had for about five hundred Years got into the Claim of deposing them, and giving their Dominions to others, in case they were Hereticks, or the Favourers of them. But the Reformation being in its first beginning protected by the Princes of *Germany*, by the Kings of the *North*, and then by the Kings of *England*; they came every where in opposition to the Papal Notions, to say that Kings had their Power from God: Not that they meant, that they had any distinct Authority besides the Law of the Land derived to them from God; but that by the Laws of God, the Authority of the Law of the Land was secured to them. For when a different Authority from that of the Law came to be pretended to, and to be grounded on these general Expressions, that received here a Parliamentary Censure, and it was then declared, that the Laws of Religion in the Scripture did only establish the several Constitutions and Governments that were in the different Parts of the World.

The Occasion that the Apostles had to write what we find in their Epistles, with relation to Government, was this: The Jews had a Notion among them from a Passage in *Deuteronomy*, that they were only to set a King over them, *One from among their Brethren, and not a Stranger*. From whence it is, That to this Day they do not think they are bound in Conscience to obey any Magistrate, who is not one of their Nation.

Now

Now the first Converts to Christianity being Jews, the Apostles took care that they should not bring this dangerous Notion with them into the Christian Religion: But they did not meddle to determine where this Authority was lodg'd, that was to be gather'd out of the several Constitutions: They did not determine how much was due to the Emperor, and how much to the Senate; and tho not long after those Epistles were writ, the Senate condemn'd *Nero* to die *more majorum*, to be whip'd to Death, none of the Christians interposed in that Matter. He prevented that infamous Death by his own Hands: And the Primitive Christians reckon'd it one of the Articles of the Glory of their Religion, that their first Persecutor came to such an End.

Not long after that, *Trajan* was fam'd for that memorable Expression, when he deliver'd the Sword to the Governors of the Provinces, as the Emblem of their Authority, he us'd these Words, *Pro me, si merear in me*: For me, but if I deserve it, against me. That did not weaken his Authority; his Government, with that of his Successors for above eighty Years, being the greatest and happiest time the *Romans* had under their Emperors. This Word was put on King *James* the First's Coin in *Scotland*. It is true, that was during his Minority; but when he afterwards changed his Motto, the Coin was not call'd in, but continu'd current till the Union.

The Primitive Christians had no Laws in their Favour, but many against them: so their patient suffering so many Persecutions according to the Laws of the Empire, under which they liv'd, was conform to the Doctrine laid down by the Apostles. When they came afterwards to have the Protection of Laws, they claim'd the Benefit of them, not without great Violence, when they thought an Infraction was made on those Laws; which broke out into great Tumults, in many of the chief Cities of the Empire, not excepting the Imperial City itself.

But to proceed with the History of our Church: When the Articles of Religion were settled, the Books of the *Apocrypha* were indeed declar'd not to be a part of the Canon of the Scripture, but yet to be useful for the *Example of Life*, and the *Instruction of Manners*. A great Part of these are the Books of the *Maccabees*, which contain the History of the Jews shaking off the Yoke of the Kings of *Syria*, when they were broke in upon by a total Overthrow of their whole Law, and an unrelenting Persecution. *Mattathias* a private Priest began the Resistance which was carried on by his Children, till they shook off the *Syrian* Yoke, and form'd themselves into a free Government, under the Family of the *Maccabees*. It were easy to shew that the Jews had been for above 400 Years subject, first to the *Babylonian*, then to the *Persian*, and at last to the *Grecian* Empire: So that by a long Prescription they were Subjects to the Kings of *Syria*. It were easy also to shew, that this Resistance was foretold by *Daniel*, in Terms of high Commendation, and is also mention'd in the Epistle to the *Hebrews*, as the Work and Effect of their Faith. If then all Resistance to illegal and barbarous Persecution is unlawful; these Books contain nothing but a History of a Rebellion, and all the Devotion that runs thro' them, is but a Cant, and instead of reading them as *Example of Life*, and *Instruction of Manners*, we ought to tear them out of our Bibles with Detestation. I shall

afterwards shew what use was made of these Books, not only by private Writers of our Church, but by what the whole body in Convocation was about to determine.

The next Step to be made, is, to consider the Homilies: The Second Book of Homilies, which has the Homilies in it against *Wilful Rebellion*, is generally believed to have been compos'd by Bishop *Jewel*, who was by much the best Writer in that time. It is certain, he understood the meaning of them well: Now I will read you two Passages out of his Defense of his Apology for the Church of *England*; from whence we may clearly gather what his Notion of Rebellion was, and that he thought a Defence against unjust and illegal Violence was not Rebellion. In one place he has these Words;

The Nobles of Scotland neither drew the Sword, nor attempted War against the Prince: They fought only the Continuance of God's undoubted Truths, and the Defense of their own Lives against your barbarous and cruel Invasions: They remember'd, besides all other Warnings, your late Dealings at Vassy, where great Numbers of their Brethren were murder'd, being together at their Prayers in the Church, holding up their Innocent Hands to Heaven; and calling upon God. In another place he writes, Neither do any of all these (Luther, Melancthon) teach the People to rebel against their Prince, but only to defend themselves by all lawful Means against Oppressions; as did David against Saul, so do the Nobles in France at this Day, they seek not to kill, but to save their own Lives.

These Passages shew that he looked on Rebellion to be a violent Rising against a Prince executing the Laws; which was the Case of the Three Rebellions in *England* that they had in view: That in King *Henry* the VIIIth's, in King *Edward*'s, and in Queen *Elizabeth*'s Time, where the Papists took Arms against their Prince, who was executing Laws made in Matters of Religion, and that with a great Gentleness. Of the Eleven Passages quoted by the Prisoner out of the Homilies, Five plainly relate only to the Coercing the Person of the Prince, in which *David* is set in Opposition to those Rebels: now, tho he indeed defended himself, yet he had a just and sacred Tenderness to the Person of *Saul*, when he had him in his Power, which is certainly sacred by our Constitution. Five of them relate to wicked Princes. It was never pretended by any who pleaded for Necessary Defense, that the bad Life of a Prince can be a just Cause of Resistance: Yet that was then pretended; for *K. Henry VIII.* had given too much occasion to reckon him a wicked Prince. So there is only one of all the Passages quoted from those Homilies, that relates simply to Rebellion in general: And it has appear'd what Bishop *Jewel*'s Sense of the Matter was. There is also a Prayer at the end of every Division of the Homily against *Wilful Rebellion*, (and by the by *Wilful* was not put in the Title for nothing) for those oppress'd by Tyranny in other Parts, that they might be relieved, and that those who were in fear of their Cruelty might be comforted.

Let us next look thro' Queen *Elizabeth*'s Long and Glorious Reign, and see what was the constant Maxim of that Time.

The Year after the Queen came to the Crown the War in *Scotland* broke out between the Queen Regent that govern'd by Commission, from her Daughter then Queen of *France*, and the Lords in *Scotland*.

Scotland. She, to obtain the Matrimonial Crown to be sent to *Francis II.* gave Assurances for the Exercise of the Reformed Religion; but the Point being gain'd, she broke all her Promises, and resolv'd to force them to return to the Exercise of the Popish Religion. Upon which the Lords of *Scotland* formed themselves into a Body, and were called the Lords of the Congregation. Forces were sent from *France* to assist the Queen Regent; upon that Queen *Elizabeth* entred into an Agreement with the *Scottish* Lords, and sent an Army to their Assistance, which continued in *Scotland* till all Matters were settled by the Pacification of *Leith*: And in a *Manifesto*, that I have in my Hands, set forth 25 Years after that, I find her reflecting on that Interposition in the Affairs of that Nation, with great Satisfaction.

The Year after this War was ended, upon *Francis* the II'd's Death, *Charles* the IXth, who was a Child, succeeded in *France*. Edicts were granted in favour of the Protestants: These were soon after broken by the Triumvirat, and upon that follow'd a Series of Wars often pacified; but always breaking out again, by reason of the Violence and Cruelty of the Government. All these Wars, till *Henry* the IVth was settled on the Throne, were in a Course of 28 Years, that which some would call *Rebellion*, being carried on against two succeeding Kings. Yet the Queen was in all that time still assisting them with Men and Money.

In the Year 1568. the Provinces in the *Netherlands* threw off the *Spanish* Yoke, that was become intolerably severe and cruel. The Queen for some Years assisted them more covertly, but when the Prince of *Orange* was kill'd, and they were in danger to be over-run, she took them more openly into her Protection; and by the *Manifesto* which I have in my Hands, she published the Grounds upon which she proceeded. She laid down this for a Foundation, That there had been an Antient League not only between the Crown of *England*, and the Princes of the *Netherlands*, but between the Subjects of both Countries, under their Seals interchangeably, for all Friendly Offices. If this was a good Reason for the Queen's giving Aid to the oppressed People of the *Netherlands*, then if the Case had been reversed, that the People of *England* had been illegally and cruelly oppressed, it furnished the Princes of those Provinces with as good a Reason for assisting them. In this Assistance given the States, the Queen persisted till the End of Her Reign; nor was this only done by the Court, but both Parliaments and Convocations granted Her several Aids to maintain these Wars: And in the Preambles of those Subsidy Acts, the Queen's Proceedings in those Particulars were highly approv'd and magnify'd. *Bilson* Bishop of *Winchester*, and several other Writers in that time, justified what she did; and not one that I ever heard of, censured or condemned it.

Upon King *James's* coming to the Crown, the first great Negotiation was for a Peace between *Spain* and the *United Provinces*; which lasted several Years. The States insisted on a Preliminary, That they should be acknowledged Free, Sovereign and Independent States; the *Spaniards* would not yield to this, nor would the States recede from it. Some here in *England* began to say, They were form'd in Rebellion, and ought not to carry their Pretensions too far: Upon that, King *James* suffer'd a Convocation to meet; and

a Book of Canons, with relation to the Supreme Authority, was prepar'd; in which, tho the Authority of the Prince, even when he becomes a Tyrant, is carried very far; yet the Case of the *Maccabees* is stated; and, it was determin'd, That when a new Government, tho begun in a Revolt, is come to a thorow Settlement, it may be owned as Lawful. King *James*, who was jealous enough of the Regal Authority, yet did not like their carrying these Matters so far: He order'd the whole Matter to be let fall so entirely, that there is not a Word of it in the Books of Convocation: But Archbishop *Sancroft* found this Collection of Canons at *Durham*, under Dr. *Overhall's* Hand, which he Copied out, and Licens'd the Book a few Days before he fell under his Suspension. I soon saw that it had a Relation to the Affairs in *Holland*: For the *Dutch* delighted to compare their first Beginnings to that of the *Jew* in *Antiochus's* time: They compar'd King *Philip* to *Antiochus Epiphanes*, and the Prince of *Orange* to *Judas Maccabeus*. But I saw much clearer into the Matter by an Original Letter of King *James*, which a worthy Gentleman sent me. I knew his Hand well, the Letter is in Print; but I will read some particulars out of it. It is directed to Dr. *Abbot*, afterwards Archbishop of *Canterbury*. It began with censuring some Positions concerning a King in Possession, the same with our Modern Term of a King *de facto*: He goes on in these Words, My Reason of calling you together, was to give your Judgments, how far a Christian and a Protestant King, may concur to assist his Neighbours to shake off their Obedience to their own Sovereign, upon the Account of Oppression, Tyranny, or what else you like to name it. In the late Queen's Time, this Kingdom was very free in assisting the *Hollanders* both with Arms and Advice; and none of your Coat ever told me, that any scrupled about it in her Reign. Upon my coming to *England*, you may know it came from some of yourselves to raise Scruples about this Matter; yet I never took any notice of these Scruples, till the Affairs of *Spain* and *Holland* forced me to it. I call'd my Clergy together, to satisfy not so much me, as the World about us, of the Justness of my owning the *Hollanders* at this time. This I needed not to have done, and you have forced me to say, I wish I had not. He reflects on those who had a great Aversion to the Notion of God's being the Author of Sin, which plainly points at Dr. *Overall*, who was the first Man of Note among us, that oppos'd the Calvinists Doctrine of Predestination; yet he says, They had gone to the Threshold of it, by saying, That even Tyranny was God's Authority, and should be revered as such. He concludes, These were edg'd Tools, and that therefore they were to let them rest. Here is a full Account of King *James's* Thoughts of this Matter, which was then the chief Subject of Discourse all *Europe* over. He had Twelve Years before this, shew'd on an eminent Occasion, that he owned the States, when he invited them in the Year 1593. to Christen his Eldest Son, Prince *Henry*. They were sensible of the great Honour done them by it; and tho they were then but Low, they sent an Embassy, with a noble Present of Gold Plate, to assist on that Occasion. This Negotiation stuck for several Years, the *Spaniards* refusing to own them in express Words: The Temper found was, they were treated with (*tanquam*) as with Free States; and the Matter went no further at that time, than a Truce for some Years, which was concluded in the Year 1609. This lets us see,

That

That the Words in King James's Speech that Year to his Parliament, were not chance Words that fell carelessly from him, *A King leaves to be a King, and degenerates into a Tyrant, as soon as he leaves off to govern by Law: In which case the King's Conscience may speak to him, as the poor Woman to Philip of Macedon, Either govern by Law, or cease to be a King.*

There is another eminent Instance towards the End of that Reign, that shews what the Sense of our best Divines was in this Matter; When the Archbishop of York's Son and Mr. Wadsworth had changed their Religion in Spain, Wadsworth writ over a bold Defence of that; and among other Things, charged the Reformation with Rebellion. This was answer'd by one of the best Books of that Time, writ by Dr. Bedell, dedicated to the Prince of Wales, who afterwards promoted him to a Bishoprick. His Words on this Head are full: I will read some of them. *Do you think Subjects are bound to give their Throats to be cut by their Fellow-Subjects, or to their Prince, at their mere Wills, against their own Laws and Edicts? You would know quo jure the Protestant Wars in France and Holland, are justified. First, The Law of Nature, which not only alloweth, but inclineth and forceth every living Thing to defend itself from Violence. Secondly, That of Nations, which permiteth those who are in the Protection of others, to whom they owe no more than an honourable Acknowledgment, in case they go about to make themselves absolute Sovereigns, and to usurp their Liberty, to resist and stand for the same. And if a lawful Prince, who is not yet Lord of his Subjects Lives and Goods, shall attempt to despoil them of the same, under colour of reducing them to his own Religion, after all humble Remonstrances, they may stand upon their own guard, and being assailed, resist Force with Force, as did the Maccabees under Antiochus. In which case notwithstanding, the Person of the Prince himself ought always to be sacred and inviolable, as was Saul to David. No Commentary is wanted here.*

*My Lords, You see how this Matter stood during King James's Reign. In the first Year of King Charles's Reign, Grotius's Book de Jure Belli & Pacis, was published at Paris, dedicated to the King of France, while France was under the Administration of the wisest and most jealous Minister of the last Age, Cardinal Richelieu. In that Book, in which he asserts the Rights of Princes with great Zeal, yet he enumerates many Cases, in which it is Lawful to resist, particularly that of a total Subversion: And that Book is now all Europe over in the highest Reputation of any Book that the Modern Ages have produced. In the beginning of King Charles's Reign, a War broke out in France, against the Protestants; upon which he sent over Ambassadors, by whose Mediation a Peace was concluded; but that being ill kept, the War broke out again; and the King thought himself bound by his Mediation to protect the Protestants. So in the Second Session of the Parliament, 1621. in the Demand of a Supply that the Lord Keeper Coventry made in the King's Name, these Words are to be found, *France is sway'd by the Popish Faction; and tho by his Majesty's Mediation, there were Articles of Agreement between that King and his Subjects, that Treaty hath been broke, and those of the Reformed Religion will be ruined without present Help.* Upon this the Commons petitioned the King for a Fast, and desired the*

Concurrence of the Lords, who join'd with them in it. The King granted it, and an Office was compos'd suitable to the Occasion; in which, among other Devotions, the Nation was directed to pray for all those, *who here or elsewhere were fighting God's Battles and Defending his Altars.* Thus the whole Body of the Legislature did concur for a Fast for that, which if this Doctrine is true, was no better than Rebellion; and yet the whole Nation, Clergy and Laity, were required to pray for Success in it.

But to complete this View of the Doctrine of our Church, it is to be consider'd, That when a Year before this, while the Loan or Benevolence were carried on, some officious Divines made use of those Expressions of Kings having their Power from God, as importing an Authority of a Nature superior to the Laws of the Land. One of these, Dr. Manwaring, was Impeached, and had a severe Sentence pass'd on him for it. So I have now made it out, beyond, I hope, the Possibility of Contradiction, that for Seventy Years together, from 1558, to 1628, the Lawfulness of Self-defence in the Case of illegal and violent Cruelty, was the publick and constant Doctrine of this Church.

These were the best and happiest Times of our Church, as is often repeated by the Earl of Clarendon: From these we ought to take the Standard of our Doctrine.

I go next to shew what was the common Doctrine for the next Sixty Years, from 1628, to 1688. I must yield up the first twelve Years: For upon the unhappy Misunderstanding between the King and that Parliament, there was a long Discontinuance of Parliaments, then the lately condemned Doctrine was again in Vogue, and nothing was so much heard of, as the Law of Government that was from God, antecedent to all Human Laws: Out of this sprung illegal Imprisonments, illegal Monopolies, severe Proceedings in the Star-Chamber, but above all, the Ship-Money. These things put the Nation in an Universal Dis-jointing and Feebleness. And when an unavoidable Necessity forced that King to call a Parliament, the fatal Effects of those Counsels broke out terribly. I know many fancy, that the War is to be charged on the Principles of Self-defence: They are much mistaken. I had occasion to see a great way into the Secret of that time, when I examin'd the Papers relating to the two Dukes of Hamilton. I knew a great deal more since from two Persons of unquestionable Integrity, who knew the Secrets of that time, the Lord Hollis, and Sir Harbottle Grimstone; but all receiv'd a full Confirmation, when I found it agreed perfectly with the noble Account given by the Earl of Clarendon.

No body dreamt of a War, nor had they any Principles leading to it. But there was an unhappy Train of Accidents that hindred Matters from being brought to a Settlement, even while the King was granting all they could desire. Stories were carried by Persons about both the King and Queen, of Words let fall, that made them conclude, there were still ill Designs on foot, against the Laws that were then pass'd. But that which brought all to a Crisis, was the Discovery of a Negotiation, to engage the Army to declare against the Parliament. Whosoever compares the Depositions in *Rushworth*, with the Account given of that Matter by the Earl of Cla-

rendon, will see there is a great deal more in the one, than the other is willing to believe; tho he acknowledges they had both *Goring's* Evidence, and *Piercy's* Letter with them. I will not take it upon me to determine, whether they believ'd too much, or the Earl of *Clarendon* too little. It is certain, they believ'd all that was in the Depositions, and a great deal more: For *Goring* being continued in the Government of *Portsmouth*, and his Father being advanced from being a Baron to be an Earl, and *Piercy's* being made a Lord, and Master of the Horse to the Prince of *Wales*, made them conclude they had suppressed a great deal, instead of saying more than was true. This stuck deep in their Hearts, and at last fatally broke out in the Demand of the Militia, that brought on the War, which I do own was plainly a *Rebellion*; because a Force was offer'd to the King, not to defend themselves from an unjust Invasion, or illegal Grievances, but to extort a new Law from him.

Thus the true Occasion of the War, was a Jealousy, that a Conduct of 15 Years had given too much ground for; and that was still unhappily kept up, by a fatal Train of Errors in every step that was made. The great Concussion that the War gave the Nation, and the barbarous Effusion of so much Blood, especially of the Royal Blood of that Blessed KING, had at last a happy, tho a late Conclusion in the *Restoration*: And it's no wonder, if such a Series of Tragical Events, begot a general Horror at the Occasion of them. But then it was, that had it not been for the Firmness of the Earl of *Clarendon* to his *English* Principles, the Liberties of the Nation had been deliver'd up.

It is to his Memory, that we owe our being a free People; for he with his two great Friends, the Duke of *Ormond*, and the Earl of *Southampton*, check'd the Forwardness of some who were desirous to load the Crown with Prerogative and Revenue. He stop't all this, which being afterwards odiously represented, brought on him that great and lasting, but honourable Disgrace. The Earl of *Southampton*, whose Death went a little before his Fall, and perhaps hasten'd it the sooner, said to many about him, that he was a true Protestant, and an honest *Englishman*; and that the Nation would feel the Effects of his being removed, whensoever it might happen.

That Lord, in the great Settlement after the *Restoration*, would carry things no farther than to repeal what had been extorted by the Tumults; and in the matter of the Militia-Act, and the Oaths relating to it, all was more cautiously worded than is commonly understood. To the Word *Commission'd by the King*, some indeed moved, that the Word *Lawfully* might be added, to make all plain. This was press'd in the House of Commons by *Vaughan*, afterward Lord Chief Justice of the Common-Pleas. The Attorney General, afterwards Lord Chancellor *Nottingham*, answer'd, That was not necessary, for the word *Commission* import'd it; since, if it was not Lawfully issued out, to Lawful Persons, and for a Lawful Reason, it was no *Commission*; and the whole House assented to this: yet in the House of Lords, the same word *Lawfully* was press'd to be added by the Earl of *Southampton*, who was answer'd by the Earl of *Anglesey*, to the same purpose with what had been said in the House of Commons. He indeed insisted to have the Word added, be-

cause it would clear all Difficulties with many, who not having heard of the Sense given in both Houses, might fancy, that any sort of *Commission* being granted, it would not be Lawful to resist it. He did not prevail: for it was said, That this Explanation being the Sense of both Houses, it would be soon spread and known over the Nation. In this Sense, it is certain, that it is not lawful to take Arms against any so commission'd by the King; for that were to take Arms against the King's Commission in the Execution of the Law, which is certainly a resisting the Ordinance of God, *which whosoever do, they shall receive to themselves Damnation*.

It was no wonder, if after such a War the Doctrine of *Non-Resistance* was preach'd and press'd with more than ordinary Warmth, and without any Exceptions; yet some still kept these in view: so did both Dr. *Falkner* and myself; and I know many others had them always in their Thoughts, tho they did not think it necessary to mention them.

I found the ill Effects that the carrying this Matter so far, had on the Mind of that unfortunate Prince, King *James*; for in the Year 1673, when he was pleas'd to admit me to much free Conversation with him, among many other things, I told him, it was impossible for him to reign in quiet in this Nation, being of that Religion: he answer'd me quick, Does not the Church of *England* maintain the Doctrine of *Non-Resistance* and *Passive Obedience*? I begg'd of him not to depend on that; for there was a Distinction in that matter, that would be found out when Men thought they needed it. I now come to tell your Lordships, how right I judged.—

It is true, they pass'd a very pompous Decree at *Oxford* 1683. but you shall hear how long they stood to it. In Summer, 1686, the Prince of *Orange* was pleas'd to receive me into his Service with a particular Confidence. Soon after the Ecclesiastical Commission was set up, and upon some Proceedings before that Board, he was desir'd from *England* to break with King *James* upon that Head. I oppos'd this, and said, I was convinced, that Commission was against Law, and would have ill Effects, but it did not strike at the Whole. This was more warmly press'd upon the Proceedings against *Magdalen College*. I still stood to my ground; and told both Prince and Princess, That if a Breach should follow on these Matters, I could not serve. When indeed the Declaration was publish'd a second time, with a Resolution to have it carried thro'; and that many Laws were dispensed with at pleasure; and Persons who were under legal Disabilities, were made Judges, Sheriffs and Magistrates; all whose Actings were so many Nullities: Then I thought here was a total Subversion of our Constitution; which from being a Legal one, was made precarious, subject to mere Will and Pleasure. So I was ready to serve in the Revolution.

Some Days after we came to *Exeter*, Sir *Edward Seymour* came thither, and he presently sent for me: When I came to him, he asked me Why were we a Rope of Sand, and had not an Association? I said, Because we had not yet a Man of his Weight to begin the Motion: He said, If we had not one by to Morrow, he would leave us before Night. I presently saw a Noble Duke, now in my Eye, and acquainted

him with this: He went to the Prince, who approving of it, an Association was prepar'd, and laid on the Table next Morning; and was after that signed by all who came to wait on the Prince. Three Days after we left *Exeter*, a Head of a College came to the Prince, to invite him to come to *Oxford*, assuring him, that the University would declare for him. He went as near it as *Abingdon*, but then the sudden Turn of Affairs at *London* obliging him to haste up, the Association was sent thither, and was signed by the Heads of the Colleges, and many others there; some doing it in a particular Warmth of Expression, and saying, That their Hearts as well as their Hands went with it. Upon what Disappointments or other Views, I cannot tell, this Contradiction to their famed Decree, five Years after it was made, seem'd to take another Turn back to it again; and the Notion of a *King de facto*, which is but a softer Word for an Usurper, came in Vogue.

The Parliament, to prevent the ill Effects of that, studied to secure the Government, *First*, by an Association, and then by an Abjuration. I, who was always against every thing that might break in upon Conscience, was for making these only voluntary; but they were Enacted, and they were generally taken. A Noble Lord on the Earls Bench, procur'd me the Sight of a Letter, that went about to persuade the taking the Abjuration, that he had from a Place where he believed it had its Effect; where I found this Distinction, That the Abjuring any Right whatsoever that the Pretender might claim, was only meant of a Legal Right, and that it had no relation to *Birth-Right*, or to *Divine Right*. This agreed with a Report that went then current, That a Person, in a great Post, sent a Message to an Honourable Gentleman, who would not take the Abjuration, that if he had an half Hour's Discourse with him, he doubted not to be able to convince him, that he might take the Abjuration, without departing from any of his Principles. Towards the End of the last Reign, a bold Attempt was made on the King's Supremacy, by an Incendiary, who is supposed to have no small Share in this Matter now before your Lordships: But the Attack on the Supremacy being liable to a *Premunire*, it was turn'd with much Malice, and manag'd with great Prevarication, against the Bishops, who adhered firmly to their Duty to the King. How great a Disjointing that has brought on this Church, is too visible all the Nation over; and it tends to carry on the wicked Design of distracting the Church, and undermining the Government.

By the time the Queen was on the Throne, or soon after, the *Rehearsal* began to be spread over the Nation, two of them a Week, which continu'd for several Years together, to be publish'd without Check or Controul. It was all thro' one Argument against the Queen's Right to the Crown: That, tho it was diversified with Incidents and Digressions, was kept always in view. The Clergy were in many Places drawn into Subscriptions for this Paper. This look'd like a Design long conniv'd at, to have the Queen's Title undermin'd: Besides this, we had a Swarm of Pamphlets every Year to the same Purpose, and, as was believed, writ by the same Hand. One sold at the Door of the House, with the Title of *King William's Exorbitant Grants*, did plainly call

him an Usurper: and starting an Objection against the Queen's possessing the Throne, gave it this Answer, That she did well to keep it still she could deliver it up to the righteous Heir. At that time there was quick Prosecution of a Paper, publish'd, with the Title of *The Shortest Way with the Dissenters*; and upon that, I brought that Pamphlet to a great Minister, and offer'd to shew him this Passage in it, to see if there should be a Prosecution of this order'd. He turned from me; so whether he heard me or not, I cannot tell: I am sure, if he says he did not, I will believe him. No Prosecution follow'd, and the Rehearsal went on. The Clergy in many Places, met at a Coffee-House on *Saturdays*, to read the Rehearsals of the Week, which had very ill Effects in most Places. I know it may be said, That the Queen's Learned Council ought to have look'd after these things: But we all know, that they stay till they receive Orders from the Ministry. The Course of that Treasonable Paper has been now for some time stop'd, so we see there is some Change in the Ministry.

But to compleat the Insolence of the Enemies of the Queen and of the Protestant Succession, they had the Impudence to give it out, That the Queen secretly favour'd them. And as this, we all know, has been long whisper'd about among us, so it was more boldly given out in *Scotland*; which oblig'd one of the Queen's Ministers in that Parliament, in a Speech that was printed, to contradict this treasonable and dishonourable Suggestion, That as some Divines would have it, that there was in God a secret as well as a reveal'd Will, and that these might be contrary to one another; so they would fasten an Imputation on the Queen, that while she reveal'd her Will one way, she had a secret Will another way; which he solemnly affirmed to be false, and highly injurious to the Queen.

While the Pamphlets and these Reports were thus set about, Mr. *Hoadly* thought that it became him to assert the Queen's Title, by justifying the Revolution, out of which it rises. But what an Outcry was rais'd on this, that one durst disturb the Progress of a wicked Opinion, that was visibly design'd to overturn the Government: And yet he asserted nothing, but what the Counsel for the Prisoner did all fully and plainly own, That in the Cases of extreme Necessity, an Exception to the Doctrine was to be admitted, and that that was the Case at the Revolution.

But as these Notions have been long let run among us, so they have appeared in a most violent and unguarded Manner, ever since the Attempt of the Pretender; and more of late, since the Preliminaries upon the Overtures for a Peace, seem to extinguish their Hopes. What Sermons on this Head are preach'd in this City, at Assizes, at *Bath*, and at many Cathedrals? Furious Men fit themselves with some hot Sermons, which they carry about from Place to Place, to poison the Nation. This has not only the visible Effect designed by it, of shaking many in their Allegiance to the Queen; and in their adhering to the Protestant Succession; but it has a curst Effect on many others, on whom this their Design does not succeed.

I am very sensible there is a great deal of Impiety and Infidelity now spread thro' the Nation: This gives every good Mind all possible Horror; but I must tell your Lordships, on what a great

Part of it is founded: for since my Conversation with *Wilmot*, Earl of *Rocheſter*, I have had many Occaſions to diſcourſe with Perſons tainted with thoſe wicked Principles; and I do affirm it, that the greateſt Prejudice theſe Perſons have at Religion, at the Clergy, and at the Publick Worſhip of God, is this, that they ſay, They ſee Clergymen take Oaths, and uſe all Prayers, both ordinary and extraordinary, for the Government, and yet in their Actings and Diſcourſes, and of late in their Sermons, they ſhew viſibly that they look another way: from whence they conclude, They are a mercenary Sort of People without Conſcience.

I hope there are not many that are ſo corrupted and ſo ſcandalous: I am ſure I know a great many that are far otherwiſe, who preach, ſpeak and act as they ſwear and pray; but thoſe who act in another way, are noiſy and impudent, and ſo bring an Imputation on the whole Body. And unleſs an effectual Stop is put to this Diſtemper, it is not poſſible to foreſee all the ill Conſequences that may follow upon it.

I have, I am afraid, wearied your Lordſhips; but I thought it was neceſſary, once for all, to

enlarge copiouſly on this Argument. And now to come cloſe to the Article, and the Sermon, for I meddle not all with the Perſon of the Man, whatever general Expreſſions might very well have been uſed, in ſetting forth *Paſſive Obedience* and *Non-Resistance* before the *Revolution*; becauſe odious Caſes ought not to be ſuppoſed, and therefore are not to be named, yet ſince *Reſiſtance* was uſed in the *Revolution*, and that the late King invited all the Subjects to join with him, which was in them certainly Reſiſtance; and ſince the Lawfulneſs of the *Revolution* is ſo much controverted, the condemning all *Reſiſtance* in ſuch crude and general Terms, is certainly a condemning the *Revolution*. And this is further aggravated from thoſe Limitations on our Obedience, in an Act paſt ſoon after the *Revolution*, by which, in Caſe our Princes turn *Papiſts*, or marry *Papiſts*, the Subjects are in expreſs Words diſcharg'd from their Allegiance to them. Certainly this puts an End to the Notion of *Non-Resistance* in any Caſe, or on any Pretence whatſoever. For theſe Reaſons, I think the firſt Article of this Impeachment, is both well grounded, and fully made out.

The Biſhop of Oxford's Speech in the Houſe of Lords, on the firſt Article of the Impeachment of Dr. Henry Sacheverell.

My LORDS,

SOME of this Bench are neceſſarily call'd up, by Words which fell from the noble Lord who ſpoke third in this Debate, who was pleas'd to mention among other ſtrange Things, *Biſhops voting contrary to their Doctrines*. The Opinions of ſeveral of the Reverend Prelates have been read before your Lordſhips in *Weſtmiſter-Hall*: They were firſt quoted by the Counſel for the Defendant, and by their Order read in ſuch a partial and unfair manner, that if I may be allow'd to uſe any other Author after the ſame way, to take a naked Propoſition out of his Book, and not conſider the Coherence or Dependance of the Words, how it may be explain'd or limited in other Places, to read juſt ſo far as may ſerve my Purpoſe, and ſtop when any thing follows that may ſet the Matter in a juſt Light, I dare undertake to make any Author ſpeak on which-ever ſide of the Queſtion I pleaſe.

But the Managers for the Honourable Houſe of Commons did Juſtice to thoſe Reverend Prelates, by obliging the Clerk to read other Paſſages in their Books, which clearly explain'd their Opinions; and ſo the only Purpoſe that was eventually ſerv'd by producing thoſe Quotations, was that which, I fear, was not intended; the vindicating thoſe Reverend Prelates from the uncharitable Imputation of having aſſerted a Doctrine in their Writings, which they had contradicted by their Practices, in relation to the *Revolution*, and the Government founded upon it.

I hope to be able to reconcile the Vote which I ſhall give, with the Opinion which I have always been of, and which having not been produced below, I ſtand up to give it your Lordſhips here; being far from cenſuring, far from entertaining the leaſt diſreſpectful Thought of any that ſhall differ in Opinion from me.

I own the Subject now in debate, is a mat-

ter of great Conſequence, and of great Nicety and Tenderneſs; and that he, who ſhould preſume to entertain your Lordſhips upon it, ought to be better qualify'd, and better prepar'd than I am in other Reſpects; but I will give place to none in thoſe that follow, viz. in delivering my ſelf with that Reſpect and Deference which is due to this Houſe, that humble Diffidence which becomes a juſt Conſciouſneſs of my own Weakneſs, and that Plainneſs and Sincerity which becomes that Character, which however unworthy of it, I have the Honour to bear; and then I am ſure I may depend upon your Lordſhips known Candor, Honour and Juſtice, that if any thing ſhould fall from me leſs correct, or leſs guarded than it ought to be, it ſhall receive the moſt favourable Conſtruction that it is capable of.

Before I deliver my Opinion, I beg leave briefly to ſtate the Queſtion; and in order to that, to lay down two Premises.

1. That Government in general, was in its original Inſtitution, deſign'd for the good of the whole Body. Men were not form'd into Societies, only to be Subjects of the arbitrary Wills, the ſlaviſh Inſtruments in the gratifying the ambitious or other corrupt Deſigns, of any one or more Men; but for the Safety and Proſperity of the whole Community.

2. That in the Holy Scriptures (as far as I can find) there is no Specification of any one particular Form of Government to which all Nations and Bodies of Men, in all Times and Places ought to be ſubject; nor are there any ſuch exact Accounts of the Extent of the Power of the Governor, or Obedience and Submission of the Governed, as can reach to all Caſes that may poſſibly happen.

There are many general Precepts requiring the Obedience and Submission of Subjects to their Governors: *Let every Soul be ſubject to the*

Higher Powers : You must needs be subject not only for Wrath, but also for Conscience-sake : He that resists, resists the Ordinance of God : And submit yourselves to every human Constitution for the Lord's sake, &c.

But yet these Scriptures do not tell us how far we must obey and be subject, nor do they necessarily imply that there can never be any Cases wherein we may not obey and not be subject, but resist; because there are other Places in Scripture, where other Duties are requir'd in Terms as large and general as these, nay in universal Terms, which yet must admit of Exceptions.

Some of the most zealous Contenders for the absolute Power of the Prince, and unconditional Submission of the Subject, found themselves very much upon the fifth Commandment, *Honour thy Father and Mother*, which they expound as comprehending political as well as natural Parents; and I do not gain-say it: But then pray, my Lords, let us see in what Terms the Duty of Children to their natural Parents is requir'd in Scripture: *Children*, says the Apostle, *obey your Parents in all Things*. This Expression is surely universal enough; and from hence, according to some Mens Reasoning, it must follow, if Children must obey their Parents in all things, then they may resist in none.

But will any body say, that notwithstanding the Universality of this Precept, there may not be some Exceptions and Limitations understood, both as to the active and passive Part of the Child's Obedience? As to the active, no one will deny, but the Command must be restrain'd to *Licita & Honeſta*; they are not to obey in all things absolutely, but in all things that are lawful and honest.

And as to the passive Part of the Child's Obedience, the Submission or Non-Resistance requir'd, permit me to put a Case. Suppose a Parent in a Phrenzy, in a Fit of Drunkenness or Passion, draws his Sword, and attempts to kill his innocent Son, and the Son has no way to escape from him: Is he oblig'd by this Duty of not resisting, to stand still and let his Father sheath his Sword in his Bowels? May he not, tho he must still have a care of his Father's Life, defend his own? May he not put by the Pass, grapple with his Father, and disarm him if he can? My Lords, surely he may; that prime Law of Nature, of Self-Preservation, will justify him in it: And then why may not the same Law of Self-Preservation justify the political Child, the Body of the People, in defending their political Life, i. e. their Constitution, against plain and avow'd Attempts of the political Parent utterly to destroy it? And it is upon this Point only that I shall state the Question.

I do allow, that in all Governments whatsoever there is an absolute Power lodg'd somewhere. With us, as I humbly conceive, that Power is lodg'd in the Legislature; for which I have the Authority of a great Politician and Statesman, Sir Thomas Smith, who was Secretary of State to two Princes, King Edward VI. and Queen Elizabeth; who in his Book, *De Republica Angl.* a Book seen and allow'd, as is said in the Title-page, in that Chapter where he treats of our Parliaments, and the Authority thereof, lays down this Assertion, '*The most high and absolute Power of the Realm of England consisteth in the Parliament.*' And giving particular Instances of that Power, among others, mentions this, '*That*

the Parliament gives Forms of Succession to the Crown.'

The executive Power with us is lodg'd with the Prince; and I do readily allow, that the Prince so vested with the executive Power, and all others lawfully commission'd by him, acting according to their Commission, and within those Laws with the Execution whereof he and they are respectively trusted, are irresistible: The Person of the Prince is always inviolable; no personal Faults in him; no Injuries to particular Persons, where they can have no Redress by Law, as in several Cases they may have; no general Maladministration, whereby the Publick may be greatly hurt, can justify any forcible Resistance of his Subjects; nor any thing else than a total Subversion of the Constitution.

But if in a legal Monarchy, where such Laws have been enacted by common Consent of Prince and People, as are to be the Measures of his Government, as well as of their Obedience, that limit his Power, as well as secure their Rights and Properties, the Prince shall change this Form of Government into an absolute Tyranny, set aside those Laws, and set up an arbitrary Will in the room of them. When the Case is plain, and when all Applications and Attempts of other Kinds prove unsuccessful; if then the Nobles and Commons join together in defence of their ancient Constitution, Government and Laws, I cannot call them Rebels. Allow me, my Lords, to lay before you a few things in maintenance of what I have advanced. And,

1. I would humbly offer some Facts, which I allow do not directly prove what I have said to be true, but they do prove it to have been the Opinion of our Princes, Parliaments, Clergy and People, in the Reigns of those three great Princes, Queen Elizabeth, King James and King Charles I. I mean the Assurances which those Princes gave to the Subjects of other Countries that were resisting their respective Princes; and to enable them to do so, they had Subsidies given them in Parliament and Convocation——, and there were Prayers compos'd and used for the Success of their Arms.

Surely, my Lords, if those Princes, Parliaments, Clergy and People, had been of opinion, that the Resistance of Subjects against their Princes was in no case lawful, but always damnable Rebellion; they would never by aiding and assisting such Rebels have involv'd themselves in the Guilt, and expos'd themselves to the dangerous Consequences of such a Sin. I mention not the particular Stories, because they are better known to your Lordships than to me, and because I doubt not but in the Course of this Debate, some Lord or other will give a larger Account of them. But I cannot forbear observing one thing relating to that Assistance, which that pious Prince, and now glorious Saint in Heaven King Charles I. gave to the *Rochellers*, who were surely the Subjects of the King of France: He order'd a Fast by Proclamation, and appointed a Form of Prayer to be drawn up for the imploring of God's Blessing. It is highly probable, that Bishop Laud had the great Hand in composing those Prayers, he being then Bishop of London, and in great Favour, and the Archbishop of Canterbury, Abbot, at that time in Disgrace. But whoever compos'd them, I beg leave to read part of one of the Collects in that Office: '*O Lord God of Hosts, that givest Victory in the Day*

'Day of Battel, and Deliverance in the time of Trouble, We beseech thee to strengthen the Hands, and encourage the Hearts of thy Servants, in fighting thy Battles, and defending thy Altars that are among us, and in all the Reformed Churches.' It seems the Reformed Churches were thought to have God's Altars among them then, however they have been villify'd since. But that which I would observe from this Passage is this, That neither that excellent King who commanded those Prayers to be compos'd, nor the Bishops who compos'd them, nor the Clergy and People who us'd and join'd in them, could in so solemn a manner have recommended those Forces to the divine Protection and Favour, and as such as were fighting God's Battles, if they had thought they were fighting against God in his Vice-gerent; and as defending his Altars, if they believed they were resisting his Ordinance.

2. I could produce several Authorities in support of what I have laid down, but I shall mention but one: It is in a Book written professedly on this Subject, and the Passage I shall quote comes home in point to the matter in hand. The Book was written in Queen Elizabeth's Time: every one that is acquainted with the History of her Reign, knows what Attempts were made by the Pope and his Party against her Government and Life, by excommunicating, deposing her, absolving her Subjects from their Allegiance, by raising Tumults and Insurrections, by Dagger, Poison, and what not: And 'tis certain, that they were these wicked Practices of the Pope and his Followers, and the Doctrines by which they justify'd them, that the Compilers of the Homilies, which were then made, and other Authors, who then wrote about the Power of the Prince and the Duty of the Subject, had principally in their View. The Book I mean, is intitled, *The true Difference between Christian Subjection and Unchristian Rebellion*. It is written by way of Dialogue between a Christian, whom the Author calls *Theophilus*, and a Jesuit whom he calls *Philander*. I beg leave to read a Quotation out of it. *Theophilus* the Christian says, *I busy not myself in other Mens Commonwealths as you (the Jesuits) do, neither will I rashly pronounce all that resist to be Rebels: Cases may fall out even in Christian Kingdoms, where the People may plead their Right against their Prince, and not be charged with Rebellion. Philander the Jesuit asks, as when for Example? Theophilus the Christian replies thus: If a Prince should go about to subject his Kingdom to a foreign Realm, or change the Form of the Commonwealth from Impery to Tyranny, or neglect the Laws establish'd by common Consent of Prince and People, to execute his own Pleasure. In these and other Cases, which might be named, if the Nobles and Commons join together to defend their antient and accusom'd Liberty, Regiment, and Laws, they may not well be accounted Rebels.* This Book is said, in the Title-page, to have been perus'd and allow'd by publick Authority; was written by a great Man, Dr. *Bilson*, then Warden of *Winchester College*; printed at *Oxford* by the University Printer, and dedicated to Queen *Elizabeth*; and the Author was afterwards made Bishop of *Winchester*. I could offer many other Authorities, not from false Sons, or perfidious Prelates of the Church, not from Men of factious and antimonarchical Principles in relation to the State; but venerable Names, Ornaments to the Ages they lived in, and such as will be remembered with

Honour in succeeding ones: But I am superceded in producing, and your Lordships Trouble saved in hearing more particular Quotations to this purpose, by what is yielded by a Reverend Divine of great Parts and Learning, far enough from the Suspicion of being prejudic'd against the Rights of Princes, or partial to those of the People, I mean the Reverend Dean of *Carlisle*, who in a *Latin Discourse* preach'd and printed in this Town upon the *Duty of Submission*, stating some Cases of extreme Necessity, and putting the Question, *Whether it may not be lawful for the People in such Cases to resist?* answers, *Viri boni & graves*, &c. 'That good and judicious Men, Men that have taken great and useful Pains in defending the Rights of Princes, and representing popular License, have contended that it is lawful:' He adds indeed, 'Whether they have done right or wrong, let others judge;' and does not give his own Opinion. But since he has granted, that such Men as he has described, Men of Probity and Judgment, zealous Assertors of the Rights of Princes, and Repressors of popular License, have contended that in Cases of extreme Necessity it is lawful for the People to defend themselves; I may comfort myself, if I err in my Opinion, that I err in good Company. But I humbly conceive I do not err, and that,

3. For this plain Reason, That if it be utterly unlawful to resist in any case whatsoever, even that of a total Subversion of the Constitution and Laws; then there is no Distinction of Governments, of absolute, I mean, and limited: or if there be a Distinction, it is a nominal one, without any real Difference. For what Difference is there between a Prince's governing arbitrarily without Law, and governing arbitrarily against Law? betwixt having no Laws at all, and having precarious Laws that depend intirely on the Will of the Prince, whether he will observe one of them, or subvert them all; and if he does, the People cannot help themselves?

But, my Lords, I hope and believe that there is a real Distinction of Governments, and that the Subjects of all Governments are not in the same wretched Condition that those of *France* and *Turkey* are in. I hope we have not boasted falsely or vainly of our own Form of Government, that we are bless'd with a Constitution more happy than any other Nation in the World enjoys, that allows and secures as great, and (I had almost said) God-like Powers and Prerogatives to the Crown, as any wise and good Prince can desire; a Power of doing every thing that is good, and nothing that is ill; and at the same time secures most valuable Rights and Privileges to the People.

What wise or good Prince would not rather chuse to reign over free Subjects, than tyrannize over Slaves? To receive a willing cheerful Obedience, proceeding from the Principles of Gratitude, Love and Interest, as well as of Duty, rather than a forced one, owing meerly to a Principle of Fear, the Principle from whence the *Indians* worship the evil Spirits?

My Lords, such a Frame of Government your Lordships have receiv'd from your Ancestors; and I hope and trust, that in grateful Respect to their Memory, and in tender regard to your Posterity, (I say nothing of ourselves, my Lords; for as for us who have the Happiness to live under the Government of the best of Princes that ever

Heaven

Heaven blest'd a Nation with; for us, I say, were our Government as arbitrary as any in the *East*, yet I should think our Rights, Liberties and Properties, and whatever is most dear and valuable to us, as safe if they depended entirely upon Her Majesty's gracious Will, as they are now they are secured to us by our Laws, or stronger Fences, if they could be made) but I speak in regard to those that are to come after us: and I do hope and trust, that as your Lordships have receiv'd such an inestimable Treasure from your Predecessors, you will transmit it inviolable to your Posterity.

My Lords, I fear I tire you, but I must beg your Patience a little longer, while I express my Surprise and Wonder that the Doctrine of *Passive Obedience* and *Non-Resistance*, in the unlimited Extent in which some explain it, is so diligently inculcated, and so zealously press'd at this Time.

Passive Obedience, I own, when truly stated, is a truly Christian Duty; a perpetual Duty as to the Obligation, but occasional as to the Practice of it. Now Preachers do not usually, neglecting the pressing of other Duties of more constant Practice, lay out their Time and Labour in filling both Pages of their Discourses with earnest Assertions and violent Exhortations to the Practice of an occasional Duty, unless they have some near Prospect of an Occasion for the Exercise of it. And yet, my Lords, has this one Duty been of late, more frequently and earnestly asserted and urged both from Pulpit and Press, than all the other Duties of Christianity: And what Occasion for this does any one pretend to have in view?

Can there be a Wretch so abandon'd, so lost to all Sense of Gratitude and every thing that is good, as to be capable of admitting a Thought, that our gracious Queen has done, is doing, or intending to do any thing, that may give her Subjects occasion for the Practice of this Duty? Has she not ever since her happy Accession to the Throne, postponed, sacrificed her own Repose and Ease to the Quiet and Happiness of her Subjects? Has she not clearly shown that she has nothing so much at Heart, as the Good and Prosperity of her People, the true Interest and Honour of her Kingdom, which she has carried higher than any of her Royal Predecessors ever did before her? Has she not approv'd herself a true Parent of her Political Children, by exercising as prudent a Care of, and expressing on all Occasions as tender an Indulgence to them, as any natural Parents ever did towards theirs?

If then there be no Occasion from the Conduct of our Prince, is there any Reason from the Behaviour of her People that may justify this extraordinary and otherwise unseasonable Zeal for this Doctrine? Do they (excepting such as the Zealots for this Doctrine have excited to disturb her peaceful Reign at home, by rebellious and dangerous Tumults and Insurrections) shew any Uneasiness under her Majesty's Government, or Inclinations to throw it off? Do they not bless their glorious Queen and God for her? Do they not on all Occasions express their grateful Sense of the many inestimable Blessings they enjoy thro' her Administration? Do not they constantly offer up their devout Prayers to God for her long Life and happy Reign? Do they not willingly pay their Taxes for the Support of her Government, cheerfully expend their Treasure and Blood too in Defence of it?

What then can be said for such a Conduct, which can have no other natural Tendency than to create unreasonable Jealousies of her People in the Head of our Queen, and groundless Fears of their Queen in the Hearts of her People? Jealousies in the Queen, that her Subjects are inclinable to rebel against her, when the Clergy think it necessary thus to press these Restraints upon them; and Fears in the People, when their Pastors are so industriously preparing them for Sufferings.

My Lords, I would not be thought to charge upon all that hold and assert this Doctrine, the Consequences which I may with too much Reason charge upon some of them; I mean such as do not allow Her Majesty's Title to the Crown, but refuse to take the Oaths to Her, or join in Prayer for Her, and have upon that account form'd one of the most unaccountable Schisms that ever was made in the Church. Some of these have engaged zealously in asserting this Doctrine; and one of them in a Paper written in Vindication of it, has not been afraid to insinuate a Parallel between the Case of *Her Majesty* and the *Pretender*, and that of *Athaliah* and *Joash*.

Horrid Suggestion that would make one tremble! What do these Men mean? Any Service to Her Majesty? No: The Consequences as to them are plain. If to resist upon any Occasion whatever be unlawful, be Rebellion, damnable Rebellion; then the Revolution was Rebellion, and all that were concern'd in it are involv'd in that Guilt; then we have continued in a Rebellion ever since; then if we wou'd avoid Damnation, we must repent of that Sin; but there is no true Repentance without Restitution, and if there must be Restitution, they will tell you what that is.

I would charitably hope, that the unfortunate Person now in Judgment before your Lordships, did not intend to carry Matters so far: But I must say, his Doctrine as he has stated and managed it, under his Head of *False Brotherhood* with relation to the State, does give too great a Handle for those that have such Views, to improve what he has said to their Purposes.

The Counsel for him, have labour'd to defend him against the Charge in this Article, by producing a great many Quotations out of the *Homilies*, *Statutes*, and *Writings* of Divines dead and living, wherein this Doctrine has been laid down generally. They all allow'd that Cases of extreme Necessity were always excepted out of this general Doctrine; and that tho the Exception was not express'd, yet it was always imply'd; and they allow'd farther, that the Case of the Revolution was a Case of such Necessity: But how did they apply this to the Case of their Client? Thus: They said, that those Divines whom they had quoted, were never found fault with for asserting the Doctrine in general Terms, not expressing but tacitly implying the Exception: Then they ask'd, Why should the Doctor be charged for asserting the Doctrine in general Terms, as others had done, not expressing the Exception which they had not express'd? Why should not he be intitled to the favourable Construction of tacitly implying the Exception of Cases of Necessity, such a Necessity as they allow'd justify'd the Revolution?

Indeed I should readily have admitted the Plea, if the Doctor had done no more than barely assert the Doctrine in general Terms, and his only Fault had been that he had not express'd the Exception which he tacitly imply'd: But has he

done no more than this? Has he not mention'd the Case of the Revolution, with no other View, as I can see, than to expose it; not as an Exception out of his general Position, but an Objection against it? Our Adversaries, says he, that is, those that oppose his general Doctrine, think they have us sure, *i. e.* effectually confute that Doctrine, by objecting the Revolution. This Objection must suppose that there was Resistance at the Revolution; for to say that the general Doctrine, that it is not lawful in any Case to resist, is not true, because the Revolution was lawful, in which there was no Resistance, would be a wonderful Objection indeed: I say, Resistance must be suppos'd in the Objection, to make Sense of it. How then does he solve this Objection? Does he say the general Doctrine always implies an Exception of Cases of Necessity? That the Revolution was a Case of such Necessity, and therefore that Necessity justify'd the Resistance at the Revolution? No, but by advancing a strange Position (which he proves by as strange a Medium) *viz.* *That there was no Resistance at the Revolution*: plainly implying, that if there was Resistance at the Revolution, which every Body knows there was, the Revolution stands condemn'd by his general Doctrine. So that I cannot see that his learned Counsel, who wanted neither Abilities nor Inclinations to serve him, have at all defended him against the Charge in this Article. But this they have effectually done, they have given up his general Doctrine, if it admits of no Exceptions; and thereby clear'd the Revolution and the necessary Means whereby it was brought about, from those black and odious Colours which he endeavour'd to cast upon them.

After all, I can truly appeal to my own Heart, and a greater than it, the Searcher of it, that I am not any ways prejudiced against the Person of the unhappy Prisoner, but rather in favour of him, as I am of all Men in his suffering Circumstances, by a natural Tenderness (it may be a Weakness, but such a one as I cannot help, which never suffers me, however oblig'd in Justice to it, to do a

hard thing to any one however deserving it, without doing at the same time a hard thing to myself: And if your Lordships should be of Opinion in the Conclusion of this Trial, That the Commons have made good their Charge against him, I am sure I could come into as easy a Sentence upon him as may be consistent with the Honour and Justice of your Proceedings, and with that which I take to be the chief End in all Punishments, not so much the hurting the Offender, as the preventing the like Offences, and hindring others from committing them for the future.

But still, my Lords, there is surely a Tenderness and Compassion due to our Queen, our Country, and our Posterity; all which, I humbly apprehend, are highly concern'd in the Issue of this Affair.

If Clergymen may with Impunity publickly in their Sermons arraign and condemn the Revolution: besides the Reflections they cast upon all the worthy Patriots that were concern'd in that great Work, the Commonalty, Gentry, and Nobility, Lords upon every Bench in this House; besides this, it must shake, it must sap the very Foundation of our present Establishment, as it stands upon the Foot of the Revolution, and utterly destroy our future hopes in the Protestant Succession which is founded upon that bottom only.

My Lords, I must humbly ask Pardon for having trespass'd so long upon your Patience, and will conclude with this one Word, That in my Opinion, *these Practisings of Clergy-men* (to use the Expression of a great and eminent Prelate) *in State Matters, are of that dangerous Tendency and Consequence, that if there be not some effectual Stop put to these Practisings, these Practisings will, in time, put an effectual End to our Constitution.*

The Commons had therefore Reason to bring this Matter in Judgment before your Lordships, and I think they have fully made good their Charge in the first Article of their Impeachment against Dr. Sacheverell.

The Bishop of Lincoln's Speech in the House of Lords, March the 17th, at the opening of the second Article of the Impeachment against Dr. Sacheverell.

My LORDS,

IT was the Misfortune of some of our Bench, that in the Prosecution of the foregoing Article of this Impeachment, a Noble Lord, who spoke very early to that Point, was pleas'd not only to anticipate our Judgment in that Particular; but to do it with this pretty hard Reflection, That in giving it, as he suppos'd we would, we should vote contrary to our own Doctrine. It is not improbable but that, in the Course of the present Debate, another Arrow may be drawn out of the same Quiver to shoot at us; and we may be told, that in defending of the Toleration granted by Law to the Dissenters, we shew ourselves to be Apostates from our own Order. But from both these Imputations I am perswaded both our Writings, and our Actions, will secure us in the Judgment of all indifferent Persons.

The Substance of this Second Article of the Impeachment, which your Lordships are now about to enter upon, is this: *'That Dr. Sacheverell in his Sermon doth suggest and maintain, that the Toleration granted by Law is unreasonable, and the Allowance of it unwarrantable. That he is a False Brother with relation to God, Religion, or the Church, who defends Toleration, and Liberty of Conscience. That Queen Elizabeth was deluded by Archbishop Grindal to the Toleration of the Genevian Discipline: And that it is the Duty of superior Pastors to thunder out their Ecclesiastical Anathemas against Persons entituled to the Benefit of the Toleration; and insolently dares, or defies, any Power on Earth to reverse such Sentences.'* This, my Lords, is the Sum of this part of the Commons Charge against Dr. Sacheverell, and I

¹ See Dr. Sacheverell's Answer to the 1st Article of Impeachment. His Speech, Fol. Pag. 23.

² Dr. Sacheverell's Sermon at St. Paul's, Pag. 8.

think the Managers have fully made it out; not by bare Intendments, by unnecessary Implications, and forced Constructions; not by piecing together broken Sentences, and conjoining of distant, and independent Passages (as he has unjustly complain'd;) but by the plain Words, and necessary Meaning, of a very great part of his Discourse.

But before I trouble your Lordships with the Proof of this, give me leave, upon this Occasion (tho it be no part of the Impeachment laid against the Preacher) to observe to your Lordships what a strange Account he has thought fit to publish of that other popular Engine, which, he says, has been made use of³ to pull down the Church, and which he calls by the Name of Comprehension.

The Person who first concerted this supposed Design against our Church, was the late most Reverend Dr. *Sanctus*, then Archbishop of *Canterbury*. The Time was towards the End of that unhappy Reign, of which so much was said upon the Occasion of the foregoing Article. Then, when we were in the height of our Labours, defending the Church of *England* against the Assaults of Popery, and thought of nothing else; that wise Prelate foreseeing some such Revolution as soon after was happily brought about, began to consider how utterly unprepared they had been at the Restoration of King *Charles II.* to settle many things to the Advantage of the Church; and what a happy Opportunity had been lost for want of such a previous Care, as he was therefore desirous should now be taken, for the better and more perfect Establishment of it. It was visible to all the Nation, that the more moderate Dissenters were generally so well satisfied with that Stand which our Divines had made against Popery, and the many unanswerable Treatises they had publish'd in Confutation of it, as to express an unusual Readiness to come in to us. And it was therefore thought worth the while, when they were deliberating about those other Matters, to consider at the same time what might be done to gain them, without doing any Prejudice to ourselves.

The Scheme was laid out, and the several Parts of it were committed, not only with the Approbation but by the Direction of that Great Prelate, to such of our Divines as were thought the most proper to be intrusted with it. His Grace took one Part to Himself: Another was committed to the then Pious and Reverend⁴ Dean, afterwards a Bishop, of our Church. The reviewing of the daily Service of our Liturgy, and the Communion-Book, was referr'd to a select Number of excellent Persons,⁵ two of which are at this time upon our Bench; and I am sure will bear Witness to the Truth of my Relation. The Design was, in short, this: To improve, and, if possible, to enforce our Discipline; to review, and enlarge our Liturgy; by correcting of some things, by adding of others; and if it should be thought advisable by Authority, when this Matter should come to be legally consider'd, first in Convocation, then in Parliament, by leaving some few Ceremonies, confess'd to be indifferent in their Natures, as indifferent in their Usage, so as not to be necessarily observ'd by those who

made a Scruple of them; till they should be able to overcome either their Weaknesses or Prejudices, and be willing to comply with them.

How far this good Design was not only known to, but approved of by, the other Fathers of our Church, that famous Petition, for which Seven of them were sent to the Tower, and which contributed so much to our Deliverance, may suffice to shew. The *'Willingness there declared of coming to such a Temper as should be thought fit with the Dissenters, when that Matter should be consider'd, and settled, in Parliament and Convocation;'* manifestly referr'd to what was then known to several, if not all of the Subscribers, to have been at that very time under Deliberation. And that nothing more was intended than I have before said, is as evident from what was publickly declared in a Treatise purposely written to recommend the Design, when it was brought before the two Houses of Parliament, in the beginning of the late Reign; and Licensed by the Authority of a Noble Peer, now present, who was at that time Secretary of State: In the very Beginning of which there is this remarkable Passage, which I shall beg leave to read to your Lordships: *'No Alteration, that I know of, is intended, but in things declared to be alterable by the Church itself. And if Things alterable be altered upon the Grounds of Prudence and Charity; and Things defective be supplied; and Things abused be restored to their proper Use; and Things of a more than ordinary Composition, revised and improved; whilst the Doctrine, Government, and Worship of the Church remain intire, in all the substantial parts of them; we have all reason to believe that this will be so far from injuring the Church, that, on the contrary, it shall receive a very great Benefit by it.'*

And now, my Lords, let any impartial Person consider, what was there in such a Design that could be justly esteem'd prejudicial to the Constitution of our Church? Wherein would our Canons have suffer'd, if those already made, had been more strongly enforced; and some new ones had been added, for the Reformation of Manners; for the better punishing of notorious Offenders; and to render our publick Discipline more strict, and severe? This we have been wishing for, ever since the Reformation. What harm would it have done our Church had it now been effected? Or how would our excellent Liturgy have been the worse, if a few more doubtful Expressions had been changed for plainer and clearer; and a Passage or two, which however capable of a just Defense, yet in many Cases seem harsh to some even of our own Communion, had either been wholly left at liberty, in such Cases, to be omitted altogether; or been so qualified as to remove all Exception against them in any Case. If such Collects, as are not yet adapted to the Festivals, or Gospels, to which they belong, had been made more full, and apposite to both; if some of the occasional Offices had been enlarged, and new ones added: If, for Example, there had been a greater variety of Prayers, Psalms, and Lessons appointed by Authority, instead of the Compositions of private Persons, now necessarily to be used, for the Visitation of the Sick; and new Forms composed for the Use of Prisoners for Debt or

³ *Serm.* pag. 16, 17.

⁴ Dr. Patrick, Bishop of Ely.

⁵ The Archbishop of York and Bishop of Ely.

⁶ A Letter

to a Member of Parliament in favour of the Bill for uniting Protestants: Licensed by the Command of the Earl of Shrewsbury, April 1. 1689. *Ja. Vernon.* Pag. 2.

Crimes? For the greater Solemnity of receiving Profelytes into our Church; of reconciling Penitents to it; and of casting notorious Offenders out of it. These were some of the main things that were then design'd. As for any favour to the Dissenters, none, that I know of, was intended, but what should have been entirely consistent with our own Constitution: And I hope it will not be thought any Crime for the Bishops, and Clergy of our Church, to be willing to enlarge its Communion, by any Methods which may be likely to gain others, and yet not injure our own Establishment.

But to satisfy your Lordships that nothing could have been designed to the Detriment of the Church; be pleas'd farther to consider, how what was thus at first project'd in private, by select Persons, and in a difficult Time, when no Countenance was to be expected from Authority to any such purpose, was afterwards, if ever, to have been brought to Maturity. And this being a matter of publick Notice, the relation of it will admit of no Exception.

No sooner were their late Majesties, of glorious Memory, seated in their Thrones, but this Design was openly espoused by them. A Commission was issued out, under the Great Seal of England, to a large number of Bishops and other eminent Divines, to meet together, and to consider of these Matters. What they did, having not had the Honour to be one of them, I shall not presume to say. This we know, that whatever they did, it was to have been carried on from them to the two Convocations of Canterbury and York: And after it should have pass'd their Approbations, it was finally to have been laid before the two Houses of Parliament, and so to have gone on to the Royal Assent. This, my Lords, was the Course thro' which all that was designed, or should have been done in this matter, must have pass'd: and I am perswaded nothing very injurious to our Church's Welfare, will ever be able to pass thro' all these.

Having thus given your Lordships a true account of that Design which Dr. Sacheverell mentions under the Name of Comprehension, I doubt not but that your Lordships will now be amazed to hear, what a false and scandalous Report he has made of it. In the 16th Page of his Sermon, he thus speaks of it: '*The worst Adversaries of our Church, says he, were to be let into her Bowels under the Holy Umbrage of Sons; who neither believed her Faith; own'd her Mission; submitted to her Discipline; or complied with her Liturgy. For the admitting of this Trojan Horse, big with Arms and Ruin into our Holy City, the straight Gate was to be laid quite open; her Walls and Enclosures to be pull'd down; and a High-road made in upon her Communion. Her Articles to be taught the Confusion of all Senses, Nations, and Languages.*'

This, my Lords, is a very strange Representation of so good a Design, as that I before recounted to your Lordships. Yet this Representation did this bold Man, as confidently, as falsely, make of it in the House of God, and publish to the View of the whole Nation. For thus he goes on: '*This pious Design of making our House of Prayer a Den of Thieves, of reforming our Church into a Chaos, is well known to have been attempted several times in this Kingdom, and lately*

within our Memory; when all Things seem'd to favour it, but that good Providence which so happily interposed against the Ruin of our Church, and blasted the long project'd Scheme of these Ecclesiastical Achitophels.' To say nothing more of the Design itself, of which I have given an Account before; pray, my Lords, who were the Achitophels that project'd it, and must have concurr'd to the Execution of? I have already named the first, and chiefest of them, the late Archbishop Sancroft. The next who openly approved of it, were the Commissioners who met upon it in the Jerusalem-Chamber: A Set of Men, than which this Church was never, at any one time, bless'd with either wiser or better since it was a Church: Who it was that presid'd in the Convocation of this Province, to which this Project was next to be referr'd; and who, had it gone on, must have had a chief Hand in the Management of it, I need not say. Every one who knows any thing at all of his Character, (and I am sure your Lordships are none of you Strangers to it) knows him to be too good a Friend to the Establishment of our Church, to have been capable of being engaged in such a villainous Design, as Dr. Sacheverell pretends, for the Subversion of it. Or had he been otherwise, yet still the major Part of that venerable Body must have been as great Achitophels as himself, or no Harm could have been done by him. Pardon me, my Lords, if the Course of my Argument obliges me to rise yet one Degree higher, and to say, that the like Majority of your Lordships, and of the House of Commons, together with his late Majesty, must all have come into the Plot against the Church; or all the Skill and Malice of the inferior Achitophels, would have signified nothing. And what Censure that Man deserves who has the Confidence to insinuate to the World, that the Bishops, the other Clergy, the Convocations, the Parliament, nay, and the late King himself, our glorious Deliverer; or at least the greater part of all these, were engaged in a Project '*so monstrous, so romantic, and absurd,*' (for here I am content to use his own Expressions) '*that it is hard to say whether it had more of Villany, or Folly, in it,*' I shall submit it to your Lordships to consider. All I design in taking notice of this part of his Sermon, is only to clear the Memory of many excellent Persons who are dead; and to vindicate the Reputation of some still living, and in the highest Stations of the Church, from that Load of Infamy which this rash Man has with so much Virulence of Speech cast upon them: And to let your Lordships see that nothing was intended in all that Affair but what was both Honourable to those who engaged in it, and I am perswaded would have been for the Interest and Peace of our Church and State, had it been accomplish'd.

I come now to that which is the proper Subject of the present Debate; namely to offer such Passages to your Lordships, as I humbly conceive do plainly and fully make out the Second Article of the Commons Impeachment against the Preacher; and prove him to have spoken with more Freedom than he ought, not only of the Dissenters themselves, but of the Toleration, (or as he had rather we should call it) the Indulgence granted by Law to them.

The Lord Bishop of London.

And here, as I remember, it was not deny'd either by his Counsel or himself, but that he had spoken, and spoken with Warmth too, against Toleration. The only Question is, What the Toleration is against which he spake? Whether it was that which has been granted by Law to the Dissenters? Or whether it was only against a general Toleration of Atheists, Deists, Socinians, Men of no Principles, perhaps of no Religion? Or at most against such of the Dissenters as abused the Indulgence granted them by Law; and made use of it to Purposes not at all warranted by it? The former of these the Commons charge upon him: The latter he pretends; the better to clear himself of their Charge.

To determine this Point, I must in the first place beg leave to observe, that among the several sorts of false Brethren, enumerated by the Preacher with relation to God, Religion, or the Church: the second kind is of those, who give up any Point of the Church's Discipline and Worship, *Page 8*. To this he adds, that those are false Brethren who defend Toleration, and Liberty of Conscience. And that we may the better know what Toleration and Liberty of Conscience he means, he specifies the very Persons to whom he refers, and of whom he speaks; the Dissenters: *'If, says he, to comply with the Dissenters both in publick and private Affairs, as Persons of tender Conscience and Piety, to promote their Interests in Elections, to sneak to them for Places and Preferment, to defend Toleration and Liberty of Conscience, and under the pretence of Moderation, excuse their Separation, are the Critterions of a true Church-Man; God deliver us all from such false Brethren.'* The Toleration therefore, and Liberty of Conscience, against which he speaks, must necessarily be that of the Dissenters; those who separate from our Church: He names no others; but carries the same Persons thro' his whole Sentence, both before and after those Expressions. Either therefore it is no Reflection upon the Act of Indulgence to say that all those who defend the Toleration of the Dissenters, and are for allowing Liberty of Conscience to them, are false Brethren with relation to God, Religion or the Church, *Page 6, 7*, and such against whom we ought to pray to God to deliver us all, *Page 8*: Or if this cannot with any Reason be either said, or supposed, then it must remain that Dr. Sacheverell has here said what the Commons charge him withal; and that in express Terms, *viz.* That he is a false Brother who defends the Toleration, not of Deists, Socinians, and I know not what Monsters of Irreligion, but of the Dissenters: Those same Dissenters who by the Act of Indulgence have a right to that Liberty of Conscience of which this Gentleman speaks so very hardly; and prays God to defend us from all such false Brethren as shall presume to excuse it.

But not to insist upon a single Passage which may be supposed to have dropt unwarily from him: In the Second Part of his Sermon, he proceeds to shew the great Perils and Mischiefs of those false Brethren, against whom he was before speaking, both to the Church and State, *Page 15*. And that these again are the same Persons who have a Right to the legal Indulgence is so very clear, that I do not see how it is possible for any one to make the least doubt of it.

Page 18. He describes them as Occasional Conformists to the Church. *Page 19*. As those who had the old Leaven of their Forefathers still working in them: And, in the next Sentence, he expressly talks of the religious Liberty which our gracious Sovereign has indulged them. This in the very same Sentence he calls their Toleration; (for the Doctor himself is not tied up to any Niceties of Expression; he may call it so, tho others may not.) These are the Persons, and the only Persons, of whom he speaks in all that part of his Discourse; let us see what he says of the Indulgence granted by Law to them.

And first, he tells us, *Page 18*. *'That it cannot be deny'd, but that tho they do submit to the Government, their Obedience is forced, and constrain'd; and so treacherous and uncertain, as never to be trusted. That they are as much Occasional Loyalists to the State, as they are Occasional Conformists to the Church; and will betray either whenever it is in their Power, and they think it for their Advantage. That nothing but a sottish Infatuation can so far blind our Eyes and our Judgments; as to make us believe that the same Causes should not produce the same Effects; that the same Latitudinarian and Republican Notions should not bring forth the same rebellious and pernicious Consequences. That we shall be convinced to our sorrow, if we don't apprehend that the old Leaven of their Forefathers is still working in the present Generation; and that this traditional Poison still remains in this brood of Vipers to sting us to Death. That they have advanced themselves from the religious Liberty which our gracious Sovereign has indulged them, to claim a Civil Right; and to justify the Church out of her Establishment, by hoisting their Toleration into its Place. That to convince us what alone will satisfy them, they insolently demand the Repeal of the Corporation and Test Acts, which under her Majesty, is the only Security the Church has to depend upon: And which (if we may believe him) they have so far eluded by their abominable Hypocrisy, as to have undermin'd her Foundations, and endanger the Government, by filling it with its professed Enemies.'* His Meaning is plainly this; that the Dissenters, whom we are so foolish as to indulge, are a parcel of false and treacherous Persons; Enemies both to our Church and State; and such as, if not timely suppress'd, will convince us to our Sorrow of the Weakness and Folly of taking such Vipers into our Bosom, as watch only for a fair opportunity to sting us to Death.

But what then must we do to secure ourselves against these dangerous Enemies? Why first, the Doctor assures us, that they are never to be gain'd by any Favour that can be shew'd to them. *'That he must be very weak, or something worse, that thinks, or pretends, that the Dissenters (for of these he still speaks) are to be won over by any other Grants and Indulgences than giving up our whole Constitution.'* This shews the Folly of trying the soft way of Indulgence with them: And therefore he concludes, That *'He who recedes the least Tittle from it (our Constitution) to satisfy, or ingratiate with these clamorous, insatiable, Church-devouring Malignants, knows not what Spirit they are of; or he ought to shew who is the true Member of our Church.'*

This I think comes fully up to what is objected

against him; namely, that Dr. Sacheverell does in his Sermon suggest and maintain, 'that the Toleration granted by Law is unreasonable, and the allowance of it unwarrantable.' For so it needs must be, if the Dissenters be such Men as he tells us they are; and will be satisfy'd with nothing less, than he assures us they will. And yet what next follows, is, if possible, still more express to the same purpose. It is objected against him, by the Commons, that he had affirm'd in his Sermon, That 'Queen Elizabeth was deluded by Archbishop Grindall (whom he scurrilously calls a false Son of the Church, and a perfidious Prelate) to the Toleration of the Genevian Discipline.' The Fact is not denied; but the Expressions are excus'd; and the Truth of the Allegation is endeavour'd to be made out by Historical Memoirs: And it is hoped that your Lordships will not account it a High Crime and Misdemeanour, to have spoken too hardly of a Prelate who has been so many Years in his Grave.

I am, my Lords, very far from thinking, that the Commons ever intended to charge Dr. Sacheverell as guilty of High Crimes and Misdemeanours, for speaking scandalously of that good Archbishop. Their Concern was not for his Person, what Respect soever they may have had (as all true Friends of the Reformation must needs have a very great one) for his Memory. But the Truth of the matter is this: The Preacher complains Page 19 of his Sermon, that Queen Elizabeth was deluded by Archbishop Grindall, to the Toleration of the Genevian Discipline. He adds, 'That the Archbishop was a perfidious Prelate, for deluding her to tolerate that Discipline. That she found it such a headstrong and encroaching Monster, that in eight Years she saw it would endanger the Monarchy as well as the Hierarchy: And like a Queen of true Resolution, and pious Zeal for both, she pronounced that such were the restless Spirits of that factious People, that no Quiet was to be expected from them, till they were Utterly Suppress'd. That this therefore like a prudent Princess, she did by wholesom Severities; and the Effect was, that by this means the Crown for many Years sat easy and flourishing on her Head: But that her Successor, King James, did not follow her wise Politicks.' And the Result was as deplorable on his side, as it had been glorious on hers: For by this means, 'His Son fell a Martyr to their Fury; his unhappy Offspring suffer'd such disastrous Calamities, as made the Royal Family one continued Sacrifice to their Malice.' And all this for want of those wholesom Severities which the wise Queen his Predecessor had used utterly to suppress that factious People.

This, my Lords, is the Doctor's Narrative, and I have given it you in his own Words. The Application is plain and home. The Dissenters are now again tolerated, as they were heretofore under Queen Elizabeth. There is a perfidious Prelate (perhaps in his Opinion a great many) who, like Archbishop Grindall, help to delude another Queen, into the Toleration of them. These Eight Years past (for the very number of Years is remarkable) her Majesty has borne the restless Spirits of this factious People; and had no Quiet for them. It is now high time for her to alter her Measures, as Queen Elizabeth wisely did. It is the only way to make the Crown sit easy and flourishing upon her Head. And

if this be not plainly to speak out what he would have done with the Act of Indulgence, I must despair of ever being able to know any Man's Meaning by his Expressions. Such Examples are not only the most likely to enforce, but the most proper and lively Methods to convey a Man's Sense, even to the dullest Capacity; and make him clearly perceive if not what he ought, yet I am sure what the Preacher would have him to do.

The Truth is, so plain was his Meaning, that he himself began to fear that he had gone a little too far in what he had said of this Matter. And, for that reason, he added that one poor Sentence which immediately follows, and of which he has made such good use since: 'That he would not be misunderstood as if he intended to cast the least invidious Reflection upon that Indulgence the Government had condescended to give them (the Dissenters:)' But what then did he intend by all this bitter Invektive against them; and that very instructive Piece of History with which he concluded it? He has told us, 'that the Dissenters are false Brethren; destructive both of our Civil and Ecclesiastical Rights. That they are Occasional Loyallists to the State, as well as Occasional Conformists to the Church; and will betray both whenever they have it in their Power, and it shall be their Interest to do it. That it must be a sottish Infatuation to believe that the same Latitudinarian and Republican Notions, should not bring forth the same rebellious and pernicious Consequences: That we shall be convinc'd to our Sorrow, if we do not apprehend that the Old Leaven of their Forefathers, is still working in the present Generation: That they have already made dangerous Encroachments upon the Government, and published treasonable Reflections upon her Majesty: That they have advanc'd their Indulgence into a Civil Right, and justled the Church out of her Establishment, by hoisting their Toleration into its Place: That they have by their abominable Hypocrisy undermined the Foundation of the Church, and endanger'd the Government, by filling it with its profest'd Enemies: That they are clamorous, insatiable, Church-devouring Malignants; whom no other Grants or Indulgences can win over, but the giving up our whole Constitution: That ever since their first unhappy Plantation in this Kingdom, they have improved, and rose upon their Demands in the Permission of the Government: That Queen Elizabeth, who tolerated them for eight Years together, was forced at last to suppress them by wholesom Severities: That this made her Crown sit easy and flourishing on her Head; whereas King James the first, by not pursuing the like Methods, ruined the whole Royal Family: That nothing better could be expected from such Mifcreants, begot in Rebellion, born in Sedition, and nursed up in Faction.' All this Dr. Sacheverell has said in these very plain, and emphatical Words. If he did not intend by all this to shew the Necessity of suppressing these factious People, these Vipers, who are just ready to sting us all to Death, I would be glad to know what it was that he did intend by it? Could he say all this, and with such a singular Strain of imperious Eloquence, and yet 'not intend to cast so much as the least invidious Reflection upon that Indulgence which the Government has thought fit to give them?' I must freely own, my Lords, I could never have imagined this: Nay, I must be excus'd if I add, That notwithstanding this poor Evasion, I can-

not yet believe it. But the Act of Indulgence stood in his way: That Act the Queen had declared her Resolution to maintain: Your Lordships and the Commons had often shewn your Steadiness to the same effect. Even those who press'd so violently against occasional Communion, yet thought it necessary to say, in the very Preamble of that Bill, that the Act of Indulgence ought inviolably to be observed: And therefore Dr. Sacheverell thought it needful to add somewhat that he knew would not take off any thing from the Force of his Invektive, yet might serve to excuse the Severity of it, and be made use of to the purpose it now is, if he should chance to be call'd to account for it. This, my Lords, I conceive to be the true Meaning of that one single Passage, so utterly repugnant to all the rest of his Discourse; nor can I put any other Interpretation upon it. For had I the same Opinion of these Men, their Principles, and their Designs, that Dr. Sacheverell has, I should be so far from thinking them fit to be indulged, that I should account it my Duty, and the Duty of every true Friend to our Church and Government, to take the same Methods of wholesom Severities with them that Queen Elizabeth did: And I hope, by God's Grace, that should I be question'd for it, I should not dissemble my Opinion; but should have the Courage honestly to own it, whatever I might chance to suffer for it.

I have, my Lords, insisted the longer upon this Part of the Doctor's Sermon, because I would not willingly fall under the Censure of picking out disjointed Sentences, and putting them together from distant Places, that so I might the better draw a Sense out of them, contrary to his Meaning. I shall trouble your Lordships but with one part more of it, to the same Effect, *Page 24, 25.* where he comes to consider, *What should be the Result of his long Discourse?* I shall read it to your Lordships in his own Words, *Page 25.* 'Let us therefore, says he, as we are unhappy Sharers of St. Paul's Misfortune, to have our Church in Perils amongst false Brethren, follow his Example and Conduct in a parallel Case. He tells us in his Epistle to the Galatians, c. 2. That he was obstructed, and pester'd in preaching the Gospel, by False Brethren unawares brought in, who came privily to spy out his Liberty which he had in Christ Jesus, that they might bring him into Bondage. To whom he gave place by Subjection, no not for an Hour, that the Truth of the Gospel might continue with the Church. Doubtless this brave and bold Resolution did the Apostle take by the peculiar Command and Inspiration of the Holy Ghost: And yet if our Dissenters had liv'd in those times, they would have branded him as an intemperate, hot, furious Zealot, that wanted to be sweetened by the gentle Spirit of Charity and Moderation forsooth.'

Here we have again the Persons of whom the Preacher speaks: They are our Dissenters, not the Deists, Atheists, Socinians, Hypocrites, of our times. And accordingly what follows, plainly refers to them: For thus he goes on, 'Schism and Faction are things of impudent and incroaching Natures; take Permissions for Power; and advance a Toleration (for so the Doctor is still at liberty to call what we must stile Indulgence) immediately into an Establishment.' Your Lordships will

please to observe, by the way, that this was the very thing he had before said of these same Persons, *Page 19.* and thereby plainly shews, that he speaks in both Places of those Dissenters who have a Right to the Toleration or Indulgence, granted by Law to Protestant Dissenters. Let us now hear what he would have done with them. Why he would have them 'treated like growing Mischiefs, or infectious Plagues; kept at a distance, lest the deadly Contagion spread.' And the Method he proposes in order thereunto, is this, 'Let us therefore, says he, have no Fellowship with these Works of Darkness; but rather reprove them.' These Works, Schism and Faction; for of these, and these only, he here speaks. This is the Peoples Part, and the inferior Pastors: 'As for the superior Pastors, let them do their Duty, in thundring out their Ecclesiastical Anathemas against them.' Against whom, my Lords? what Works of Darkness? Still the same he before-mention'd: Our Dissenters, those are the Persons: Their Schism and Faction; those are the Works of Darkness to which he refers. 'And let any Power on Earth dare reverse a Sentence ratify'd in Heaven.'

This, my Lords, was the last part of the Commons Impeachment upon this second Article: And 'tis so plainly expressed by the Preacher in this Passage, that I confess it amazes me to consider with what Positiveness he has thought fit to deny that any such thing was meant by him. The Persons whom the superior Pastors are summoned to anathematize, are the same with those, whom the other Pastors and People are to have no Fellowship withal, but to reprove. These, by the necessary Connexion of his Discourse, are our Dissenters; whose Works of Darkness, he states to be Schism and Faction: Those Dissenters to whom the Government hath granted a Toleration; as himself, in the same Passage, takes notice. Which being so; I shall leave the Doctor to deny and protest, as he pleases; but when all is done, his own Words will rise up against him, and appear to every impartial Person so plain, and positive, as to put it beyond the Power of any artificial Interpretation to perplex the Meaning of them.

And this lets us into the true Application of those Passages of Scripture, with which he concludes his whole Discourse. In which, having shewn the Danger of our Church from these false Brethren, and exhorted his Auditory to a steady Courage and Resolution in the Defense of it; he thus at once both inforces his Doctrine, and abuses his Adversaries. That tho the Church (for to that he applies, what Zachariah spake of the false Prophets that seduced the People) lies bleeding of the Wounds she has received in the House of her Friends: A Passage first thrown at my^s self, for defending the Prince's Authority, when some of these very Men engaged as vehemently on the side of Liberty, against the Rights of the Crown, as they now pretend to stand up vigorously for it: 'Tho the Ways of Zion may mourn for a Time (so the Doctor glosses upon the Text) and her Gates be desolate; her Priests sigh, and she in bitterness, because (it is the Preacher's Reason, the Text has no such Word) Her Adversaries are chief; he means in the Administration under her Majesty; and her Enemies at present prosper; (so he again improves the Text; in

¹ Zech. xiii. 6.

² See Dr. Atterbury's Rights of an English Convocation; Title Page.

³ Lament. i. 4, 5.

hopes, I suppose, that it will not be long before he shall have preach'd them out of their Places :) [†] *Tho among all her Lovers she has few, (the Prophet complained that Jerusalem had none) to comfort her; and many (Jeremiah said all) have dealt treacherously with her, and are become her Enemies; (he refers to those of whom he had before spoken, Page 22.) Tho there are few to guide her among all the Sons which she hath brought forth; neither are there many to take her by the Hand of all the Sons that she hath brought up; (Isaiah in both places, says none:) Tho her Enemies cry down with her, down with her, even to the Ground: That is, in other Words, tho (the Preacher, [and a few of his Friends, excepted] both the Fathers and Pastors of the Church; and the Men who are at present in Power, and Authority, in the State, are become false Brethren, and run in with those Enemies of the Church, our Dissenters, against it; 'Yet there is a God that can, and will raise her up, if we forsake her not.'*

It were an easy matter to make many proper Remarks upon these Passages of Scripture, thus applied, or rather abused, by the Preacher: But that would be besides my present Business; and will fall in more properly under the last Article of this Impeachment. It is enough that I have,

[†] Lament. i. 2;

⁵ Isaiah li. 18.

I hope, fully shewn your Lordships how Dr. Sacheverell has treated if not the Indulgence itself, yet I am sure, those who are entitled to the Benefit of it: And who if they shall have the Misfortune, by this kind of Preaching, to be once generally thought such wicked, false, and dangerous Enemies to our Church and State as they are here represented, I cannot think that their Indulgence will hold long. If they have Numbers to secure them, it is well for them: But otherwise I am sure as the Case is here stated, it must be our Wisdom, as well as Duty, to suppress them.

How criminal such an Invektive as this will be accounted in the Eye of the Law, I dare not presume to suggest: Much less shall I pretend to intimate what Censure it may deserve. Somewhat I think should be done to put a Stop to such Preaching, as if not timely corrected may kindle such Heats and Animosities among us, as may truly endanger both our Church and State. As for the Preacher himself, I am very willing to come into any Measures of Favour to him, that are consistent with your Lordships Honour and Justice, and will answer the Ends of the Impeachment that has been brought before us against him.

The Bishop of Norwich's Speech in the House of Lords, at the opening of the Second Article of Impeachment against Dr. Sacheverell.

MY LORDS,

I Am very sensible under what Disadvantage in the Opinion of many, a Bishop must speak against a Clergyman that stands accused of Crimes committed by him in the seeming Execution of his Office; especially after having been so publicly required to be an Advocate as well as a Judge. And I am the more sensible of this Prejudice lying against me, for having been so lately called into that Order, and for being so unworthy of it.

But I think myself obliged notwithstanding, under all these Disadvantages, to deliver not only my Judgment, but also the Reasons that determine me to it: Which I shall do as plainly as I can; with that Deference to your Lordships, which I am sure it must upon all Occasions particularly become me to pay; and at the same time with that Freedom which I think the Importance of this Cause does at this time require.

Dr. Sacheverell stands impeached by the Commons of Great-Britain, of High Crimes and Misdemeanours expressed in the several Articles of the Charge exhibited against him: And your Lordships have heard what they have said in support of that Charge, as well as what has been offer'd in the Doctor's Defense.

Your Lordships have also debated among yourselves the Merits of the Cause as to the first of these Articles: and have come to a Resolution, that the Commons have made good that part of their Charge: In which Resolution as I did heartily concur; so I was ready to have humbly represented to your Lordships my Reasons for so doing, had there been either room or occasion for it.

Your Lordships are now upon the Second Article; wherein the Doctor is charged for suggesting and maintaining that the Toleration granted by Law is unreasonable, and the Allowance of it unwarrantable; with other Particulars that have immediate relation to this general Charge, and which are indeed so many Proofs of it.

In this view therefore, my Lords, I beg leave to consider them: And the First of these Instances in Support of this Charge, is, that he asserts that *He is a false Brother with relation to God, Religion, or the Church, who defends Toleration and Liberty of Conscience*; and this, my Lords, the Doctor does assert in so many Words. It is one of the many Marks he gives whereby we may discern who is a false Brother in those respects; not a small part of one general Mark, as was alleged very inconclusively, I think, in his Defence. For if it was to be granted, (tho' it cannot be fairly pretended) that the Doctor makes the defending of Toleration and Liberty of Conscience, one Branch only of the Character of a false Brother; I do not see how it cou'd make even a part of that Character, if there was no false Brotherhood in it. And I shall not trouble myself or your Lordships with going about to settle the degrees of false Brotherhood that are in this part of the Character, because I think every degree of it is unreasonable and not to be warranted.

And therefore the Doctor cannot make it so much as a part of the Character of a false Brother to defend Toleration and Liberty of Conscience, as it is confess'd that he does, but he must at the same time suggest and maintain that the Toleration is unreasonable,

unreasonable, and the Allowance of it unwarrantable. For it can never be any degree of false Brotherhood, to defend what is reasonable and warrantable: Nor wou'd even the Doctor, as inconsistent a Man as several of the Noble Lords that have spoken for him represent him to be, ever have made it one; if he had not himself condemn'd that which he blames others for defending.

The *Second Instance* alledg'd is, that he calls Archbishop Grindal a false Son of the Church, and a perfidious Prelate, for deluding Queen Elizabeth into the Toleration of the Genevian Discipline. I shall not, my Lords, go about to add any thing to the full and just Vindication you have heard of that excellent Prelate. But can any of your Lordships believe, that a Presbyter of the Church of England, professing more than ordinary Zeal for Episcopacy and the Constitution of this Church, should bestow such Language on one who was the first Bishop and the Ornament of it so long; only for disposing that glorious Queen to a mild Treatment of the Puritans of that Time, which is the utmost that is pretended to be laid to his Charge, if he had thought Toleration a reasonable thing, or what was fit to be established by Law?

This, my Lords, I confess can never enter into my Thoughts, as ready as I am to enlarge them for the admitting of any favourable Construction that will not shut out common Sense.

The *Third Instance* is his making it the Duty of the Superior Pastors to thunder out their Ecclesiastical Anathemas against Persons entitled to the Benefits of the Toleration. And to shew that he has done this, I need only refer your Lordships to that part of his Sermon where the Superior Pastors are call'd upon to do so; (*viz.*) the Fourth and last General Head, where he draws the Consequence of all that he had spoken before, in the following Words.

* Now what should be the Result of this long Discourse, but that if we bear any true Concern for the Interest, Honour, and Safety of our Church and Government, we ought stedfastly to adhere to those Fundamental Principles, upon which both are founded, and upon which their Security under God alone depends; and consequently that it highly behoves us, cautiously to watch against, to mark, and avoid all those that thus treacherously desert them. And indeed it wou'd be both for our Advantage, as well as their Credit, if such Men wou'd throw off the Mask, entirely quit our Church of which they are no True Members, and not fraudulently eat her Bread, and lay wait for her Ruin, purloin her Revenues, and ungratefully lift up their Heels against Her. For then we should be one Fold under one Shepherd; all those invidious Distinctions, that now distract and confound us, lost; and we shou'd be terrible like an Army of Banners to our Enemies; who cou'd never break in upon such an uniform and well-compacted Body. This indeed wou'd be a True Peace, and Solid Union, when we shou'd all with one Mind and one Mouth glorify God, and not with a confus'd diversity of contradictory Opinions, and inconsistent Jargon of Worship, which the God of Peace, Purity, and Order cannot but abhor. As it is a Maxim in Politicks, that all Governments are best supported by the same Methods

and Councils upon which they are founded; so it will appear undeniably true in its Application to our Constitution, which can be maintain'd by no other Principles, but those on which it is built, and like their Basis, the Gospel, if there's any Violation, or Breach made in any Branch of it, it shakes and endangers the whole Frame and Body. These things however little they may be represented by our Adversaries, will be found of the most considerable Consequence. Let us therefore, as we are unhappy Sharers of St. Paul's Misfortune, to have our Church in Perils among false Brethren, follow his Example and Conduct in a parallel Case. He tells us in his Epistle to the Galatians, c. 2. That he was obstructed and pester'd in his preaching the Gospel, by false Brethren unawares brought in, who came privily to spy out his Liberty, which he had in Christ Jesus, that they might bring him into Bondage: To whom he gave place by Subjection, no not for an Hour, that the Truth of the Gospel might continue with the Church. Doubtless this brave and bold Resolution did the Apostle take by the peculiar Command and Inspiration of the Holy Ghost; and yet if our Dissenters had liv'd in those Times, they wou'd have branded him, as an intemperate, hot, furious Zealot, that wanted to be sweeten'd by the gentle Spirit of Charity and Moderation forsooth. Schism and Faction are things of impudent and incroaching Natures, they thrive upon Concessions, take Permission for Power, and advance a Toleration immediately into an Establishment. And are therefore to be treated like growing Mischiefs, or infectious Plagues, kept at a distance, lest their deadly Contagion spreads. Let us therefore have no Fellowship with those Works of Darkness, but rather reprove them. Let our superior Pastors do their Duty in thundering out their Ecclesiastical Anathemas, and let any Power on Earth dare reverse a Sentence ratify'd in Heaven.

Can any thing, my Lords, be plainer than that the Dissenters, and they only, are here spoken of? And what does the Doctor say in his own defence, to avoid it? his Words in his printed Speech are these:

* Schismatics, my Lords, are not the only Persons against whom Ecclesiastical Censures may be denounced: The Works of Darkness which I referr'd to as fit to be reprov'd, in that part of my Sermon where I speak of these Censures, are of the same kind with those mentioned by the Apostle, whose words I produc'd. All lewd and immoral Practices, &c.

It is very true, my Lords, Schismatics are not the only Persons against whom Ecclesiastical Censures may be denounced, but I must still say they are the only Persons referr'd to, in the Paragraph I have read to your Lordships; and therefore I own I am a good deal concern'd, to find the Doctor making so vain, so unsincere a Defense. For it is not Works of Darkness in general he is cautioning against, but expressly, by a Word of his own inserting, not the Apostle's, those Works of Darkness mentioned immediately before; Schism and Faction, which with him go always together.

* Vide Serm. p. 22. l. 4.

These are the Sins against which he calls upon his superior Pastors to thunder out their Ecclesiastical Anathemas; nor can the Charge be avoided by that Distinction which was offer'd in his behalf, between a Censure purely Spiritual, and an Ecclesiastical Censure. For admitting there is ground for that Distinction in a Scholastical Consideration of the general Question of Christian Censures; yet there is no room to make use of it in this case, because he calls expressly for Ecclesiastical Anathemas, which can be apply'd to none but such as are part of the Order and Discipline of this Church.

And it is certain, my Lords, that these Censures cannot, since the Act of Toleration, be inflicted upon Dissenters how much soever their Schism remains; because it is expressly provided by an Act of Parliament, (an Act, my Lords, of the whole Christian Society, to which the Superior Pastors were personally concurring) that they shall not be treated as Schismatics in the way of those Ecclesiastical Censures, to which their Separation would otherwise have certainly subjected them.

And tho I cannot undertake upon Memory to be very particular, yet I dare venture to say, there have antiently been Relaxations of the Discipline of the Church, even when the Crime was thought to deserve the Continuance of it, for Publick Expedience; and better preserving the Peace of the Christian World: And that in such Cases any Presbyter or Bishop wou'd himself have been censured, if he had not acquiesced in such Relaxations.

My Lords, a Presbyter of the Church of *England*, is the more obliged to acquiesce in all such Relaxations amongst us as are legally made, because he has solemnly promised at his Ordination, that *he will give his Faithful Diligence always so to minister the Doctrine, and Sacraments, and the Discipline of Christ, as the Lord hath commanded, and as this Church and Realm hath received the same.*

I have already observed to your Lordships, how the Discipline of the Church stands at present as to the Point in question. And as the Relaxation of it in that particular, was agreeable to that Temper which the Bishops who petitioned King *James*, gave the Dissenters ground to expect: So I am verily perswaded that the Church is so far from having been hurt by this Indulgence, that it has received Advantage as well as Credit, from that Moderation which gave way to it. I could give several Instances of this within my own Observation, while I was Arch-Deacon, under a Reverend Prelate that sits now before me, and since I have had the Honour to be on this Bench: In which Compass of Time several Men of Sobriety and Learning, bred up to be Ministers amongst the Dissenters, have left the Separation, and upon due Trial have been admitted to Orders in our Church: in which they have officiated with entire Conformity to our Rules, and to the Honour of our holy Religion.

These Instances have been so frequent and remarkable, since the Dissenters have been exempted from the Penalties of certain Laws, above what had been observ'd before; that I think it very ill becomes any Clergyman to preach against that Exemption, as the Doctor (notwithstanding his Reserve for Consciences truly scrupulous) has done; and to call upon his Superiors to act in

Contradiction to it. He should have forbore doing this, at least out of regard to her Majesty, who had been graciously pleas'd to declare from the Throne, that she would preserve the Toleration inviolable: A Resolution I shall ever think it my Duty upon all proper Occasions to express my Approbation of, as just and wise and charitable, and every way agreeable to the Spirit and Genius of the Christian Religion.

I shall not, my Lords, enter into the Enquiry of what Sentences are ratified in Heaven: But as one may venture to say, that all that have been pronounced on Earth, are not ratify'd there; so, by all I have seen of the Doctor's Spirit in these Matters, I have great reason to fear, that if the Power of the Keys was in his Hands, it would often be very sadly abused.

However he has so good an Opinion of his own Spirit, as to put his Superiors in mind of another Part of their Duty, immediately after that I have mention'd; and that is, to promote Men of Probity, Conscience and Courage, without which he thinks they cannot be fit Members of the Church Militant; in which I can as little agree with him as in the former Demand. For if I may judge of the Probity, Conscience, and Courage he thinks so deserving, by what appears in his Sermon, compar'd with his Speech to your Lordships; I cannot think them Qualifications for a Minister of the Church of Christ in any respect; and I hope I shall be so happy as to find all the Reverend Prelates, with whom I have the Honour to sit, agreeing with me in this.

But tho I hope such a Conduct will never recommend any Person to Favour; yet I do not desire that even that which I heartily blame shou'd be punished so much as I think it deserves. And tho he, who pleads so warmly for wholesom Severities toward those who differ from him, has the least Title to your Lordships Compassion; yet I hope he will find it, as far as the just Concern you have for the Publick Tranquillity will allow you to shew it.

This I say from that which, I bless God, is the natural Temper of my Mind, and not from the Care that has been taken by some to intimidate, as far as they could, those who were to have the Cognizance of the Doctor's Cause, and were not thought to be favourable to it.

I shall not take upon me to charge the Doctor or any of his particular Friends with this Practice, as great a Temptation as one is under to do so from several Circumstances. And it is not the least, that occurs in his Prayers, which he has published upon this Occasion, to represent not so much to God as to the World, that he is under Persecution, when he is prosecuted for offending against the Law by those who in common Justice ought to be thought the fairest Accusers; and before your Lordships, who are justly acknowledged to be the most impartial Judges.

However I will never believe, till I cannot avoid it, that any Members of the Church of *England* who have acknowledged the Government, much less any Clergyman who has so often profess'd his Obedience to it in Church and State, shou'd have been any way accessary to those Threatnings that have been given out, particularly against such Bishops as should happen to condemn the Doctor's Proceedings.

As far, my Lords, as I have seen of this Cause, I am likely to be one of these Bishops; and tho I do not pretend to any great share of Courage, I am very free to declare to your Lordships, that I am in no Comparison so apprehensive of what may befall myself for condemning this Person, as I am of what will probably befall the Publick, if your Lordships should not condemn him.

But that is in your Lordships Judgment, to which I humbly submit it: And only beg Pardon for having detain'd your Lordships so long in giving my Reasons why I think the Commons have made good this Second Part of their Charge.

The End of the Fifth Volume.



Book.
Room

